A Decision on the Welding Sector: How the Turkish Competition Board Uses Economic Analysis in the Presence and Absence of the Evidence of Communication among Competitor Undertakings?

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The Turkish Competition Board's (the "***Board***") decision on whether undertakings that are active in the welding sector violated Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") by way of determining their prices together has been published.[1]

The Board found that the investigated undertakings (i.e. (i) Gedik Kaynak Sanayi ve Tic. A.Ş. ("***Gedik***"), (ii) Kaynak Tekniği San. ve Tic. A.Ş. ("***Askaynak***") under the control of Lincoln Electric Holdings, Inc., and (iii) Oerlikon Kaynak Elektrodları ve Sanayi A.Ş. ("***Oerlikon***")/ Magmaweld Uluslararası Tic. A.Ş. ("***Magmaweld***") under the control of Zaimoğlu Holding A.Ş.)) have violated Article 4 of the Law No. 4054 through price fixing in 2011 but did not impose an administrative fine on the investigated undertakings for their violation in 2011 due to the expiration of the 8-year statute of limitation. For the following periods from 2011 to 2019, the Board reached the conclusion that there is no sufficient finding to prove that the undertakings violated Article 4 of the Law No. 4054 and therefore did not impose any administrative fine on the investigated undertakings.

By way of background information, the Board explained in the decision that welding is a manufacturing method used to join metal or thermoplastic materials together, and that the welding sector in Turkey has an oligopolistic structure with three major players among many domestic and foreign companies operating in the market. These major players are the investigated undertakings, i.e. (i) Gedik (ii) Askaynak and (iii) Oerlikon/Magmaweld.

[1] The Board's decision dated 08.04.2021 and numbered 21-20/247-104.

The decision of the Board sheds light on how the Board uses economic analysis for its assessment under Article 4 of the Law No. 4054 in an oligopolistic market under different scenarios. In the decision, the Board used economic analysis (i) to determine the duration of a cartel infringement that it found based on communication evidence and (ii) to decide on whether to apply the presumption of concerted practice where there is no evidence of communication among undertakings. The Board also explained how to determine the starting point for the statute of limitation for the infringements by-object.

I. Theoretical Background Set out by the Board

The Board stated that (i) the documents related to the year of 2011 will be analyzed within the framework of whether there is any anti-competitive "agreement" between the undertakings since these documents include some evidence proving an agreement while (ii) the parallel pricing behavior of the undertakings during the period between 2017 and 2019 will be analyzed within the framework of "presumption of concerted practice" under Article 4/3 of the Law No. 4054 since there is no evidence of communication for this period.

Accordingly, the Board first provided its interpretation on the presumption of concerted practice provided under Article 4/3 of the Law No. 4054 which is as follows: "*In cases where the existence of an agreement cannot be proved, a similarity of price changes in the market, or the balance of demand and supply, or the operational regions of undertakings to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.*" According to the Board, the said article provides that, even if there is no evidence of communication, the Board may decide that there is concerted practice among undertakings provided that (i) the economic evidence shows a parallel behavior and (ii) the undertakings could not disprove the Board's claim.

II. The Board's Analysis on the Findings for 2011

Based on the evaluation of the documents collected from the undertakings, the Board found that (i) the general managers of Gedik, Askaynak and Oerlikon/Magmaweld took joint decisions on product prices and sales methods, (ii) they showed an effort to ensure implementation of these decisions by each undertaking and (iii) they warned those who do not comply with such decisions. Based on these findings, the Board decided that there was (i) a clear meeting of minds of the general managers of the competitor undertakings and (ii) an

effort to implement monitoring and sanctioning mechanism (i.e. warning) in case of a "cheat" and "self-seeking". Accordingly, the Board decided that the attempts and actions of the undertakings fulfil the necessary conditions for finding of a cartel infringement.

The Board then noted that although the documents show the existence of a cartel and the intention of maintaining the cartel, the documents concern only a period of 4 months, hence it is necessary to conduct an economic analysis on the price-cost data of undertakings in the relevant periods (i.e. 2011-2016) to determine the duration of the cartel agreement. In this regard, the Board found that although the economic analysis demonstrated a parallelism between the prices of the competitor undertakings, there was also parallelism between the relevant costs. Thus, the Board decided that the economic findings were insufficient to reach the conclusion that (i) the parallelism in the prices was independent from the parallelism in the costs and (ii) there existed an anti-competitive agreement especially considering that the sector consists of homogenous products and small number of players. For completeness, the Board requested further economic analysis from the Turkish Competition Authority's Economic Analysis and Research Department which takes into account all variables that may affect the prices other than the cost variable, but the additional analysis did not provide any evidence for the existence of an anti-competitive agreement. Therefore, the Board only relied on the documents collected from the undertakings when determining the duration of the cartel.

