



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON RESALE PRICE MAINTENANCE

-- Note by Turkey --

This note is submitted by Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21-23 October 2008.

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1. The Turkish experience on Resale Price Maintenance (RPM) will be explained on the basis of legal provisions and case law.

1. The legal framework of RPM in the Turkish jurisdiction

2. The treatment of RPM in the Turkish jurisdiction finds its legal roots primarily in the Act no 4054 on the Protection of Competition (Competition Act). According to Article 4 of the Competition Act “*Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited*”. Furthermore, the same article provides a non-exhaustive list of practices as examples to this prohibition. In line with this, article 4 (a) states that “*fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale*” is among such examples.

3. Moreover, Block Exemption Communiqué on Vertical Agreements no 2002/2 (Communiqué on Vertical Agreements) determines the conditions for exempting those vertical agreements as a block from the application of the provisions of article 4 of the Competition Act, Communiqué on Vertical Agreements states that those agreements preventing the buyer from determining its own selling price can not benefit from this block exemption (article 4 (a)). Nevertheless, according to the same article the supplier may set the maximum selling price or recommend the selling price, on condition that it does not transform into a fixed or minimum selling price as a result of the pressure or encouragement by any of the parties. Accordingly, determination of minimum and fixed resale prices by the supplier is definitely prohibited. Guidelines on vertical agreements¹ (Guidelines) explains that in order for the selling prices, of maximum or recommended nature, declared to the buyer not to transform into a minimum or fixed price, it is required to clearly mention on the price lists issued or on the product that the said prices have the nature of being maximum or recommended.

4. The same Guidelines² mentions that besides directly determining the selling price of the buyer by placing an explicit provision in vertical agreements concluded between the supplier and the buyer(s), suppliers may also realise the same infringement by indirect means through various practices. Determining the profit margin of the buyer, determining the maximum level of the discount rate that may be applied by the buyer over the level of a price announced to be the recommended price, applying extra discounts to the buyer insofar as he conforms to the recommended prices, or threatening the buyer with delaying, suspending deliveries or terminating the agreement in case he does not conform to these prices, or applying such criminal sanctions *de facto* may be given as the example of an indirect determination of the resale price. Such practices of *indirectly* determining the resale price fall under article 4 (a) of the Communiqué on Vertical Agreements, thus prohibited.

5. Last but not least, direct or indirect methods aimed at the determination of the resale price would be more effective where prices applied by buyers can be monitored and controlled by the supplier³. For example, an obligation which may be imposed on all buyers, about reporting those buyers who sell at prices different from the standard price lists shall considerably facilitate the control, by the supplier, of prices applied in the market.

¹ Guidelines on the Explanation of the Block Exemption Communiqué on Vertical Agreements No:2002/2 can be reached at: <http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz6.doc>, Paragraph 16.

² Ibid, Paragraph 17.

³ Ibid, Paragraph 18.

2. Case law

2.1 *Doğuş Automotive/Volkswagen case*⁴

6. Doğuş Automotive (Doğuş) is the authorised supplier (importer) of Volkswagen vehicles in Turkey. It was found that Doğuş was fixing the resale prices of its resellers not only with respect to sales in the Volkswagen passenger cars and light commercial vehicles markets but also in the spare parts and accessories markets. Thus, as a result of the investigation carried out Doğuş was found to be in violation of article 4 (a) of the Competition Act that explicitly prohibits the fixing of the purchase or sale price of goods or services and imposed a **fine**.

7. The Competition Board decision states that the information and documents obtained during the inquiries show Doğuş's involvement in many activities that violated the Competition Act with respect to RPM, beginning from May 1997 until the commencement of the investigation by the Competition Board on 12.12.2000. Doğuş asked its customers whether they were able to buy their vehicles from the resellers at the recommended prices imposed by Doğuş in the questionnaires on customer happiness. The answers to these questionnaires were decisive in the calculation of the profit margins of Doğuş's resellers and moreover they were being used as a tool to punish those who did not comply with it. According to the decision, this practice indicates that Doğuş was using sanctions on its retailers in the absence of obedience to its recommended prices imposed on the retailers. The decision further mentions Doğuş's practice led to fixed prices in the relevant markets and considered as a clear violation of the Competition Act since Doğuş was aiming to restrain the competition in the market, even if in practice some discounts can be made by the resellers.

8. As a result, it was found that Doğuş was fixing the resale prices of Volkswagen vehicles and the use of expression "recommended" in the price lists did not prevent such practices. Further it was understood that Doğuş was carrying out its anti-competitive practices via determining the profit margin of the buyer (indirect price fixing), decreasing the profit margin of the buyer which is a certain percentage within the fixed prices, controlling periodically the prices and invoices of cars that are being sold, warning the retailers which did not comply with the price lists of Doğuş, cutting the incentive premiums of retailers and sanctioning those retailers that did not follow the price lists. Another issue that prevents the competition between Doğuş's retailers is the fixing of selling conditions of retailers with respect to fleet sales that ends up in sanctioning those who do not comply with them.

