
TCA's Hefty Fine on Nestle Due to Vertical Restraints in Light of Highlights from Oral Hearing

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Introduction

On 21.02.2024, the Turkish Competition Authority's ("TCA") decision imposing an administrative fine of TRY 346,911,505.44 (approx. EUR 10.4 million)¹ on Nestle Trkiye Gıda Sanayi A.ř. ("Nestle") was published on the TCA's official website².

For the background information, the TCA had initiated a full-fledged investigation on 15.12.2022 against Nestle regarding the allegations that the undertaking violated Article 4 of the Law No. 4054 on the Protection of Competition ("Competition Law") by means of (i) determining the resale prices of its distributors ("RPM") and (ii) imposing region and customer restrictions to its distributors³. In line with the case team's assessments (noted during the oral hearing which will be summarized below), the TCA decided that Nestle violated Article 4 of the Competition Law via these vertical restraints.

The TCA's justifications and approach to the Nestle's practices based on the findings within the case in terms of the foregoing determinations shall remain to be seen until the TCA publishes its reasoned decision on the case. Until then, we believe that the remarkable points of the case disclosed during the live-streamed oral hearing held on 06.02.2024, as discussed in this article below, can shed light on the investigation and justifications fundamentally based by the TCA establishing the decision.

1. Arguments on Market Definition

During the oral hearing session, Nestle claimed that the relevant market has not been correctly defined. Nestle's arguments in this context based on their two different sales channels as retail channel and out-of-home consumption channel ("Nestle Professional - NP").

By arguing that the investigation concerns NP channel since all findings in the case are regarding NP channel, Nestle noted that NP channel does not sell products to end-users, but sells products to hotels, restaurants etc. which offer Nestle's products to their customers complementarily or use Nestle's products in preparation of their foods. Accordingly, NP channel is positioned as a separate business unit from retail channel, and its distributors, employees, products, competitors and thus, market shares are different. Having noted that the competitive conditions for NP channel are different than retail channel, it is thus stated that retail channel and NP channel should be considered under different market definitions.

Consecutively, in response to the case team's evaluation that Nestle's market share is above 50% for some products, Nestle asserted that this market share calculation is stemming from the incorrect definition of the relevant market and claimed that its market share for NP channel, which is approximately 9%, is not high enough to be able to perform the said violations.

2. Arguments on RPM

As regards the RPM allegation, Nestle argued that it does not intervene in resale prices of its distributors through pressure, incentive, or coercion and that the prices mentioned in the findings collected within the scope of the case were not applied as found during the investigation.

To support this, Nestle explained that it applies some discount models in which Nestle compensates the discount given by the distributor and Nestle employees may have said to distributors not to reduce the price since Nestle would have to compensate the discount. Nestle claimed that these communications were misunderstood and distributors are always free to grant discounts on their own expense.

Nestle also claimed that during the negotiations between distributors and their customers, distributors sometimes use Nestle as an excuse for not providing more discount to the persisting customers (as if there was a restriction imposed by Nestle on distributors in order not to grant more discounts to customers) and these communications were misunderstood by the TCA.

3. Arguments on Region and Customer Restrictions

Nestle indicated that although there is no exclusivity clause in the distributorship agreements, commercial practices were conducted under the assumption of the existence of an exclusive distribution system. In this regard, Nestle asserted that if there would be an exclusivity clause in the distributorship agreements, this would benefit from the vertical block exemption due to low market share of Nestle's NP channel (i.e. 9%). So, the practical implementation of the exclusive distribution system does not fall foul of competition rules.

Nestle stated that per the invoices, it is seen that the distributors sold products outside of their alleged regions.

Nestle also explained that they had initiated a compliance programme to eliminate the respective inconsistency and requested to offer commitments to the TCA, however the TCA rejected this request.

4. Arguments on Information Tracking

During the Q&A session, the TCA addressed the issue in Panorama system managed by Nestle, in which the distributors enter their final prices and sales regions. The TCA asked Nestle the reasons for diligently tracking the commercial practices of its distributors.

With regard to the sales location information, Nestle explained that it lends free-of-charge coffee machines, and their maintenance and repair should be conducted by Nestle periodically. Therefore, Nestle stated that the undertaking should know the location of the machines. Concerning the final sales price information, Nestle argued that since it grants distributors promotions based on their turnover, it follows the final sales price information.

Closing Remarks

The TCA did not satisfy with the defences raised by Nestle and imposed a single fine of TRY

346,911,505.44 (approx. EUR 10.4 million) for both RPM and sales restrictions. Since the imposed fine is relatively high, it seems that the TCA rejected Nestle's claim that the fine should be calculated from the turnover on NP channel instead of the total Turkish turnover.

The TCA's rejection of Nestle's commitments regarding sales restrictions is one of the most significant aspects of this investigation, since TCA's tendency on its precedents is usually to accept the commitments offered by the undertakings in the investigations regarding sales restrictions. It is known that the TCA may separate its conclusions in the vertical investigations into two, for RPM allegations and sales restrictions, and accept commitments for the sales restrictions. With its *Singer*⁴ and *Pierre Fabre*⁵ decisions, the TCA had separated the investigations into two for online sales restrictions and RPM violation, and concluded the investigations on online sales restrictions with commitments and the latter with settlements. This approach can be understood as the TCA is willing to separate the investigations for procedural economy when it is possible to implement commitment and settlement mechanisms simultaneously.

On the other hand, while there is no settlement request of Nestle (as per publicly available information regarding the investigation) in terms of the RPM allegation, we assume that the TCA preferred not to accept Nestle's request for commitments regarding sales restrictions by separating the Nestle vertical restraints investigation. It can be asserted that the TCA might have accepted Nestle's request to offer commitments (i) if the TCA had estimated Nestle's market share to be lower, and (ii) if there had been just "active" sales restrictions allegation. The TCA's reasoned decision will enlighten this issue once we see the evaluations comprehensively.

¹In the calculation of the administrative fine in terms of EUR, the average buying rate of exchange of the Central Bank of Turkey for 21.02.2024, which is the date of announcement of the short-form decision, was taken into consideration as the rate of exchange. For 21.02.2024, this rate was EUR 1 = TRY 33.39.

²The TCA's decision dated 15.02.2024 and numbered 24-08/149-61.

³The TCA's announcement regarding the initiation of the investigation is available in English here.

⁴The TCA's decision dated 09.09.2021 and numbered 21- 42/614-301, dated 30.09.2021 and numbered 21-46/672-336.

⁵The TCA's decision dated 23.02.2023 and numbered 23-10/175-43, dated 09.03.2023 and numbered 23-13/214-70.