



Resale Price Maintenance and Online Sales Bans Once Again under the Turkish Competition Authority's Close Radar: Oriflame and Uğur Cases

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I. Introduction

In nine days, the Turkish Competition Authority (the “*Authority*”) published three Competition Board (the “*Board*”) decisions regarding allegations of resale price maintenance and online sales bans. The decisions are against companies operating in entirely different sectors.

First, the Oriflame¹ decisions comprised (i) a commitment approval decision (“*Oriflame I*”)² regarding the online sales ban allegations³ and (ii) a settlement decision on the resale price maintenance allegations (“*Oriflame II*”)⁴. Subsequently, the Uğur⁵ decision addressed the same categories of offence and imposed a fine of TL 51.4 million for resale price maintenance (“*Uğur Decision*”).⁶

This paper will review these decisions, focusing on the aspects of online sales bans and resale price maintenance, and will elaborate on the rapid increase in the Authority's scrutiny of these types of practices.

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¹ Oriflame Kozmetik Ürünleri Ticaret Limited Şirketi.

² Board's decision dated 14.3.2024 and numbered 24-13/245-102.

³ The commitment decision also concerned other restrictions against the resellers, but this paper will focus on the internet sales ban evaluations.

⁴ Board's decision dated 14.3.2024 and numbered 24-13/246-103.

⁵ Uğur Soğutma Makinaları Sanayi ve Ticaret AŞ.

⁶ Board's decision dated 14.12.2023 and numbered 23-58/1147-409.

II. Defendants and Relevant Markets

Oriflame is primarily engaged in the import, export, domestic wholesale, and direct sale of various cosmetic products, including personal care products, skin, hair, and body care products, as well as wellness products. The Board broadly defines the relevant product market as “cosmetic and personal care products,” noting that a narrower market definition is unnecessary, although narrower markets have been defined⁷ for the relevant products⁸. The relevant geographical market is Turkiye.

Uğur, on the other hand, produces, markets, sells, and distributes products like fridges, freezers, coolers, air conditioners, ice cream machines, etc. The Uğur Decision concerns Uğur’s freezers and coolers. The Board saw no need to define a relevant market as the offence in question would constitute a violation in all alternative markets.⁹ The relevant geographical market is, once again, Turkiye.

III. Online Sales Ban Dimension

More often than not, the Board does not welcome online sales bans. The Authority’s Guidelines on Vertical Agreements regards a supplier’s imposing of restrictions on sales through distributors’/dealers’/buyers’ websites as a restriction on passive sales. In this context, purchases made through consumers’ (i) visits to resellers’ websites, (ii) contacts with resellers, or (iii) requests to be informed by resellers are regarded as passive sales.¹⁰

In its highly-debated BSH decision,¹¹ the Board viewed directing the online sales tabs of BSH’s dealers’ websites to the main website of BSH and the pre-2015 online sales ban clause in the contacts as restrictions on passive sales. BSH was alleged to restrict online sales of Bosch branded products by way of certain terms that required BSH’s distributors to obtain BSH’s prior authorization before making any online sales and adopting certain repressive practices towards

⁷ See. e.g., the Board’s decisions dated 10.10.2005 and numbered 05-66/946- 25; dated 08.05.2008 and numbered 08-32/401-136; dated 09.09.2009 and numbered 09-41/987-249; dated 16.09.2021 and numbered 21-43/638-317.

⁸ Oriflame I, paras. 11-12; Oriflame II, paras. 15-16.

⁹ Uğur Decision, para. 22.

¹⁰ See. Gönenç Gürkaynak, *Turkish Competition Law*, Section 5.1.2.2.2., Concurrences, 2021.

¹¹ Board’s decision dated 22.08.2017 and numbered 17-27/454-195.

the restriction of online sales by way of warning distributors on online sales prices and refusing to supply in case of incompliance. The Board assessed that the relevant clauses in the distribution agreement and BSH's "warning practices" as such may lead to potential restrictions of online sales and carried out an individual exemption analysis which concluded that the relevant practices hindered new developments and improvements, or economic or technical development of production or distribution of products.¹²

In Yatsan¹³, another landmark decision concerning online sales bans, the Board assessed that the prohibition of online sales imposed by Yatsan on its resellers could not be justified based on the preservation of brand image and potential concerns in terms of free riding. The Board found that Yatsan's products does not have special characteristics that may necessitate the prohibition of their sales to certain customers due to health and safety reasons, and thus, Yatsan's agreement with its resellers would not benefit from the block exemption. Furthermore, compared to the traditional sales methods, the internet is a significant tool that allows both resellers and suppliers to reach more and varied end-users, and online sales increase consumer welfare by decreasing search and comparison costs and easing the process of reaching a demanded product. The Board concluded that such restriction goes beyond what is necessary to attain the objective of preserving the brand image and prevent free riding.

The Board's Oriflame I and Uğur Decisions follow the same line of reasoning as previous precedents¹⁴, reaffirming them once again. However, these two decisions differ from each other in terms of the evidence base. Oriflame I cites various documents showing that Oriflame either entirely prohibited the resellers' online sales or allowed online sales for only a limited time whereas its general policy is to restrict online sales.¹⁵ These documents also refer to blockage punishments by Oriflame on the resellers due to breaches of online resale bans. On the other hand, in Uğur Decision there is only one document, Document-99, where a reseller states that the reseller is not able to make online sales due to an agreement with Uğur. However, the Authority did not find any additional evidence to show the existence of such an agreement or any other evidence that might support the allegation that Uğur does, indeed, prevented passive sales through internet.¹⁶

¹² See. Gönenç Gürkaynak, *Turkish Competition Law*, Section 5.1.2.2.2., Concurrences, 2021.

