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Resale Price Maintenance in the Spotlight: Farmatek's Case and the Board's Settlement Decision

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I. Introduction

This article aims to provide insight on the Turkish Competition Board's ("***Board***") settlement decision[1] on the investigation concerning Farmatek Ic ve Dis Ticaret Anonim Sirketi ("***Farmatek***"), shedding light on the Board's approach to practices in relation to resale price maintenance ("***RPM***") and settlement procedures. In its decision, the Board evaluates Farmatek's practices regarding RPM in the nutrition supplements market and decides to close the investigation with settlement.

II. Procedural Background and Farmatek's Activities

With its decision dated 13.04.2023 and numbered 23-18/343-M(6), the Board decided to launch a full-fledged investigation against Farmatek in order to determine whether it violated Article 4 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") by the implementation of RPM practices and restriction of internet sales. Subsequently, Farmatek submitted its request for the initiation of the settlement procedure. The Board has accepted Farmatek's request and proceeded with the settlement procedure.

Before delving into the substantive analysis, the Board examined Farmatek's activities and noted that Farmatek was a company with a sole shareholder who also acted as the chairperson of Farmatek's board of directors. The main activities of Farmatek consist of sales, marketing, import, and export of natural nutrition products made from herbal ingredients, vitamins,

[1] The Board's *Farmatek* decision, dated 05.10.2023 and numbered 23-47/890-314.

bodybuilding products, slimming products, cosmetic products, and textile products, as well as the sales and marketing of their raw materials and components. Farmatek operated in the supplements and vitamin sector in the pharmacy distribution as well as ready-to-drink liquid, powder, tablet, and bar forms of collagen in the pharmacy distribution channel.

III. The Relevant Product and Geographic Market

After examining Farmatek's activities, the Board assessed the relevant product and geographic markets. In terms of relevant product market, the Board stated that dietary/nutrition supplements were dietary aids that are sold through pharmacy or retail channels in capsule, powder or liquid form containing minerals, vitamins, amino acids, fatty acids, various bioactive substances, plants and plant extracts. These products differed from the intended use of pharmaceuticals by being supplementary and not treating health issues. The Board indicated that all of the products subject to the case file were qualified as nutrition supplements and therefore defined the relevant product market as the "nutrition supplement" market.

With regard to the relevant geographic market, the Board assessed that it could be defined as Turkiye considering the features of goods and services, customer preferences and low barriers to entry, insignificant price and market share discrepancies between the undertakings in different regions and increasing market homogeneity due to online sales.

IV. The Board's Assessments on the Violation of Article 4 of Law No. 4054 through RPM

Under Article 4 of Law No. 4054, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect of the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. In this respect, Article 4 of Law No. 4054 expansively applied to all agreements, decisions, and concerted practices among undertakings. The principal aim of this provision is to ensure that each undertaking independently determines its own commercial policies and market activities, free from the influence of other undertakings. More specifically, the second paragraph of Article 4 of Law No. 4054, outlines the circumstances that fall under this prohibition, including "*the determination of the purchase or sale price of goods or services, as well as elements such as*

costs and profits, and any conditions of purchase or sale." Given that Article 4 of Law No. 4054 does not distinguish between price agreements among competitors or non-competitors, both situations are encompassed by this provision. In other words, the article covers anticompetitive agreements among competitors operating at the same level (horizontal agreements), as well as vertical agreements among non-competitors operating at different levels of the supply chain.

Further, the Board also emphasized that within the context of Farmatek's case, the relationship between the supplier and the sellers operating in the retail sales channel constituted a vertical relationship, as they operated at different levels of the value chain in accordance with Article 2 of the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No. 2002/2***"). Consequently, practices involving the RPM are also among the actions prohibited under Article 4 of Law No. 4054.

In terms of the Board's decisional practice, it is indicated that monitoring the prices in a specific market and providing resale prices to the buyers are considered as a direct intervention with the retail prices and prevents the determination of resale prices in a free competitive environment, since buyers should determine their retail prices on the basis of their independent commercial decisions. The Board precedents underscored that such an intervention would restrict the competition by object and regardless of any effects, the competition among the players would be violated [2]. In this regard, RPM is not considered within the scope of exemptions under Article 5 of Law No. 4054. In a similar vein, the RPM is also considered as a restriction of competition by object under European Union competition law[3].

In line with this theoretical framework, the Board stated that the evidence obtained during the on-site inspection at Farmatek's premises indicated that Farmatek intervened in the resale prices in the downstream market by determining the price as well as pressuring and sanctioning the resellers to sell the products above the price threshold set by Farmatek.

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[2] See the Board's decision dated 22.11.2018 and numbered 18-44/703-345; the Board's decision dated 10.01.2019 and numbered 19-03/23-10; the Board's decision dated 12.11.2019 and numbered 19-39/610-263; the Board's decision dated 02.11.2011 and numbered 11-55/1434-509; the Board's decision dated 04.03.2021 and numbered 21-11/154-63; the Board's decision dated 26.03.2020 and numbered 20-16/232-113; the Board's decision dated 12.03.2020 and numbered 20-14/192-98; the Board's decision dated 04.03.2021 and numbered 21-11/154-63.