9. *Although effect of the vertical agreements with respect to RPM conduct is clear in this case, the decision clearly states that "object" of an RPM conduct is enough for **the prohibition of such practices** under the Competition Act even if they did not result in any anti-competitive effects in the markets. However, absence of effect could be a mitigating factor. A fine was imposed on Doğuş Otomotiv due to fixed resale prices*

2.2 *Warner Bros Case*⁵

10. Warner Bros Film ve Video Sanayi ve Ticaret A.Ş. (WB Company) is the distributor of Warner and Columbia branded films to movie theatres in Turkey. WB Company distributes Turkish movies too. The relevant market for this investigation is described as the "distribution of movies with an aim to project them in the movie theatres".

⁴ Competition Board decision dated 5.10.2001; numbered 01-47/483-120; investigation.

⁵ Competition Board decision dated 8.3.2007; numbered 07-19/192- 63; investigation.

11. WB Company was fixing the ticket prices of the movie theatres within the same city and the region through the vertical agreements that it signed with them. During the investigation process, a questionnaire was prepared and sent to many movie theatres across Turkey. Question on RPM with respect to ticket prices is an issue that was asked in addition to other issues such as exclusivity, projection period, commercial risks that movie theatres face etc.

12. The inquiries show that WB Company is considered as a dominant undertaking according to article 3⁶ of the Competition Act within the “film distribution market” based on its global power to provide the required amount of qualified films on a continuous basis which also form a barrier to entry for other actors. In addition WB Company’s being exclusive supplier to some movie theatres, guarantee prices that it could demand from the movie theatres, its relatively high share for the distribution of Turkish movies based on its strong distribution network represent other important issues in its dominance.

13. The Competition Board decision states that the existence of IP rights among the producer, distributor and movie theatres does not change the fact that there is a vertical relationship among these actors and those agreements might prevent and/or restrict competition within the market. Finally, the Competition Board decides that WB Company is intervening into and/or fixing the ticket prices of movie theatres based on the vertical agreements, thus in violation of the Competition Act article 4(a) that explicitly prohibits the fixing of the purchase or sale price of goods or services. Besides, the Competition Board decision states that WB Company is abusing its dominant position arising from “film distribution market” within the “distribution of movies with an aim to project them in the movie theatres” market through actions which aim at distorting competitive conditions by fixing and/or controlling ticket prices of the movie theatres, and via equalising ticket prices among competitive movie theatres in line with Article 6 (d)⁷ of the Competition Act. Nevertheless, WB Company terminated its conduct and a **fine** amounting to 1% of total turnover was imposed based on this mitigating circumstance.

14. *This case shows that RPM can be used as a conduct by the dominant undertakings to distort competition in a market and thus might be evaluated under article 6 of the Competition Act on abuse of dominant position provision as well as article 4 treatments. RPM practices by WB Company had both the intent and effect of distorting competition. A fine is imposed on WB Company due to fixed RPs.*

2.3 Efes Case⁸

15. Efes Pazarlama ve Dağıtım A.Ş. (Efes) is the associate company of Anadolu Efes Biracılık A.Ş. that produces beer. Beer market has a duopolistic structure in Turkey. Efes is responsible for the marketing and distribution of beer produced by Anadolu Efes. This decision discusses the effect and the object of RPM related documents in a very detailed way. In order to understand the effect of the Efes’s agreements with its dealers, the invoices are examined. The inquiries did not find any sanction and/or enforcement of Efes on its retailers when there is deviation from the prices that it recommends. This decision also evaluates the objective of those agreements in a separate section and mentions that agreements having the object of prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and therefore prohibited according to the Competition Act. Accordingly, this

⁶ Article 3 of the Competition Act defines dominant position as “the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers”.

⁷ Article 6(d) prohibits “Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market”.

⁸ Competition Board decision dated 13.7.2005; numbered 05-46/669-171; investigation.

decision discusses the reasons why suppliers are engaging in RPM conducts and the pros and cons of such practices.

16. In literature, there are two types of explanations. On one hand, such agreements can be used to coordinate cartels at the supplier and distributor level. On the other hand, they are used to protect some products from free riding, try to create efficiency at the sales points and sales structure, or to introduce new products to the market and to protect product image as a result of which efficiency is attained. The Competition Board decision stresses the fact that among these explanations coordination of cartels and the prevention of free-riding are at the forefront. However, there has been no finding of such objective of Efes. In sum, it was found that Efes is not fixing resale prices of the products that it distributes, thus the investigation found no violation of the Competition Act.

17. *This case did not find any agreements, involving RPM, either object or effect of which are contrary to Competition Act.*

2.4 Kütaş Teekanne Case⁹

18. Kütaş Teekanne is active in the “black tea” and “herbal tea” markets. In a preliminary inquiry, Kütaş Teekanne’s vertical agreements with its dealers are examined to understand the scope and enforcement of the provision stating “*Dealer can apply a maximum of (...) % discount to the potential points. The total amount of discounts will be covered by the dealer*”. In this regard, this decision puts forward that the relation between Kütaş Teekanne and its dealers needs to be examined.

