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The Evaluation of the TCA's Recent Decisions Regarding the FMCG Sector

Mustafa Ayna, Arda Diler, Selim Turan, Mithat Can Kaçar (ACTECON) · Friday, July 12th, 2024

Introduction

The reasoned decisions regarding the two separate investigations conducted independently by the Turkish Competition Authority (“TCA”) against suppliers operating in the fast-moving consumer goods (“FMCG”) market were published on the official website of the TCA in May 2024. Both decisions set significant precedents regarding “*resale price maintenance*”, which the TCA has particularly focused on in recent years. Information regarding the relevant investigations and their outcome is provided below as follows:

- The investigation against Erbak Uluda? Pazarlama Sat?? ve Da??t?m A.?. (“**Uluda?**”) for allegedly enforcing resale price maintenance among organised retail sellers was concluded following Uluda?’s settlement **Through this settlement application, Uluda? acknowledged that its behaviours towards its buyers constituted resale price maintenance within Article 4 of Law No. 4054 on the Protection of Competition (“Competition Law”)** (for the full text of the decision see [here](#)).
- Following the investigation conducted into Nuh’un Ankara Makarnas? Sanayi ve Ticaret A.?. (“**Nuh Makarna**”) and ?htiyaç Maddeleri Pazarlama Sanayi ve Ticaret A.?. (“**?sra G?da**”) for allegedly attempting to maintain the resale prices of their buyers, the TCA **decided that Article 4 of the Competition Law had not been violated and therefore no fine would be imposed** (for the full text of the decision see [here](#)).

The assessments of the TCA with respect to each decision are presented below.

The Uluda? Settlement Decision

The TCA concluded its investigation into Uluda?’s alleged practice of maintenance of the resale prices of its buyers by admitting Uluda?’s settlement text submitted by Uluda? into its records.

Behaviours Subject to the Investigation and Evaluation

As a result of the findings found out at the on-site investigation conducted within the scope of the

relevant investigation, the TCA determined that Uluda? had engaged in practices to maintain the resale price for its re-sellers based on 26 pieces of evidence in the file. Below are examples of some of the evidence that substantiates the TCA's decision.

Based on one of Uluda?'s internal correspondences, the TCA emphasized that Uluda? employees had used the following statement:

"Friends, as you know, shelf prices have increased in national supermarkets. There should be no local supermarket that does not raise its shelf prices; otherwise there will be a problem (Evidence 4)."

The TCA pointed out that this statement reflected Uluda?'s strategy to maintain shelf prices at a certain level in both national and local markets.

Likewise, the TCA determined that Uluda? had imposed the sanction of suspending delivery to the markets that applied shelf prices characterised by Uluda? as "low" or "spoiled" based on a statement in another internal correspondence:

"Both companies were not provided with these products on the relevant dates due to their spoiled prices, and their purchasing managers were also contacted and warned not to sell our products below the prices we recommended (Evidence 2)."

The TCA noted that Uluda? sought compliance from its buyers with the minimum shelf prices it had determined, according to another statement from an internal correspondence that says,

"Local market chains may participate in the campaign under the control of regional managers, provided that they do not spoil the price (minimum shelf price of 1 litre, 2.25 TRY and 2 litres, 3.95 TRY) (Evidence 3)."

Furthermore, Uluda? stated that buyers that did not meet this condition would not be allowed to participate in the periodic discounts introduced by Uluda?.

Additionally, the findings cited by the TCA as a basis for its decision are not limited to Uluda?'s internal correspondences. For example, in a correspondence between Uluda? and GIMSA, a local market, it was stated,

*"The price of Nevros lemonade is TRY 2.00 as of today, but **I kindly request** you **increase** the price to TRY 2.00 immediately as of today (Evidence 1)."*

In another correspondence between Uluda? and MOPA?, another local market, stated,

"The shelf price of our 1 litre lemonade should be TRY 5.25. The price of normal

*product is TRY 5.25 and the price of the sugar-free version is TRY 4.99 ... **We kindly request your assistance for correction** (Evidence 19)."*

In this regard, the TCA concluded that Uluda? had emphasized maintaining the shelf prices at the same level overall and aimed to ensure the shelf prices of all retailers during price change periods. The TCA thus found that Uluda? had intervened in the shelf prices of its buyers who applied shelf prices below the determined level by Uluda?.

Consequently, the TCA concluded that Uluda? had (i) monitored the shelf prices of the retailers, (ii) directly intervened to raise prices that did not meet the demanded level, and (iii) employed incentive mechanisms such as providing discounts to the retailers, (iv) and enforcing pressure mechanisms such as suspending delivery to maintain the resale prices. Accordingly, the TCA determined the base fine to be imposed on Uluda? as TRY 22,442,256 (EUR 873,920)[1]. Finally, the fine to be imposed as a result of the settlement discount was determined as TRY 16,831,692 (EUR 655,440).

The Pasta Sector Decision

As a result of the TCA's investigation conducted into the allegation that Nuh Makarna (A pasta supplier) and ?sra G?da (The local distributor of pasta produced by Nuh Makarna) had taken actions to maintain the resale prices of their buyers, the TCA decided that Article 4 of the Competition Law had not been violated, and thus, there is no room for imposing an administrative fine on either Nuh Makarna or ?sra G?da. The TCA's assessments of the matter are presented below.

First, the TCA evaluated the case regarding Nuh Makarna. The TCA initially analysed a correspondence between an employee of ?ok (A discounter that operates at national level) and an employee of Nuh Makarna. Within the scope of the relevant correspondence, the TCA held that ?ok had requested to intervene in the shelf prices of A101 (A discounter that operates at national level). Nevertheless, no evidence was found proving that Nuh Makarna had taken any action against A101 in response to ?ok's request. Moreover, no one had responded to the messages of the ?ok employee on behalf of Nuh Makarna.

