The TCA’s Unstable Approach Towards RPM Practices

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Introduction

In May 2019, Turkish Competition Authority (“**TCA**”) has published two reasoned decisions, namely *Bfit Decision***[1]** and *Minikoli Decision***[2]**, in which it assesses the resale price maintenance (“**RPM**”) activities of the concerned undertakings. These decisions bear significance since they represent the TCA’s unstable approach towards RPM activities. In the aforementioned cases, the TCA adopted an *effect-based analysis*, as it generally did in the past. However, the TCA had displayed a deviation from the said approach in its previous two decisions; *Sony* Decision**[3]** and *Henkel* Decision**[4]** and adopted a *by object analysis.* Therefore, *Bfit* and *Minikoli* Decisions show this unstable approach.

RPM, in a nutshell, can be defined as; imposition of pressure regarding the sale prices and conditions by the undertakings who are in the position of supplier onto the undertakings who are in the downstream markets such as dealers, distributors or retailers. Such practices are deemed as a violation of competition rules within the context of Article 4 of the Law No. 4054 on the Protection of Competition (“**Competition Law**“) and Block Exemption Communiqué No. 2002/2 on Vertical Agreements (“**Communiqué No. 2002/2**”).

While assessing whether there exists a violation or not, the TCA has generally been evaluating the effects of the RPM practices on the market. Such approach is called the *effect-based analysis.* In the *Bfit* and *Minikoli* Decisions, the TCA adopted the same approach. However, in the *Henkel* and *Sony* Decisions, the TCA had adopted a relatively rigid approach which does not take the effects of the practices into consideration and ruled on imposition of administrative fines. Such approach deems RPM practices as a violation of Competition Law regardless of their effects on the market. The aforesaid approach is called *by object analysis,* since it takes only the aim of the practice into account.

We will examine the *Bfit* and *Minikoli* Decisions and the TCA’s approach on RPM activities in this article.

TCA’s Previous Decisions Applying by Object Analysis

In the *Sony* Decision, the TCA decided that Sony Eurasia Pazarlama A.Ş. (“**Sony**”) violated Article 4 of the Competition Law via practices of RPM by interfering with its dealers’ online sales and restricted competition in the “*consumer electronics*” market. The TCA ruled on an administrative fine amounting to TRY 2,346,618.62 (approx. USD 403,723.379)[5].

In the *Henkel* Decision, the TCA established that Türk Henkel Kimya Sanayi ve Ticaret A.Ş. (“**Henkel**”) violated Article 4 of the Competition Law through practices of RPM. The TCA stated in the decision that Henkel restricted competition in the markets of “*beauty and personal care products*” and “*laundry and home care products*” by using various computer programs and internal report systems. The TCA imposed an administrative fine of TRY 6,944,931.02 (approx. USD 1,194,784.51).

The decisions have remarkable common points such as; (**i**) the TCA ruled on imposition of administrative fines contrary to the concerned case handlers’ conclusions that there was no need for it in both cases and (**ii**) the TCA adopted a by object analysis approach which is the opposite of its established effect-based analysis approach, in both of the decisions.

The TCA’s Effect-Based Analysis Approach in Minikoli and Bfit Cases

In the *Bfit* Decision, the TCA concluded the preliminary inquiry stating that there was no need to initiate an investigation. Said preliminary inquiry was initiated in order to assess whether the franchise agreements of Bfit Sağlık ve Spor Yatırım ve Tic. A.Ş. (“**Bfit**”) contained clauses violating the Competition Law and Communiqué No. 2002/2. The TCA, in its decision, mainly focused on *non-compete* and *no-poaching* clauses. However, it also evaluated Bfit’s RPM practices.

In summary, the TCA decided that Bfit’s franchise agreements are in the scope of Article 4 of the Competition Law due to non-compete and no-poaching clauses they contained, and they neither can benefit from the block exemption nor can receive an individual exemption.

With regards to RPM practices of Bfit, considering the documents acquired during the on-the-spot inspections and the information presented by Bfit, the TCA determined that; (**i**) price lists were created and distributed to the centers by Bfit only related to the reformer pilates services, (**ii**) the franchisees have freedom to set a price for the services other than reformer pilates services, (**iii**) this price list practice has been initiated recently and (**iv**) it has been detected that franchisees are able to deviate from the list prices.