19. The inquiries show that in practice dealers can provide discounts to retailers from their gross profit at different proportions due to issues such as buyer power of retailer or payment conditions. Firstly, Kütaş Teekanne did not possess a well established widespread distribution network during the time of the inquiries that would allow it to dictate prices on its dealers which is verified by the invoice checks and dealer statements. Secondly, dealers preferred to set their sales policies on their own at the time of the inquiries. For instance, small dealers prefer to have higher discounts to increase their sales whereas big dealers prefer to follow a single price policy.

20. Further to effect of the resale prices found in the agreements, the objective of such provisions is also dealt within the decision. The Competition Board decision discusses this provision based on article 4(a) of the Competition Act and article 4(a) of the Communiqué on Vertical Agreements. Additionally, the decision refers to Guidelines that considers determining the maximum level of the discount rate that may be applied by the buyer over the level of a price announced to be the recommended price as an indirect way of setting maximum resale prices and furthermore states that this conduct is prohibited according to the Competition Act. Nevertheless, this decision focuses on the following two points. First of all, it refers to the fact that vertical restraints are capable of restricting the intra-brand competition and thus might have benefits on the inter-brand competition via encouraging dealers to provide services before and after sales in the market. If the inter-brand competition is robust, then the negative effects of lack of intra-brand competition will be less in those markets. The life cycle of the market in question is also important in the determination of how much the lack of intra-brand competition might affect that market. The negative results arising from the lack of intra-brand competition would be more effective in a mature market. Black tea and herbal tea markets in Turkey are dynamic competitive markets without any entry barriers. Secondly, Kütaş Teekanne after loosing its market share to a great extent has ended its activities in the relevant markets via transferring its brands to other companies as a result of which all its activities with its dealers came to an end in 2006 while these agreements are being examined. Due to dynamic nature of the

⁹ Competition Board decision dated 24.8.2006; numbered 06-59/773-226; preliminary inquiry.

tea markets and the Kütaş Teekanne's not being active in the relevant markets any more, the Competition Board decides not to initiate an investigation against those vertical agreements involving provisions that have the objective of RPM in the absence of effect.

21. *In dealing with RPM in this rather recent case the Competition Board did not initiate an investigation based on mere existence of object vis-à-vis vertical agreements involving provisions leading to minimum resale prices. The Competition Board based its analysis on findings concerning the structure of the market and evidences obtained. This case discussed the pros and cons of inter-brand vs intra-brand competition extensively.*

2.5 Vira Case¹⁰

22. Vira is the exclusive distributor of the Kryolan branded make-up products in Turkey. The relevant market in question is defined as the "professional make-up products". Similar to the decisions that did not foresee the initiation of an investigation with respect to RPM, Competition Board considers whether the consumers suffer from any loss, vertical prices lead to horizontal price cooperation and inter-brand vs. intra-brand competition is found etc. When the vertical prices fixed by the supplier do not restrict inter-brand competition or they do not lead to supplier or dealer cartels, it is presumed by the Competition Board that inter-brand competition will increase.

23. In this case, AFW which imports Kryolan brand make-up products made a complaint about Vira which is the distributor of Kryolan branded goods in Turkey saying that Vira is interfered into the selling prices of its retailers. In fact the problems faced between Vira and AFW is arising from illegal import allegations. In practice, the inquiries show that Vira is trying to use price lists as "maximum price lists" in order to prevent consumer detriment due to specificity of these professional make-up products that are used by specific group of people like hotel animation teams, hair dressers, theatre artists...etc. The retailers also state that there has been no sanction by Vira concerning the use of the same price list. Retailers were able to make discounts on those products. The Competition Board decides that Vira's agreements with its retailers can not benefit from the Communiqué on Vertical Agreements because of the 40% market share threshold. However, they can benefit from an individual exemption for a period of 10 years if the relevant provisions are re-structured according to the article 4(a) of the Communiqué.

24. *The Competition Board tries to evaluate the effects of fixed RPM in addition to mere existence of intent and provides an individual exemption on condition that some amendments to RPM provisions.*

3. Conclusion

25. Fixing the purchase or sale price of goods or services is strictly prohibited under the Competition Act. In addition, determination of minimum and fixed resale prices is definitely prohibited by Communiqué on Vertical Agreements if vertical agreements are to benefit from this block exemption. In its earlier cases, the Competition Board finds it sufficient either the objective or the effect of the agreements to prohibit RPM practices (*Doğuş Automotive/Volkswagen; WB Company; Efes cases*). Therefore, earlier the undertakings were imposed fines due to RPM in the following two cases: *Doğuş Automotive/Volkswagen; WB Company*. Nevertheless in latter cases, the Competition Board takes into consideration the structure of the market to a great extent and considers the effect of vertical agreements involving RPM and did not initiate an investigation (*Kütaş; Vira cases*). The inter-brand vs. intra-brand competition and the market structure is discussed extensively in one case (*Kütaş Teekanne*), while consumers benefit and the real effect on the markets is the main issue in another (*Vira*).

¹⁰ Competition Board decision dated 2.8.2007; numbered 07-63/767-275; preliminary inquiry.