

August 31 2023

Turkish Competition Board's approach in recent RPM cases: intracompany correspondence not sufficient to establish violation

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Introduction

The Turkish Competition Authority's focus on anti-competitive practices regarding resale price maintenance (RPM) continues. This time, the Turkish Competition Board launched:

- a fully fledged investigation against BSH Ev Aletleri Sanayi ve Ticaret AŞ, an undertaking active in the production, export, import, distribution, marketing and after-sales services of white goods (the BSH decision);⁽¹⁾ and
- a preliminary investigation against Sezen Gıda Mad Tarım ve Hayvancılık Ürün Tic ve San Ltd Şti, an undertaking active in the production of honey products (the Anavarza decision).⁽²⁾

These investigations were initiated on the grounds that the companies violated article 4 of Law No. 4054 on the Protection of Competition via RPM conduct. In the Anavarza decision, the board unanimously decided to not initiate a fully fledged investigation against Anavarza and in the BSH decision, the board unanimously decided that BSH did not violate Law No. 4054.

This article aims to provide a brief overview of the board's recent decisions with a focus on:

- whether RPM violations can be categorised as "by object" restrictions;
- the requirement of mutual agreement; and
- standard of proof.

General background

As a principle, unilateral actions of an undertaking do not fall within the scope of article 4 of Law No. 4054. According to article 4 of Law No. 4054, RPM practices of suppliers over resellers are prohibited. In the framework of Turkish competition law, unilateral conduct is not encompassed within the boundaries of the violation. In order for there to be an agreement, two sub-elements must be proven:

- direct or indirect interaction/communication involving a minimum of two entities; and
- (arising from this interaction/communication) a clear or implied endorsement from the receiving party of said interaction/communication.

Board's analysis on RPM in BSH and Anavarza decisions

The board's recent Anavarza and BSH decisions concluded that intracompany documents did not present mutual agreements that would be required to establish an RPM type of violation.

In the Anavarza decision, which concerned RPM allegations, an internal correspondence had been obtained from Anavarza in which an employee had stated that they would contact Özdilek, reseller of Anavarza, and subsequently stated that the price had been updated. With regards to this document, the board found that, although the statements raised concerns that Anavarza had interfered in Özdilek's retail prices, the correspondence was an intracompany correspondence and thus was far from demonstrating an agreement between Anavarza and Özdilek regarding applicable shelf prices.⁽³⁾

The board held in its decision that statements such as "" did not amount to any agreement or show any pressure or incentive on Anavarza's side, simply based on the fact that it was an intracompany correspondence.

On the other hand, in the BSH decision, the board identified a draft email by a reseller complaining about the suppliers' interference in prices. However, that draft email had never been sent to BSH. The board concluded that the concerned document was not eligible to prove beyond reasonable doubt that BSH has interfered with its distributor's resale prices and, in this context, the required standard of proof was not met".⁽⁴⁾

According to the board's approach in these recent decisions, internal communications are not eligible to prove beyond reasonable doubt to prove an article 4 violation through RPM.

Comment

The board's recent approach in RPM cases shows that unilateral actions or intracompany correspondence, which are not able to demonstrate concurrence of wills, cannot establish an RPM violation. Time will tell whether the board will keep following this approach in evaluating the RPM cases.

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Endnotes

(1) *BSH*, 15 December 2022, 22-55/864-358.

(2) *Anavarza*, 9 March 2023, 23-13/209-67.

(3) *Anavarza* decision, paragraph 68.

(4) *BSH* decision, paragraph 43.