Turkish Competition Board Signals Shift Toward Effects-Based Analysis for Resale Price Maintenance

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Traditionally, Turkey has considered resale price maintenance ("**RPM"**) to be one of the hardcore vertical restraints. The Turkish Competition Board (t**he "Board**") has a track record of imposing significant administrative monetary fines for violations RPM in vertical relationships. However, recent years have witnessed a shifting approach, with the Board treating RPM more leniently. The Board has begun indicating that an individual exemption analysis could be conducted, rather than necessarily reaching the conclusion that a legislative violation exists.

RPM is addressed under Turkish law by Article 4 of Law No. 4054 on Protection of Competition ("**Law No. 4054**"), akin to Article 101 of the TFEU. A number of Board decisions illustrate the Board's traditional approach to RPM. The most recent examples are from 2012 and 2013, where the board imposed administrative monetary fines of around EUR 350.000 and EUR 175.000 respectively on separate undertakings operating in the consumer electronics and industrial gases sectors. Administrative monetary fines are calculated based on the relevant undertaking's turnover.

The Board has not yet granted an individual exemption (akin to Article 101(3) of the TFEU) for RPM. However, the mere fact that the Board is signaling that individual exemptions are an option represents a big change of position. In the most recent precedents, the Board chose to simply warn the undertakings to cease RPM conduct, despite concluding a violation of laws existed based on RPM. The Board analyzes the effects of RPM in the relevant markets when reaching these decisions.

The Board's recent Mars Sinema decision is the latest link in the chain, illustrating the Board's evolving approach.

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

Mars Sinema is one of the biggest movie theater chains in Turkey. Its business model includes theaters operated by Mars Sinema itself, as well as theaters operated under franchise agreements.

The Board initiated a preliminary investigation upon receiving a complaint that Mars Sinema is fixing the ticket and café services prices in its franchise agreements. Documents obtained via dawn raids revealed that most of the Mars Sinema franchise agreements had expired and only two agreements were currently in force (in Ankara and Antalya).

Status of Franchisees

Mars Sinema argued that the franchise agreements confer control (either joint or sole) over the movie theaters and therefore no vertical relationship exists between Mars Sinema and its counterparts to these agreements.

The Board referred to the its Guidelines on Vertical Agreements, which state: "Franchise agreements contain licenses of intellectual property rights relating in particular to trademarks or signs and know-how for the use and distribution of goods or services. In addition to the license of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The license and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method."

The Board concluded that Mars Sinema should be characterized as franchisor because the agreements foresee provision of commercial and technical assistance, as well as require royalty fees be paid to Mars Sinema. The Board acknowledged that franchise agreements require a certain degree of control over the franchise system and participants in order to ensure consistent quality levels among the system.

The Board concluded that franchisees were using their own entrepreneurial resources (i.e. the franchisees made all the investment on the movie theaters) and thus Mars Sinema was not exercising control over its franchisees. In reaching this decision, the Board referred to its merger control guidelines, which state: "In line with these considerations, *franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor."*

Therefore, the Board characterized the circumstances as a vertical relationship and analyzed them under Article 4 of the Law No. 4054.

Vertical Restrictions

The Board continued on to assess Mars Sinema's alleged vertical restrictions and surrounding circumstances. The franchise agreements allowed Mars Sinema to set prices and promotions for tickets and café services on franchisees. It was also understood that in practice, Mars Sinema used software to upload prices for tickets and café services, with franchisees unable to change such prices.

The Board indicated that vertical price restriction can cause negative effects on competition, such as distorting intra-brand competition and facilitating horizontal cooperation among suppliers.

The Board provided examples of potential efficiencies that a vertical price restriction might create by enhancing consumer welfare:

- Allowing distributors to focus solely on promotional and marketing activities for products recently introduced into a competitive market.
- Allowing short term (two to six weeks) rebate schemes to be applied homogeneously among a franchise system.
- Preventing free-riding.

However, the Board ruled that Mars Sinema did not qualify for an individual exemption because none of these efficiencies apply to the vertical agreements in question.

The Board emphasized that vertical restrictions must be assessed on a case-by-case basis, considering the different market dynamics for each case. Factors include:

- Competitive structure of the relevant market.
- Effect of vertical restriction on competition.
- Market positions of the supplier and distributor.
- Level of inter-brand competition.
- Market position of the supplier and its competitors.
- Market coverage by others under similar agreements
- Duration of vertical restriction.

The Board noted that Mars Sinema operates 73 movie theaters around Turkey, among which only two theaters operate under franchise agreements. Thus, despite Mars Sinema's market power, the franchise agreements constitute only a small portion of its portfolio. The Board concluded that vertical price restraints foreseen in Mars Sinema's franchise agreements effected only Ankara and Antalya (where the two franchised theaters are located) since 2014. Therefore, the market effects of the restrictions are very limited and short in duration.

The Board held that there is no need to proceed with initiating a full-fledged investigation into the vertical price restrictions, provided Mars Sinema ceased its price maintenance behavior within 90 days.

Conclusion

RPM have traditionally been considered to be one of the hardcore vertical restraints in Turkey. However, as with the most of the modern competition law enforcers, the Board has begun to signal a shift toward a more effects-based approach to vertical price restrictions. While no cases have been granted an individual exception for RPM yet, recent Board decisions can be viewed as baby steps towards a change in characterizing vertical price restrictions in Turkey.

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