Furthermore, the TCA focused on whether Nuh Makarna's internal correspondence regarding the matter, stating that the prices applied by its buyers should not be below TRY 1.55 in local and national markets constituted a violation:

"As of 1 February 2018, the price of our Nuhun Ankara 500 gr pasta insert (Action) in local and national markets in all regions should fall not below TRY 1.55. TRY 1.55 action prices are valid for all regions (Istanbul-Bursa-Aegean included.)

I kindly request your sensitivity regarding this matter.

Best regards."

Additionally, the TCA found that several similar correspondences had occurred within the sales teams of Nuh Makarna. The TCA emphasized that delineating how the decisions of the sales representatives of Nuh Makarna regarding shelf prices and action prices, which should not be below a certain level, took place. In this regard, The TCA stated that Nuh Makarna had notified solely the purchase price to its buyers and recommended shelf prices during the price transition periods. Consequently, the TCA stated that Nuh Makarna's correspondence with its customers did not indicate that Nuh Makarna had intervened in the price of its resellers.

The TCA further stated that in cases where the violation of resale price maintenance occurs, terms such as “*spoiled price*”, “*fix*”, and “*intervention*” are commonly used. However, since such expressions were not found within Nuh Makarna's correspondence, this strengthened the argument that Nuh Makarna had not committed any violation. Additionally, the TCA included various correspondences in its decision suggesting that Nuh Makarna's buyers had been free to determine their own shelf prices. Furthermore, the TCA indicated that there had been a divergence in the shelf prices applied by Nuh Makarna's buyers in similar periods. In conclusion, the TCA stated that the investigation had not determined any violation of Article 4 of the Competition Law on the side of Nuh Makarna.

The TCA examined similar issues regarding the evidence gathered during the on-site inspection at ?sra G?da and stated that no evidence showing any communication or price movement had been detected that would justify the allegation of a violation.

First, the TCA analyzed the statement that “*Balmar and Ziba will update their prices on Monday*” (Paragraph 66) sent by an employee of ?sra G?da to one of the retailers. Since the price movements of the retailers in question did not indicate an agreement and there was no evidence of communication in this direction, the TCA found no violation in this evidence.

Similarly, the TCA scrutinized the following correspondence between the employee of a local market called Heybem Market (N.S.) and ?sra G?da's sales representative (O.A.):

“O.A. 15.12.2021 (14.07): (....) good day. The shelf prices of pasta at local markets in our region have been updated to TRY 5.95. We kindly ask you to update the shelf prices accordingly. Thank you and have a good day

N.S. 15.12.2021 (14.11): How can we sell them at TRY 5.95 with this cost?

O.A. 15.12.2021 (14.14): It will be discussed again for new updates this week. Have a good day.”

Thereupon, the TCA examined the correspondence and noted that ?sra G?da had mentioned that the shelf prices in local markets in the region had been updated to TRY 5.95 and that Heybem Market should update its prices accordingly. Subsequently, the TCA requested information from Heybem Market to understand how the price movements in the market had appeared during the relevant period. Upon reviewing the price information in the reply to the letters, the ensuing two points were observed.

- One day before the aforementioned correspondence, on 14 December 2021, the purchase price of Heybem Market had been TRY 4.24 and the sale price had been TRY 5.50.

- On 15 December 2021, a price increase had been implemented, with the purchase price of the market at TRY 87 and the sales price at TRY 6.25 on that date.

During the respective period, in parallel with the reaction given in the correspondence, it was determined that the sales price of Heybem Market had amounted to TRY 6.25, or else above the aforementioned level. In this respect, the TCA concluded that Heybem Market had been free to determine the shelf price and added that no agreement or collusion had been found between ?sra G?da and Heybem Market on the shelf price to be applied.

As a result, the TCA concluded that no violation had been detected with respect to ?sra G?da, and no investigation was initiated.

Conclusion

The *Uluda?* and *Pasta Sector* decisions indicate that the preliminary inquiries and investigations regarding the FMCG sector, which have a prominent place on the agenda of the TCA since the pandemic, continue as a growing trend.

These decisions include important evaluations regarding the standard of proof applied resale price maintenance. In this respect, in light of the relevant decisions, it can be inferred that the TCA does not consider internal correspondence indicating the “*desire to maintain the resale price*” as sufficient in terms of communication evidence and puts stress on such correspondence together with price movements. Additionally, it is evident from the decisions that the TCA places special importance to the concepts such as “*spoiled price*“, “*correction*“, and “*intervention*” in communication evidence. It considers the existence of such correspondence as critical in terms of proving the violation of resale price maintenance. Likewise, the settlement procedure in *Uluda?* Decision is a current example of the settlement trend in TCA investigations.

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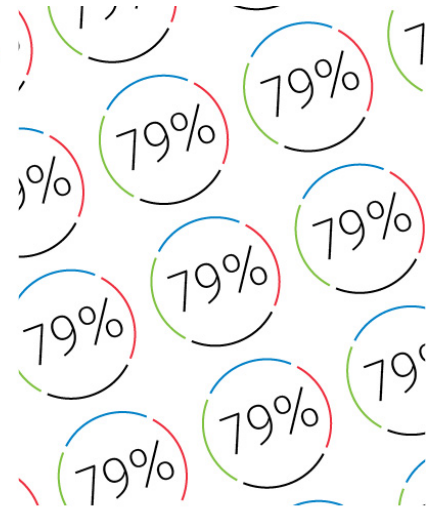
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