[3] Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, Article 3.4

More specifically, the Board conducted a comprehensive review of the obtained correspondence between Farmatek and its resellers which included communications that Farmatek instructed resellers to make updates and adjust the resale prices. Notably, a reseller (i.e. an employee of Eline Gıda Kimya İlaç San. ve Tic. Ltd. Şti.("***Neosante***")) asked Farmatek to issue warnings to other resellers who were selling products below the price level set by Farmatek. Further, it is determined that Farmatek's agreements with its resellers included provisions which require compliance with the predetermined price increase periods and campaign end dates.

In addition, there were several correspondence indicating that resellers (e.g. Likya Farma Emlak Gıda Kozmetik İthalat İhracat Turizm ve Ticaret Ltd. Şti. and Neosante) were instructed to change their resale prices. In particular, the Board assessed that there were correspondence between Farmatek and its resellers, in which Farmatek warned the resellers that they would be deprived of the turnover-based premium if they made sales below the retail sales price.

Based on the collected evidence, the Board concluded that Farmatek's correspondences demonstrated that it engaged in RPM. More specifically, the Board assessed that the statements "*Our request from you is to update the prices seen in the attachment until 12:00 and to make our trade more profitable (...)*" was an indication of Farmatek engaging in RPM practices. Furthermore, the statement "*As I have mentioned you and Mr. (...) before, we have never changed the price of a product which is not discounted. (...) We are waiting for your urgent interference.*" demonstrated the reseller's request from Farmatek to issue warnings to other resellers and highlighted that Farmatek also previously engaged in RPM practices as well. Moreover, the Board's assessment of the evidence indicated that Farmatek was engaged in the price agreements with resellers in which Farmatek actively interfered in the circumstances where retail prices were fell below the agreed price levels. Lastly, the Board noted that Farmatek's statements warning the resellers that they would be deprived of the turnover-based premium if they made sales below the retail sales price confirmed that Farmatek interfered with the sales prices in the downstream market.

Therefore, in light of both the theoretical and practical assessments on the evidence, the Board concluded that Farmatek violated Article 4 of Law No. 4054 by engaging in practices of RPM.

V. Assessment on Settlement Procedure and Administrative Monetary Fine

As per Article 16 of Law No. 4054, in case of violations under Articles 4, 6 and 7 of Law No. 4054, the Board may base the fine up to 10% of the undertaking's turnover generated in the most recent financial year or if this cannot be calculated, the fine should be based on the turnover generated as of the end of the financial year closest to the fining decision. Moreover, Article 5 of the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance ("***Regulation on Fines***"), sets the minimum base fine levels for the violations. Specifically, Article 5 of the Regulation on Fines stipulates that the base fine for cartel-related violations should range from 2% to 5% of the turnover, while for other violations, the base fine should be set between 0.5% to 3% of the turnover, considering the elements such as undertaking's market power and actual or potential damage caused by the violation. In addition, after the calculation of the base fine, the Board may increase or decrease the administrative fine depending on the aggravating and mitigating factors set forth under Articles 6 and 7 of the Regulation on Fine.

According to Article 43 of Law No. 4054, the Board may, either upon request of the investigated undertakings prior to the service of the investigation report or by *ex officio,* initiate the settlement procedure depending on the procedural benefits conferred by expediting the conclusion of the investigation as well as the existence and the scope of the violation. In case the Board initiates the settlement procedure and concludes the investigation with a detection of violence and administrative monetary fine, the administrative monetary fine may be reduced up to 25%.

In this respect, within the course of the settlement procedure, Farmatek acknowledged that it violated Article 4 of Law No. 4054 by engaging in RPM practices. In terms of the administrative monetary fine to be calculated, the Board emphasized that Farmatek's violation lasted between one to five years (i.e. 2019 to 2022) and accordingly the percentage of the base fine should be increased by half under Regulation on Fines. On the other hand, the Board decided to reduce the percentage of the base fine by 40% since the products subject to the violation corresponded to a relatively small portion of Farmatek's overall turnover as per the Regulation on Fines.

VI. Conclusion

In light of the foregoing substantive and procedural assessments, the Board unanimously decided that Farmatek violated Article 4 of Law No. 4054, by engaging in RPM practices which was acknowledged by Farmatek during the settlement procedure.

In a similar vein, the Board has several precedents in which the investigations were concluded through the settlement procedures for undertakings that violated Article 4 of Law No. 4054 by engaging in RPM practices[4].

This decision underlines the theoretical framework of RPM practices and involves the Board's assessments for their impact on downstream markets. Moreover, it establishes a precedent for future cases, offering guidance and creating a framework that harmonizes the Board's approach towards the criteria for the settlement procedures and the calculation of the administrative monetary fine.

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[4] See the Board's *Ipek Gıda* decision dated 28.09.2023 and numbered 23-46/882-31; *L'Oreal* decision dated 07.09.2023 and numbered 23-41/808-286; *Sistem Kozmetik* decision dated 19.10.2023 and numbered 23-49/949-338; *Kare* decision dated 13.04.2023 and numbered 23-18/347-117; *Elca* decision dated 17.08.2023 and numbered 23-39/739-253; *NAOS* decision dated 12.01.2023 and numbered 23-03/29-12; *Avon* decision dated 09.03.2023 and numbered 23-13/233-72; *Sunny* decision dated 05.01.2023 and numbered 23-01/12-7; *Farmasi* decision dated 16.02.2023 and numbered 23-09/143-42; *Natura* decision dated 23.11.2022 and numbered 22-52/777-317.