A Different Perspective to Employer`s Liability for Anti-competitive Behaviors: Arçelik's Application for Leniency

Authors: Gönenç Gürkaynak, Esq. and Baran Can Yıldırım, ELIG Gürkaynak Attorneys-at-Law

(1) Introduction

The Turkish Competition Authority ("***Authority***") has recently published a decision concerning a leniency application submitted by Arçelik Pazarlama A.Ş. ("***Arçelik***" or "***Applicant***") – one of the leading manufacturers of white appliances in Turkey.[1]

The case and the subsequent decision are interesting in various aspects. Firstly, Arçelik submitted a set of documents attesting to an employee`s exchange of commercially and competitively sensitive information with its competitor Vestel Ticaret A.Ş. ("***Vestel***"), under a leniency application, taking the risk of not being granted full immunity from the fines given that a possible violation stemming from exchange of competitively sensitive information is not covered by the Turkish leniency regulation. Secondly, while the Competition Board ("***Board***") did establish that there was an exchange of competitively sensitive information, it refrained from categorizing it as a violation within the meaning of the Law No. 4054 on the Protection of Competition ("***Competition Law***"). Lastly, the Board demonstrated once again that it welcomes applications for leniency (which still remain in the low numbers in Turkey when compared with the European practice) by maintaining its relatively recent practice of not fining the Applicants.

We will, in this article, briefly put forward the legislation and case-law surrounding the leniency procedure in Turkey, explain the exchange of competitively sensitive information within the meaning of Competition Law and discuss their implications with regard to the case at hand.

(2) Background

The case began when Arçelik detected a unilateral flow of its competitively sensitive information to Vestel, one of its significant competitors. Deciding to conduct a more

[1] The Board's decision dated January 2, 2020, and numbered 20-01/13-5.

comprehensive internal investigation, it was revealed that one of Arçelik's senior regional sales managers had been systematically sending out Arçelik's competitively sensitive information to a friend working for Vestel. This person had actually been a former Arçelik employee, had worked for various market research companies before being employed by Vestel and the flow of information was going back years. Thus, although the company had suffered losses due to its employee's actions, Arçelik decided to request immunity from fines pursuant to Article 4 the Regulation on Active Cooperation for Detecting Cartels ("***Leniency Regulation***") by submitting a leniency application to the Authority, concerned that such an exchange of information may create the impression of a cartel, in light of the Authority`s recent cartel decisions.

(3) The Leniency Procedure in Turkey and Arçelik's Leniency Application

Under the Leniency Regulation which came into force in 2009, the leniency program was made available only for cartel members. The term "cartel" as defined in the Leniency Regulation includes price fixing, sharing of customers, suppliers, markets or trade channels, restricting output or placing quotas and bid rigging among competitors. Therefore, technically, a leniency applicant cannot be immune from the fines, if its violation of the law is limited to the exchange of competitively sensitive information, however, it can have its fine reduced by 25% to 60% depending on its level of cooperation with the Authority, as per the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance.

Those being said, the Board`s recent precedent indicates that a leniency applicant may enjoy a total immunity from fines, even when the subject matter falls under another form of antitrust violation. Indeed, in the *Syndicated Loans*[2] decision, the Applicant – Bank of Tokyo-Mitsubishi UFJ Turkey was granted full immunity based on its active role of revealing the violation, even though the particular violation was in the form of an exchange of competitively sensitive information. This was the first case, where the Board granted full immunity without establishing a cartel violation. Previously, for instance in its *Hyundai*

[2] The Board's decision dated November 11, 2017 and numbered 17-39/636-276.

Dealers[3] decision, the Board had fined an automotive dealer leniency applicant on the ground that the established violation did not fall within the definition of a cartel.

