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The Turkish Competition Authority issues a decision on the analysis of alleged price coordination of undertakings in the welding sector underscoring the importance of economic analysis when investigating infringement complaint *(Mamaweld / Oerlikon / Askaynak / Gedik)*

ANTICOMPETITIVE PRACTICES, CONCERTED PRACTICES, MANUFACTURING, PRICE COORDINATION, ECONOMIC EFFICIENCY, COOPERATION AGREEMENT, TURKEY, OLIGOPOLY, ECONOMIC ANALYSIS

Turkish Competition Authority, *Mamaweld / Oerlikon / Askaynak / Gedik*, NCA Decision, 08 April 2021

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1 Introduction

On July 29, 2019 a complaint was brought to the Turkish Competition Authority's ("**Authority**") attention, which alleged that certain undertakings operating in the welding sector acted together and subsequently violated the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). The complaint claimed the following:

- As per the Turkish Commercial Registry Gazette's announcement on July 11, 2019, 33.71% and 15.86% of Kaynak Tekniği Sanayi ve Ticaret A.Ş.'s ("**ASKAYNAK**") shares, held by Eczacıbaşı Holding A.Ş. and Eczacıbaşı Yatırım Holding A.Ş. (together, "**ECZACIBAŞI GRUBU**") respectively, had been acquired by Lincoln Electric France S.A.S. ("**LINCOLN**"). Following this acquisition, LINCOLN now owned 99.57% of ASKAYNAK's shares in total, together with its previously owned 50% shareholding;
- 21% of Oerlikon Kaynak Elektrodları ve Sanayi A.Ş.'s ("**OERLIKON**") shares belonged to European Holding Interota [*1*] ("**EUROPEAN**"), a company which had been previously acquired by LINCOLN. Along with having control over its management, LINCOLN now owned 21% of OERLIKON's shares as well, while the remaining

shares belonged to a domestic shareholder; and

- The welding industry was fundamentally made up of three active players, which were ASKAYNAK, OERLIKON and Gedik Sanayi ve Ticaret A.Ş. ("**GEDIK**"), and that the acquisition in question created a joint dominant position over the market and made it more suitable for coordination. The complaint also included allegations of a joint dominant position, which is usually not a commonly referred claim.

2 Background

Preliminary Investigation

Following their first meeting held on September 26, 2019, the Competition Board ("**Board**") decided to carry out a preliminary investigation. In line with the findings obtained during the on-site investigation on October 31, 2019 ("**First On-Site Inspection**"), a secondary on-site investigation ("**Second On-Site Inspection**") was conducted on December 18, 2019. In addition to the findings of the First and Second On-Site Inspections, the Authority requested very detailed numeric data from a remarkably extensive period of between the years 2011-2019. The requested figures related to the (i) monthly price and cost information; (ii) monthly export volumes and values; and (iii) domestic sale volumes and values of the products concerned.

After the meeting held on February 20, 2020, the Board decided to conduct a full-fledged investigation against ASKAYNAK, OERLIKON and GEDIK pursuant Article 41 of the Law No. 4054. Allegations concerning LINCOLN's (i) acquisition of ASKAYNAK's full control, and (ii) minority shareholding in OERLIKON were also reviewed at the same meeting; however, the Board decided that these did not necessitate a further investigation on that front.

On March 3, 2020 Competition Authority conducted yet another on-site inspection ("**Third On-Site Inspection**") on the premises of the investigated undertakings. Later, on May 22, the Authority consulted the Presidency of Economic Analyses and Research Department ("**EARD**") for an opinion on whether the pricing behaviour of the investigated undertakings constituted evidence of presumption of communication.

The Board decided on July 24, 2020 to prolong the standard 6-month duration of the investigation for another 3 months, making the investigation period last for a total of 9 months.

Information About the Parties

OERLIKON is solely controlled by and operates under Zaimoğlu Holding A.Ş. ("**ZAIMOGLU**"). LINCOLN is a minority shareholder of OERLIKON which does not grant a right to control. OERLIKON has a license from LINCOLN to sell products under the *Oerlikon* brand.

ZAIMOGLU produces and imports products in the welding sector, and sells these products to domestic and international markets through Magmaweld Uluslararası Ticaret A.Ş. ("**MAGMAWELD**"), another company in the ZAIMOGLU group. OERLIKON and MAGMAWELD sell their own branded products as well as some *Lincoln* branded products.