The TCA evaluated the aforesaid practices and determined that such practices cannot benefit from individual exemption within the scope of the Competition Law. On the other hand, considering the abovementioned determinations and Bfit’s low share in the market consisting of numerous and strong competitors, the TCA ruled that the effects of the RPM practices are very limited and therefore there was no need to initiate an investigation. However, instead of a full-fledged investigation, the TCA decided to share its non-binding opinion pursuant to the Article 9(3) of the Competition Law stating that Bfit shall amend the concerned clauses in its agreements; otherwise, a full-fledged investigation will be initiated.

As it can be seen, the TCA did not rule on a violation by object, and evaluated conditions such as market characteristics, market share of the concerned undertaking and the duration of the practices. Therefore, it can be deducted that the TCA has adopted an effect-based analysis approach.

When it comes to *Minikoli* Decision, the TCA concluded another preliminary inquiry without initiating an investigation. Said preliminary inquiry was initiated regarding the allegations whether Okan Okandan Mini Moda (“**Minikoli**”) violated the Competition Law through means of RPM practices imposed upon its dealers.

The business relationship between Minikoli and its dealers depends on a certain type of dealership called “*XML dealership*”, in another name “*dropshipping*”. Within the scope of the business logic of XML dealership, the dealer does not establish an inventory and simply transfers the order to the supplier. The dealer bills the customer and gets paid and then the supplier bills the dealer and gets paid from the dealer itself. Therefore, a resale system exists between the supplier and the dealer, which means the dealers act as independent entities and assumes their own risks.

In light of the above, the TCA determined that the agreements signed between Minikoli and its dealers contain clauses which prohibit discounts without the approval of Minikoli. Such clause interferes with the price policies of the dealers and therefore are evaluated under RPM practices.

Nevertheless, establishing the existence of clauses leading to RPM practices, the TCA did not rule on a violation by object. On the contrary, it took (**i**) the market share of the Minikoli and (**ii**) the fact that these clauses are not enforced, into consideration and decided that there was no need to initiate an investigation. The TCA emphasized that Minikoli did not pressured its dealers into implementing fixed prices or did not impose sanctions against the dealers who deviated from Minikoli’s prices. With all these factors in mind, the TCA decided to share its opinion in accordance with Article 9(3) of the Competition Law stipulating that Minikoli shall remove the concerned clause regarding RPM practices in 90 days instead of initiating a full-fledged investigation. The TCA also stated that in the case that Minikoli fails to comply with this opinion, a full-fledged investigation will be initiated.

Within this context, it is clear that the TCA adopted the effect-based analysis approach in the *Minikoli* Decision. Even though it established the existence of RPM clauses, the TCA decided not to initiate a full-fledged investigation since Minikoli did not implement such clauses in reality.

Conclusion

The TCA has adopted the effect-based analysis approach until the *Sony* and *Henkel* Decisions and considered the effects of the RPM practices on the market while deciding whether to impose fines or not. While evaluating the effects of the RPM practices, the TCA mostly emphasized the market share of the concerned undertakings, the number of competitors in the market and the duration of the practice. Nevertheless, this approach left its place to by object analysis in *Sony* and *Henkel* decisions, in which the TCA ruled on existence of violation and imposition of administrative fines purely based on the aim of the practices. However, we see that the TCA could establish effect-based approach on a case by case basis. Yet, even it is seen that the TCA adopted effect-based approach in these two recent decisions as it generally did in the past, considering the *Sony* and *Henkel* Decisions, these decisions do not help to remove uncertainty of the TCA’s approach on the RPM activities.

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[1] The TCA’s decision dated 07.02.2019 and numbered 19-06/64-27.

[2] The TCA’s decision dated 07.03.2019 and numbered 19-11/129-56.

[3] The TCA’s decision dated 22.11.2018 and numbered 18-44/703-345.

[4] The TCA’s decision dated 19.09.2018 and numbered 18-33/556-274.

[5] The calculations are based on today’s exchange rate (21.06.2019; 1 TRY = 0.1720 USD).