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HEARING ON ACROSS PLATFORM PARITY AGREEMENTS

-- Turkey --

27-28 October 2015

This document reproduces a written contribution from Turkey submitted for Item 7 of the 124th OECD Competition Committee on 27-28 October 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competition-crossplatform-parity.htm

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-- Turkey --

1. Having made an overview of the Turkish Competition Board (Board) decisions so far, it can be said that the Turkish competition law experience is quite limited on price parity agreements between suppliers and retailers, except for cases on retail price maintenance (RPM) agreements. There appears to be no experience whatsoever regarding Across Platform Parity Agreements (APPAs), which are agreements between suppliers and retailers that specify a relative relationship between the prices of competing products or the prices charged by competing retailers. Although we do not have any enforcement experience regarding APPAs, we would like to make a brief contribution to the discussion by way of drawing upon our experience with practices similar to APPAs.

1. Turkish Competition Board Practice on Price Parity Agreements

2. We have had Board decisions on price parity agreements mainly regarding RPM, yet it can be said that the Turkish approach to RPM so far has not been a consistent one.

3. In a decision related with cosmetics market dating back to 2007 (Decision No: 07-63/767-275, Date: 02.08.2007), the Board stated that it has changed the “*per se*” approach from its initial decisions to a “*rule of reason*” approach. The Board went on to say that in RPM cases that have been closed without a further in-depth investigation, it has taken into account factors such as, consumers are not harmed, vertical price maintenance did not become a horizontal price fixing between competitors and inter-brand competition is not restricted. In another decision (Decision No: 09-57/1365-357, Date: 25.11.2009) related with corn seed market, the Board emphasized that, presenting a vertical restraint, RPM is affecting intra-brand competition rather than inter-brand competition, which makes it less restrictive than other practices.

4. There have been cases in which the Board has decided not to further proceed with an in-depth investigation but rather close the case with letters of warning, even though it has accepted that RPM is an infringement (Decision No: 09-57/1365-357, Date: 25.11.2009, related with corn seed market; Decision No: 08-35/462-162, Date: 27.05.2008, related with motorcycle market). In such decisions, despite accepting the negative effects of RPM, the Board decided that these negative effects stayed limited due to factors such as low market barriers, dynamic and growing markets, low market shares of the parties, horizontal competition, etc.

5. On the other hand, in a decision related with electronics market, dated 2011 (Decision No: 11-39/838-262, Date: 23.06.2011), the Board stated that RPM is an infringement by object, and that there is no need to further consider its effects with a “*rule of reason*” analysis. Moreover, the Board expressed that, the factors that the market is dynamic and growing, and that there is competition at the horizontal level do not fully remove the negative effects of RPM which raises the prices of the final product. Nevertheless, it accepted that as with any agreement, RPM can be granted an individual exemption.

6. In contrast, in a later decision regarding electronics market, dated 2011 (Decision No: 11-54/1380-490, Date: 27.10.2011), the Board explained its view that, in the case of an RPM agreement, the possible effects of the RPM should be evaluated with the relevant market conditions. In this manner, in markets with a high level of inter-brand competition and potential growth, product differentiation, low barriers to entry, small amount of initial investment, frequent entry and exits, high number of market players and small-scale firms, along with low market power of the parties, negative effects of RPM will be less.

7. Considering the similarities between RPM and APPAs, it is hard to say how the Board will approach to APPAs in the future, and whether it will take into account the positive effects of APPAs through a balancing with the theories of harm.

8. We have had a single Board decision (Decision No: 10-76/1572-605, Date: 08.12.2010, related with electronics market) on “most favoured customer” (MFC/MFN) clause which concerned brick and mortar retailers, and two decisions on the way about online selling platforms (Booking.com and Yemeksepeti.com) both of which are in the in-depth investigation phase. The Board has expressed in its only MFC decision so far that MFC can have horizontal restrictive effects by way of facilitating coordination or raising rivals’ costs. In addition, the Board said that, despite its pro-competitive features, in markets with a low level of competition and where the parties to the agreement have a high market power, MFC can be anti-competitive.

9. Regarding APPAs, it is possible to say that as with RPM and MFC, the specific market conditions and the qualities of the parties to the agreement and other market participants will be taken into account while evaluating whether the APPAs in question are restricting competition. Yet, as will be explained later, it is possible to say that APPAs will be handled more cautiously due to their horizontal element. It is probable that there has not been any complaint yet made to the TCA about APPAs, since the final consumers are usually not aware of these agreements which are made between the suppliers and retailers.

2. Theories of Harm

10. Similar to RPM and MFC, APPAs restrict the ability for the seller to discriminate its prices between its customers.

11. Regarding the possible theories of harm, the Board has stated that RPM can result in a decrease of welfare by way of facilitating price fixing between suppliers and retailers, resulting in consumer harm through price raise, lessening consumer welfare through providing imbalanced benefits among consumers, protecting inefficient retailers and negatively effecting the retail services (Decision No: 11-34/742-230, Date: 06.06.2011, related with telecommunications market). It also specified that while RPM will fully prevent intra-brand competition by abolishing any downward pressure and causing rigidity in prices, it will also make the prices highly transparent and facilitate horizontal coordination between competitors (Decision No: 09-57/1365-357, Date: 25.11.2009, related with corn seed market).

