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Competition Authority's request of foreign affiliate data from Turkish subsidiaries quashed by court as unlawful

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› Introduction

› Facts

› Decision

› Comment

Introduction

Within the scope of the Competition Authority's preliminary investigation launched against certain banks in Turkey, the Authority requested a set of data possessed by foreign affiliates from their Turkish subsidiaries by relying on the economic unity theory. The Competition Board imposed administrative monetary fines on some of the investigated banks that are located in Turkey for not being able to provide the requested data within the formal deadline.

Some of the banks under investigation requested an annulment of the Board's decision, which emanated from the Authority's unlawful request, by arguing that the economic unity theory was not a procedural rule but rather a concept related to the essence of competition law, and that it did not shed light on the notification procedures. Ankara Administrative Court of First Instance annulled the Board's decision and explicitly set out that the Authority's notification to the Turkish subsidiaries for a request of foreign affiliate data could not be deemed as a duly served notification and the Authority cannot justify it by relying on the argument that they are within the same economic unity.

Facts

In early 2020, the Board decided to launch a preliminary investigation to determine whether certain banks and financial institutions in Turkey had violated Law No. 4054 on the Protection of Competition through their activities related to:

- deposits;
- credit;
- foreign currency;
- stocks;
- bonds;
- bills; and
- brokerage services.

Within the scope of the pre-investigation, the Authority requested the investigated undertakings (ie, Turkish entities of the banks and financial institutions) to provide certain chat room communications of their various traders who are employed outside Turkey and have the highest Turkish-lira quotation volume among the traders using that currency. However, since the requested chat logs were not in the possession of the Turkish entities, some of the investigated undertakings argued that the Authority should duly serve the notification to the group entities (ie, data holding entities), which are located outside of Turkey. Therefore, the investigated undertakings could not completely comply with the Authority's information request within the formal deadline. Even though some of the Turkish entities of the banks or financial institutions provided the Authority with the requested data comprising millions of chat logs and hundreds of gigabytes after the formal deadline expired, in July 2020, the Board imposed administrative monetary fines on some of the investigated undertakings for not being able to provide the requested data within the formal deadline pursuant to paragraph (c) of article 16 of Law No. 4054.

Subsequently, some of the investigated undertakings appealed against the Board's decision. Having assessed the merits of the case, the Court unanimously decided to annul the Board's decision.

Decision

The Court accepted some of the banks' arguments that the Board had erred in imposing an administrative monetary fine on the relevant undertakings due to the unlawful notification, and that the chat logs of affiliates in foreign countries could not be requested from the Turkish entities.

In terms of the assessment regarding the merits of the case, the annulment decision indicates that the legal services to be made within the scope of Law No. 4054 should still be pursued in accordance with the provisions of Notification Law No. 7201, which stipulate the legal services to be made to entities domiciled abroad, if:

- there are not any bilateral or multilateral agreements regarding mutual legal assistance and cooperation between Turkey and other states for the legal service of the notification; or
- the subject of the legal service falls outside the scope of such agreements.

In this respect, the annulment decision remarks that while the Authority's request for information is an administrative act, the scope of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") is limited to the legal services of judicial and extrajudicial documents in civil or commercial matters. Based

on this, the annulment decision concludes that even if the Hague Service Convention does not apply to the present case, the legal service should have been made to the entities located abroad in line with the mandatory service requirements set forth under the Notification Law.

The annulment decision also provides assessments regarding the concept of the single economic unit approach. The Court indicates that the single economic unit approach serves the purposes of competition law and allows the parent entity to be held responsible for a competition law violation conducted by its controlled subsidiaries and/or affiliated entities. Therefore, such principle or concept cannot be utilised with the scope of the legal services to be made by the Authority, which is a procedural issue. Based on this, the Administrative Court decided that the Authority should have requested the chat logs pertaining to the employees that were employed outside of Turkey from the relevant undertakings located in the respective countries, rather than addressing its information requests to these undertakings' entities in Turkey.

Comment

The Court's annulment decision is of great importance, as it sheds light on the requirements that should be followed by the Authority for the purposes of notification to the entities located abroad. Even though the Court's annulment decision is subject to appeal before the regional administrative courts (ie, an appellate court), it is already a candidate to set a landmark precedent in terms of the mandatory legal service requirements that need to be strictly complied with by the Authority when serving the correct addresses located abroad. For now, it seems that the Authority's reliance on the economic unity principle for the request of foreign affiliate information from Turkish subsidiaries might be blocked in the future cases, if the Court's annulment decision is not appealed, or if it is appealed but then upheld.

The Court's annulment decision is a testament to the fact that the Authority is obliged to comply with the mandatory legal service rules set forth in the Notification Law for a lawful service to the foreign affiliates located abroad, and there is no legal gap that might give room to discretionary approaches and methods in this regard.

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