

Competition Board Announces Signs of Impact-Based Analysis for Determining Resale Price

26 Apr 2016

Historically, Turkey, the determination of resale price maintenance ("**YSFB**") open-public (hardcore) that characterize as one of the vertical restraints are among the competition law regimes. In the past, it is possible to come across instances in which the Competition Board ("the **Board**") has ruled administrative fines in amounts that may be deemed important in the files identified by the YSFB. However, in recent years the Board has been giving change signals in its approach towards the YSFB and has been taking a more flexible stance by approaching the issue based on impact. The Committee has begun to note that individual exemption analysis can be made even for these relationships, rather than reaching a direct violation of vertical relations involving YSFB in their recent decisions.

YSFB is considered within the scope of the limitation under Turkish law, which is similar to article 4 of the Law on the Protection of Competition No. 4054 ("**Law No. 4054**") (Article 101 of the Agreement on the Functioning of the European Union ("**EU Treaty**"). It is possible to find many examples of the Council's approach to the YSFB today. The most up-to-date example in this regard is the file in which an administrative penalty amounting to approximately TL 1 million is filed against an enterprise operating in the consumer electronics sector in 2012.

Although the Board has indicated that an individual exemption analysis may be made for the YSFB, there is no example yet of individual exemption for the YSFB (similar to the EU Article 101 (3)). Nevertheless, even if the Council points out that individual exemption may be an option, it points out that the issue is beginning to be seen differently by the Board. Although the Board has determined in its recent decisions that some of the enterprises in question have constituted the YSFB, they have committed themselves to warn them of the suspension of YSFB activities. The issue that prompted the Board to send warnings to undertakings in these resolutions is to determine that the effects of the YSFB on the relevant markets are limited.

The Council's up-to-date decision on Mars Cinema is the last ring on the chain that shows the changing approach of the Board.

Mars Cinema Decision (20 November 2015 , 15-41 / 682-243)

Mars Cinema is one of the largest cinema chain in Turkey. The business model of Mars Cinema has a dual structure, including cinemas operated by Mars Cinema and cinemas operated under franchise agreements.

The Board has conducted preliminary research on the complaint made by Mars Cinema regarding the franchise agreements and the prices of the ticket prices and the prices of the cafe services offered at the cinema. As a result of the on-site examinations, it is understood that Mars festival agreement has come to an end and only two agreements are in force.

Status of Franchise Areas

Mars Cinema has argued that the franchise agreements have caused a change of control and that the control of cinema halls (alone or in common control) is in Mars Cinema, and that there is no vertical relationship based on these contracts between Mars Cinema and its counterparts.

In the face of this argument, the Committee referred to the Manual on Vertical Agreements and revealed the nature of the franchise relationship. According to this; *"Franchise agreements contain licenses for intellectual property rights and know-how, in particular trademarks, marks, etc., which will be used for the distribution of goods or services. In addition to the idea rights and know-how licenses, the franchisee generally provides commercial and technical assistance to the franchisee in the course of the contract. Licenses and benefits are complementary parts of the business method in the franchise package. In exchange for these elements the franchisee is paid a franchise fee by the franchisee area."*

In the light of these explanations, the Board decided that Mars Cinema should be considered as a franchisee in terms of decision making. Because the franchise agreements include provisions for commercial and technical assistance, as well as the payment of license fees to Mars Cinema. The Board also acknowledged that franchise agreements require some control over the franchise system and its participants in order to make the quality level of the system permanent.

In addition, the Board decided that Mars Cinema had no control over the cinemas, drawing attention to the fact that the franchise areas were using their own capital (in other words, all investments in movie theaters were made by franchisees). While this decision was taken, the Board found a guide to the "Concept of Matter and Control". According to the guide: *"In the context of the above explanations, it can be said that franchising agreements do not normally control the business of the franchisee, the franchisee. Even if the essential part of assets belongs to the franchise, the franchisee usually uses these resources for their own account."*

For this reason, the Board has characterized the issue as a vertical relation and examined it under Article 4 of Law No. 4054.

Vertical Constraints

After the Board characterizes the issue as a vertical relationship, it has examined the issues that could limit competition in relation to it. In this context, it is seen that the Council has decided that the prices and promotions for the cinema tickets and cafe services of the franchise areas are determined by Mars Cinema thanks to the franchise agreements. As understood from the decision text, it is understood that in the application, prices related to ticket and café services have been uploaded to the system in such a way that it is not possible for Mars Cinema to change the software and franchise areas.

In the Committee, the Committee noted that vertical price restrictions may have negative adverse effects such as adverse effects on intra-brand competition and facilitating horizontal co-operation among suppliers.

In addition, the Board also noted the potential positive effects of vertical price restrictions that could increase consumer welfare:

- If a new product is introduced in a competitive bazaar, it may be possible to determine the resale price by encouraging distributors to advertise and sell the product during the placement of the product in the market, thereby increasing consumer demand by increasing the demand for the product.
- It may be possible for the resale price determination to generate consumer benefits through short-term (up to 2 to 6 weeks) discounted price campaigns to be implemented in a similar franchise or similar distribution system based on a single distribution format.
- It may be possible for the resale price determination to create consumer benefits by preventing retailers from offering freebies at the distributor level by encouraging retailers to offer additional pre-sales services (due to the extra margin they provide).

However, the Board did not recognize an individual exemption from Mars Cinema because the vertical agreements did not give birth to the pre-event.

The Board stressed that vertical limitations should be examined in each case in light of different market dynamics. In this context, it is possible to summarize the following considerations.

- Competitive structure of the relevant market,
- Competition effect of vertical constraints,
- The positions of suppliers and distributors in the market,
- The size of the competition for the brand,
- The positions of suppliers and competitors in the market,
- The prevalence of the application in the market,
- The time of vertical restraints.

After setting forth the title of this Assembly, Mars cinema theaters operating in Turkey and that 73 of them stated that they operated with only two of the franchise agreement. Moving from this, it is possible to achieve the result that, despite the market power of Mars Cinema, only a small part of the franchise agreements portfolio is formed. In this respect, the Committee assessed that the effects of market restrictions on the market were very limited and short, emphasizing that the vertical price restrictions seen in the franchise agreements of Mars Cinema are effective only in Ankara and Antalya (places where movie theaters subject to the franchise agreement are located) since 2014.

After all these evaluations, the Board ruled that if Mars Cinema would terminate its pricing policy within 90 days, there would be no need to initiate a full inquiry into vertical price restrictions.

Result

YSFB, hardcore Turkey was seen as one of the vertical limitations of the characteristic; but with many modern competition law authorities, the Commission signals that it is adopting a more focused approach to vertical price restrictions. If no file is still recognized as the individual exemption for the current ysbf'y decision it can be seen as a harbinger of the change in attitude towards vertical price restrictions in Turkey.

Related Practices

- [Distribution, Franchising and Agency Agreements](#)