In assessing Arçelik's leniency application in light of the above, it may be argued that Arçelik might have failed to benefit from full immunity as per the Leniency Regulation, had the Authority established a violation, since the documents provided to the Authority were, on their face, merely presenting an exchange of competitively sensitive information. As such, it is noteworthy that Arçelik specifically argued that its exchange of information with Vestel may be categorized as a "cartel" since in the past, *e.g.* in the *Aegean Cement Producers*[4] decision, the Board had considered information exchanges to be a facilitating factor of cartel organizations. Arçelik further argued that the Board did not fine the leniency applicant in the *Syndicated Loans* decision and therefore, established a precedent that does not distinguish cartels from others, in terms of granting the leniency applicant full immunity from fines.

(4) Exchange of Competitively Sensitive Information

Article 4 of the Competition Law is the main provision that applies to exchange of information: it prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have, as their object or effect, the prevention, restriction or distortion of competition within a product or services market. The Guidelines on Horizontal Cooperation Agreements ("***Guidelines***"), issued to set forth the principles to consider when assessing these agreements and practices in accordance with the Competition Law, also includes the general principles surrounding information exchanges. Pursuant to the Guidelines, the Board takes into consideration whether the information is strategic, aggregated, historic, frequent, and public, in order to assess the restrictive effects on competition, within the meaning of Article 4.

In light of above, in order for an information exchange to fall under Article 4 of the Competition Law, such information exchange should involve strategically valuable information that is likely to affect the market behavior of the parties. Although what strategically valuable information entails, varies depending on the facts and market structure

[3] The Board's decision dated December 16, 2013 and numbered 13-70/952-403.
[4] The Board's decision dated January 1, 2016 and numbered 16-02/44-14.

surrounding the case, the prices, any future business strategies and promotional campaigns are usually categorized as strategically valuable. Future pricing related information is particularly considered strategic, which may facilitate, monitor, or execute a collusion. It should be noted that the precedent of the Board suggests that the exchange of competitively sensitive information may be an infringement in and of itself, without being categorized as cartel.[5]

Having said this, it is understood from the documents discussed in the decision that in this particular case, the competitively sensitive information had flowed from Arçelik to Vestel and not the other way around. However, it must also be noted that the Board normally does not make a distinction as to whether there was an "exchange" between the parties or whether the information was shared unilaterally. Indeed, the Board stated in the decision that even in cases where there is one-way flow of information, such flow may lead to a violation, so long as the information is of strategic value for the receiver, and the receiver does not explicitly reject the shared information.

The documents submitted in this particular case show that Vestel had received information with regard to Arçelik`s very recent retail sales, dealers' revenues, current prices and prospective price increases, promotions and prospective campaigns, all of which are generally considered to be strategically valuable information that may affect a competitor's market behavior by way of increasing the transparency and foreseeability of the prices in the market. Indeed, in the Board's *Aral Oyun* decision,[6] the Board found that Aral Oyun, which is a supplier of computer and console games, and some of the Aral Oyun retailers, had exchanged future pricing strategies with regard to the concerned retailers' competitors. As a result, the relevant retailers and Aral Oyun were fined by the Board. Similarly, in the *Aegean Cement Producers* decision, the Board established that the investigated undertakings exchanged information on, among others, costs and future business strategies, which facilitated collusion in the market. In light of the above, it could be stated that the information shared with Vestel falls within the category that the Board considers, under normal circumstances, to lead to a violation of Article 4.

[5] The Board's decision dated April 18, 2011 and numbered 11-24/464-139.
[6] The Board's decision dated November 11, 2016 and numbered 16-37/628-279.

Accordingly, one would expect the Board to decide that the aforesaid information flow falls within the scope of Article 4 and that the Parties violated the Competition Law by way of an exchange of competitively sensitive information. However, as will be put forward below, this was not the case in this instance.

(5) A Different Perspective to the Employers' Liability for their Employees' Anti-competitive Behaviors

The Board followed a different approach to determine whether the information exchange at hand constituted a violation within the meaning of the Competition Law. As such, the Board took into consideration that Arçelik was not aware of the information exchange and therefore, it was not in a position to make its strategic calls based on the information conveyed to Vestel and/or Vestel's strategic behaviour. Further, the Board considered that Arçelik had in fact incurred damages from the anti-competitive actions of its employee.