¹³ The Board's decision dated 23.09.2010 and numbered 10-60/1251-469.

¹⁴ Also, the decisions dated 08.05.2008 and numbered 08-32/401-136, dated 24.10.2013 and numbered 13-59/831-353, dated 6 15.02.2018 and numbered 18-05/74-40.

¹⁵ Oriflame I, para. 24.

¹⁶ See. Gönenç Gürkaynak, *Turkish Competition Law*, Section 5.1.2.2.2., Concurrences, 2021.

Therefore, the Board clears Uğur from the allegations on online sales bans as the burden of proof is not met. In Oriflame I, however, the Board notes these evidence as “competition law concerns” under the Communiqué No. 2021/2 on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse Of Dominant Position (“*Communiqué No. 2021/2*”) and evaluates Oriflame’s commitments.

To address this, Oriflame commits to signing new agreements with its authorized resellers, which will include provisions to: (i) remove any clauses that may directly or indirectly restrict resellers' online sales, (ii) avoid de facto restrictions on online sales, (iii) refrain from requiring authorization or approval for resellers wishing to make online sales, and (iv) announce these contractual revisions on its official website. The Board notes that these measures are appropriate and sufficient to resolve the competition law concerns in question, makes these commitments binding for Oriflame, and concludes the investigation regarding the allegations of online sales bans.¹⁷

IV. Resale Price Maintenance Dimension

Under Turkish competition laws, fixing the purchase or sale price of products or services, or those elements such as cost and profit which form the price, as well as any terms of purchase or sale, fall within the Article 4 prohibition, which is akin to and closely modeled after the Article 81 of the TFEU. In order for a restriction on competition falling under Article 4 of Law No. 4054 to be in compliance with the law, the restriction should either benefit from a block exemption or an individual exemption (Article 5 of Law No. 4054). “*Preventing the purchaser from determining its own selling price*” by way of fixing the resale price or setting the minimum resale price, i.e., resale price maintenance, is considered a hard-core violation that cannot benefit from the block exemption. Accordingly, actions such as instructing dealers and/or customers not to sell below a certain price level or at a certain profit margin, or monitoring resale prices and taking steps to enforce such prices through monitoring practices, would be regarded as resale price maintenance and therefore violate competition law.¹⁸

¹⁷ Oriflame I also ends the investigation for the allegation that Oriflame imposed other restrictions against resellers and with Oriflame II, the entire investigation ends as the only remaining allegation on resale price maintenance are settled in Oriflame II.

¹⁸ See. Gönenç Gürkaynak, *Turkish Competition Law*, Section 5.1.1., Concurrences, 2021.

While Oriflame applied to offer commitments regarding allegations of online sales bans,¹⁹ the application on the resale price maintenance was a settlement application, which ultimately led to Oriflame II. In that decision, the Board found that Oriflame not only prevented resellers from pricing the relevant products below the resale prices specified in the product catalog but also sanctioned them for doing so. Therefore, the Board concluded that Oriflame violated Article 4 of Law No. 4054 on the Protection of Competition by intervening in the sales prices of its resellers. Since Oriflame applied for settlement, confirmed this violation finding, and waived its rights to appeal the infringement decision, the Board closed the investigation with settlement after lowering the fine by 25%. In the end, the Board fined Oriflame with TL 4.4 million due to resale price maintenance.

The same offence led to a considerably higher administrative monetary fine against Uğur. In Uğur Decision, the Board referred to a set of documents obtained during the investigation and these decisions formed the basis for the violation finding. These documents showed that Uğur's employees warned the dealers who sold products at a price lower than the resale prices determined by Uğur. These prices were called as "distorted prices", and the resale price was determined directly by requiring the dealers to increase the prices to the price level set by Uğur. The Board also found that Uğur exerted pressure on dealers with "screen closure" sanctions when they did not sell at the prices Uğur determined. As a result, the Board imposed Uğur and administrative monetary fine of TL 51.4 million.

V. Conclusion

The Board's Oriflame I, Oriflame II and Uğur Decisions confirm that the Board's existing precedent on online sales bans and resale price maintenance are still up to date.

Importantly, the number of Board decisions on these fronts has gained acceleration. In less than a month after Oriflame I, Oriflame II and Uğur decisions, the Authority published three more decisions with similar allegations against Ege Seramik Sanayi ve Ticaret A.Ş. (together with

¹⁹ Also, for the allegations on other reseller restrictions than online sales bans.

NG Kütahya Seramik Porselen Turizm A.Ş.),²⁰ Duracell Satış ve Dağıtım Ltd. Şti.²¹ and Amway Türkiye Ltd.²²

The Board's decisions provide insight into their rationale behind investigating online sales bans, noting that online sales reduce both consumer costs and distribution costs for businesses. Additionally, since resale price maintenance practices tend to increase consumer costs, one could argue that the Authority's policy of lowering prices to promote consumer welfare becomes particularly important during periods of high inflation. Investigations into resale price maintenance and online sales bans are keyways in which this competition policy is implemented, and as such, there is reason to expect more similar casefiles in the near future.

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²⁰ The Board's decision dated 28.3.2024 and numbered 24-15/310-125.

²¹ The Board's decision dated 4.4.2024 and numbered 24-16/359-139.

²² The Board's decision dated 4.4.2024 and numbered 24-16/382-144.