Following that, the Board conducted an analysis on the punishability of the violation and examined whether the statute of limitation was expired with respect to the violation detected based on the relevant documents. The Board referred to Article 20 of the Law No. 5326 on Misdemeanour providing the statute of limitation as 8 years and explained how the starting point of the statute of limitation for competition law infringements can be determined. The Board noted that since the documents concern a restriction of competition by-object, it is sufficient to make the relevant correspondence for breaching the law. Hence, the infringement occurred when the correspondences are made. Indeed, the date of the last document to prove the existence of violation was 25 April 2011, and there was no other communication, document or economic analysis to prove the existence of violation for the following periods. Therefore, the Board stated that the infringement ceased on 25 April 2011 and given that Board rendered its decision to initiate the relevant investigation against the undertakings on 20 February 2020, the statute of limitation had run out, and there were no grounds to impose an administrative fine for the violation occurred in 2011.

III. The Board's Analysis on the Findings for the Period of 2017-2019

In its analysis for the period of 2017-2019, the Board first highlighted a document dated 2011 indicating that the relevant undertakings showed effort to keep their coordination in secret and carried out measures not to leave any evidence behind (e.g. communicating via personal e-mails). Therefore, the Board noted the possibility that the reason why no communication documents were obtained after 2011 may be because the cartel agreement was well-hidden after that date and stated that the search for economic evidence has gained importance due to this possibility.

In light of the theoretical background set out above, the Board argued that the presumption of concerted practice provided under Article 4/3 of the Law No. 4054 is a tool which enables the Board to reach the conclusion that there was a violation based on purely economic evidence in the absence of concrete communication evidence. The Board noted that the existence of anti-competitive "agreement" and "concerted practice" needs to be proved based on an "evidence of communication" demonstrating the presence of coordination. Nevertheless, for the assessment under Article 4/3 of the Law No. 4054, the Board argued that:

"*In order to find that the high prices that are independent from the costs are applied as a result of coordination, the pricing behaviors must provide a presumption for the existence of a communication within the framework of the 'presumption of concerted practice'. In other words, the pricing behavior must create an environment where the need for communication between undertakings is replaced by that behavior.*"

Accordingly, if the pricing behavior of the undertakings provides such an environment, this may enable the Board to presume that there was a violation even in the absence of communication.

After providing the results of the economic analysis, the Board explained that even though there was a period within the overall period from 2011 to 2019 where there was a parallel price increase which is independent from the increases in the costs, the following question needs to be answered before finding a violation: "*Taking into account the tendency for oligopolistic dependency in the welding sector, are the price increases the result of an anti-competitive agreement or oligopolistic dependency*?" On this note, the Board stated that while the parallel price increases as a result of oligopolistic dependency are considered as one-sided

actions and do not amount to a competition violation; price increases as a result of a concerted practice or agreement, are considered to be a violation of Article 4 of the Law No. 4054.

In light of this, the Board stated that it analyzed the case based on an economic analysis on whether the pricing behavior in the market was in line with a situation where there is communication for coordination.

The relevant economic analysis revealed that the pricing behavior was parallel during the investigation period and the profitability of the undertakings was increased in the last periods. Nevertheless, it was found that the cost and currency exchange rate had a significant impact on the price changes, and when the data are adjusted for the impact of these variables, the price changes did not show the effect of an infringement.

More specifically, it was found that;

(i) The prices in the welding sector are affected by the exchange rate increases before the increase is actually reflected on the costs because the prices are increased based on the expectation of cost increases and in parallel with the increases in producer price index. Indeed, the prices in the sector were mostly correlated with the exchange rate and producer price index.

(ii) The increase in the prices before the increases in the costs - in addition to the increased export opportunities due to the exchange rate - has led to an increase in the profitability of the undertakings.

(iii) Even though the raw materials in the welding sector are supplied mostly from domestic producers, the first parameter to affect the prices is fluctuations in the exchange rate since the price of raw materials is indexed to the prices determined in the worldwide metal exchange markets.

(iv) There are fluctuations and delays in the price transitions of undertakings - which is not expected in cases where the prices are increased based on an agreement.

Based on the above findings, the Board decided that even though the possibility of an anti-competitive conduct cannot be entirely excluded given the increased profitability observed in this period and the fact that the increases in the exchange rate reflected on the prices before its effect on the costs, there is no statistically meaningful correlation among the undertakings' prices when the data are adjusted for the exchange rates and costs. The Board then concluded

that the presumption of the concerted practice cannot be applied for the period of 2017-2019 since there are no indications of "market behavior that provides a presumption of communication". Accordingly, the Board decided that the undertakings did not violate Article 4 of the Law No. 4054 during the relevant period.

IV. Conclusion

The decision is noteworthy since, first, the Board underlined that, within the framework of the presumption of concerted practice, it may base its allegation under Article 4 of the Law No. 4054 based on purely economic evidence if the "market behavior provides a presumption of communication". Second, the Board seems to consider itself liable to include the period between 2011 and 2016 into the duration of the "cartel" infringement if there existed a parallelism in prices (i) that cannot be explained by the costs within that period and (ii) "indicating an anti-competitive agreement" even if the last evidence of communication was dated 2011.

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