This approach seems to differ from the established practice of the competition authorities. Indeed, even in instances where the employee acts contrary to the instructions of the senior management, the company is deemed to be strictly liable if such actions are anti-competitive in nature.[7] The European Commission's precedent also states that an undertaking may even be liable for a *false* self-employed person[8] or for other entities acting as third-party service providers for that undertaking.[9] The Turkish precedent also indicated that for the purposes of establishing a violation, whether the employee was acting upon the instructions of the undertaking was not taken into consideration, so long as such action created anti-competitive affects.[10] The Board makes it clear that whether the anti-competitive behaviour is economically rational (in other words, is in the interest of the undertaking) is not of relevance in determining the violation.[11] That is to say, the anti-competitive behaviour may not result in a favourable result for the undertaking and such undertaking may still be violating the Competition Law.

---

[7] *See VM Remonts*, C-542/14, ECLI:EU:C:2016:578.
[8] False self-employed people are described as "service providers in a situation comparable to that of employees." *See FNV Kunsten Informatie en Media*, Case C-413/13, ECLI:EU:C:2014:2411.
[9] *See* C-542/14.
[10] The Board's decisions dated June 7, 2006 and numbered 06-41/519-139; dated November 26, 1998 and numbered 93/750-159; dated December 27, 2007 and numbered 07-92/1170-456.
[11] The Board's decision dated July 8, 2013 and numbered 13-42/538-238.

Seeming somewhat contradictory to its previous precedents, the majority of the Board ultimately decided that the information exchanged by Arçelik's employee was against the interest of Arçelik, and Arçelik was neither aware of, nor had consented to the relevant information exchange; thus the conduct of a single employee within the scope of information exchange does not violate Article 4 of Law No. 4054. On that front, one of the Board members dissented, arguing that the Board's precedent established that unilateral information sharing may also amount to a violation, if the counterparty who received the competitively sensitive information does not explicitly reject the shared information.

(6) Conclusion

Despite the existence of exchange of competitively sensitive information such as future pricing strategies and prospective campaigns, the Board followed a different approach in determining whether such exchange amounts to a violation within the meaning of the Competition Law.

The Board has taken into account whether such information exchange benefited the undertaking in question and whether it was aware of its employee's actions. The Board did not take into consideration whether Vestel, the receiver of the competitively sensitive information, was able to take advantage of such information flow. In this regard, it is noteworthy that the Authority case-handlers had opined that, both Arçelik and Vestel had violated Article 4 of the Competition Law by way of competitively sensitive information exchange, and that Arçelik should be granted full immunity from the fines under leniency rules and precedents. The Board, however, established that there had been no violation and therefore did not fine either of the undertakings.

The decision seems to diminish the strict liability of the Employers for the anti-competitive actions of their employees. As such, undertakings in the future would have a tendency to structure defences around the fact that they were not aware of the investigated behaviour of their employees, in order to do away with allegations of the case-handlers in that regard, especially if the Board keeps following its looser approach observed in this particular case.

The leniency applicants may face private damages claims brought by individuals and other undertakings suffering from the anti-trust violations of the leniency applicants, even when the

competition authorities grant the leniency applicant full immunity from the fines. However, if the competition authorities do not found a violation stemming from the leniency application, the concerned leniency applicant not only is not fined, but also be mostly freed of potential private damages claims. In this case, for instance, Arçelik and/or Vestel may have faced lawsuits initiated by consumers or their dealers on the ground that the anti-competitive behaviours of the undertakings concerned increased the prices of the white appliances that they bought, had there been a violation established by the Board.

The decision may be taken as an expression of the Board's temperate approach towards leniency applicants with a view to encourage the undertakings to use the Leniency Regulation, which benefits both consumers and the parties as it reduces the costs stemming from the investigation procedure and frees up resources of the authorities to tackle other competition law violations.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

(First published by Mondaq on September 22, 2020)