12. We believe that the same of the above mentioned theories of harm might be true for APPAs, and that these agreements might similarly affect the pricing behaviour and competitive incentives of the market players. With their horizontal level, APPAs may also be exclusionary by raising rival’s costs and thus lifting up the barriers to entry. They may result in an overall higher price level than would be in the absence of APPAs, especially when the parties to the agreement have a high market power and/or a number of parallel APPAs in the market has a cumulative anti-competitive effect. By means of APPAs, any price cut made by the supplier/retailer in order to match the lower prices of competing retailers/products will become more expensive, and thus, prices will become rigid and sticky in a higher level than the competitive one. Since it may become easier to monitor the price-cutters, any discount will become more costly, stabilizing potential cartels against cheating. So that, the price transparency as a result of APPAs can be used as a facilitating factor for collusion at the horizontal level. In the end, APPAs may result in a restriction of both intra and inter-brand competition.

3. Benefits

13. The Board has taken into account certain benefits claimed by the parties to RPM agreements. It stated in some decisions that RPM do have certain benefits such as encouraging the retailers for efficient pre-sales services, dealing with the free-rider problem, protecting the brand image, managing demand uncertainty, promoting special treatment in multi-brand sales points, boosting market entry, avoiding double-marginalisation and preventing retailers with market power from influencing the prices (Decision

No: 09-57/1365-357, Date: 25.11.2009, related with corn seed market; Decision No: 11-34/742-230, Date: 06.06.2011, related with telecommunications market).

14. We believe that such benefits may also be claimed by the parties to APPAs. APPAs may encourage investments on brands or online/brick and mortar platforms by avoiding free-riding, and thus create efficiency.

15. Moreover, APPAs can reduce the transaction costs associated with bargaining and the search costs (time, money, psychological costs, etc.) for lower prices, especially in markets with where future prices and other market conditions are hard to predict because of uncertainties.

16. In addition to these potential benefits, just as MFC, APPAs may help the lower prices of competing products/retailers to diffuse further across the market. In theory, these agreements can help an overall price decrease in the market. However, in practice, due to the high cost of the price cuts, competing suppliers/retailers may reach a mutual understanding in order not to further drop the prices. This will make sense since consumers are not part of these agreements and are often not even aware of their existence. So, even if in theory, APPAs might have a benefit of a price decrease, in practice, the prices will probably become rigid and keep in a higher level than it could have been in the absence of APPAs. Nevertheless, this outcome will also be dependent on the market power of the parties and the percentage of APPAs in the overall market.

4. Relevant characteristics of these agreements and their impact on the analysis of the effects

17. Either the supplier or the retailer can set the price constraint in APPAs. If the constraint is set by the retailer, it may restrict intra-brand competition. If the constraint is set by the supplier, inter-brand competition may be restricted as well, especially if the supplier/retailer has market power. On the other hand, as mentioned above, depending on the market structure (oligopolistic, transparent, prone to collusion, etc.), the market power of the supplier/retailer and the percentage of APPAs in the market, a restriction in intra-brand competition may also result in a restriction in inter-brand competition.

5. Platforms

18. MFC and APPAs are alike in the sense that in MFC, the seller agrees that the buyer will receive prices/terms that are at least as favourable as those offered to any other buyer, while in APPAs, the retailer may require the supplier not to offer its products through other retailers at a lower price, or the supplier may require the retailer to charge its products the same price as/a constantly lower price than what the retailer asks for competing products. In short, in both price constraints, either the supplier or the retailer is asking for more advantageous prices/terms than its competitors.

19. MFC seems to be especially common among online platforms which can be explained by the fact that online platforms make it easier for the parties to agreement to know whether the other party is complying with the agreed terms. Thus, even though we have not had any case of APPA yet, we believe that there is a high chance of seeing such agreements especially in the online area which makes it very convenient for the suppliers and the retailers to monitor each other's behaviour. APPAs will possibly take place more often in markets with a high transparency and where monitoring is not costly. Just like MFC, we think that APPAs may involve selling conditions other than prices as well.

20. Regarding two-sided markets, since these markets are usually with higher barriers to entry due to network effects, they may be more concentrated, and thus, they might have a higher potential for restriction of competition as a result of APPAs.

6. Similarities/Differences with other price parity agreements

21. As mentioned earlier, APPAs are similar to RPM and MFC in many senses. They all have the vertical level, with a potential of restricting intra-brand competition, which may also result in a restriction of inter-brand competition if certain factors are present, such as the market power of the parties, a cumulative effect of parallel agreements in the market, increasing transparency of the market, price rigidity, etc. APPAs are more similar to MFC, in the sense that, in MFC, the prices offered at a retailer needs to be at least as low as the prices offered in other retailers; and in APPAs, prices offered at a retailer should either match the prices of other retailers or be lower than them by a constant price parity.

22. APPAs differ than other kinds of vertical agreements with its horizontal level which obliges the retailers to sell the products of the supplier at a price that matches (or is lower by a constant price parity than) the prices of competing products. This horizontal dimension of APPAs make them potentially more anti-competitive, and therefore, we believe that the effects of these agreements should be evaluated more carefully and thoroughly than other price parity agreements.