GEDIK's shares belong to Hülya GEDİK, Gedik Holding A.Ş., Böhler Kaynak Çubukları ve Elektrodları A.Ş., and Gedik Döküm ve Vana Sanayi ve Ticaret A.Ş. GEDIK sells its products directly to customers as well as through dealers.

LINCOLN is a publicly held Corporation in the United States of America. None of its shareholders have control over

LINCOLN seperately or together with other shareholders. It acquired all of ASKAYNAK's shares and its sole control in June 2019 following the Authority's clearance.

Information About the Market

Welding is a manufacturing process which is mainly used to fuse metals or thermoplastics together. The Board specified that the welding sector essentially incorporates various downstream markets such as welding consumables, welding equipment and automatic/robotic control systems.

The Board determined that the main products and usage areas of the sector can be categorised as the following:

- MMA: construction, all welding manufacture, and repair and maintenance services;
- MIG/MAG-TIG welding wires: automotive, heavy transport, machine manufacture, and metalware manufacture; and
- Submerged arc powders, wires and flux-cored wires, and welding machines: shipbuilding, heavy transport and construction, pressure vessel manufacture, and machine manufacture.

Welding machines are used in various areas such as shipbuilding, shipyards, natural gas pipelines, harbour construction, steel structures, pressure vessels, buffer tank manufacture, automotive industry, on-board equipment (dumper trucks, cranes and garbage trucks etc.) railcar manufacture, manufacture of armored land vehicles for the defense industry, ventilation systems, mining industry, manufacture of road and construction vehicles, iron-steel industry and rolling press repair and hard surfacing, and the wheel trim industry. This proves that welding consumables are the main inputs of the production and repair-maintenance activities of all sectors in the metal industry. They differ depending on the welding technology used by the sectors, and are used in the metal-machinery industries which carry out wide-ranging production.

The Board observed that almost all firms active in the Turkish welding market operate in all of the sector's fields. Whereas undertakings in this sector manufactured some of the products in their own facilities, it was also possible for them to have other undertakings produce under their own brand. It is also possible for them to procure these products from abroad or manufacture them in their own facilities under technology and license agreements. The Board underlined that products manufactured in Turkey or imported from abroad are generally sold to large industrialists either directly or through franchise channels.

The Board underlined the oligopolistic nature of the welding market in Turkey, and stated that the market is fundamentally operated by three major players: (i) GEDİK (ii) ASKAYNAK under LINCOLN's control, and (iii) OERLIKON/MAGMAWELD which is controlled by ZAIMOGLU.

With regards to the importation opportunities of the market, the Board specified that products are imported from various countries including China, Korea and Vietnam. The Board highlighted that, although there are no legislation-based obstacles towards importation in the market, it is apparent that importation opportunities had *de facto* scaled down. Contrarily, exportation opportunities increased due to the devaluation of TRY in the recent years. The Board remarked that production cost of the products in the welding market consists of raw material costs, labour costs and other production expenses. Raw materials for welding products are mainly supplied from domestic

producers; however, fluctuations in the exchange rate still affect the prices in the welding sector through cost increases and expectations as raw material prices are indexed to the prices determined by the world metal markets.

The Board determined that, considering the scope of the case and context of the allegations, there was no need to define a narrower product market as the downstream markets of the welding sector. Lastly, the relevant geographical market was defined as "Turkey" based on characteristics of the products and scope of the case.

Evaluation under Article 4

(I) Cartelisation in 2011

(a) Documents Received During the Dawn Raids

In one of the e-mails obtained from the on-site inspection conducted at MAGMAWELD, the Board found a correspondence that took place in 2011 between chairmen of the executive boards of GEDİK, MAGMAWELD/OERLIKON and ASKAYNAK. The correspondence included the following statements: *"There is a cake. Someone is devouring the cake while we are choking each other with the illusion of getting it all! The calculation is very clear: if each of us sold 10,000 tons of wire for 5krş/kg more, it would be worth 500,000 TL. This is for a single product line only! That's why I repeat: We can't get anywhere by saying 'let's take the opportunity', please do what is necessary. Otherwise, 2011 will be lost, too."*

In an e-mail dated April 25, 2011 obtained from an on-site inspection at GEDIK, the Board found a correspondence including the following statements:

"(..) As you can see I am using my personal e-mail address. And likewise, while responding to this e-mail, I would like to ask you use your personal e-mails. (…)"

"(…) meeting at our place happens to be an even greater danger. Both camera records and witnessing of our employees are risky (…) Please tell your friends from data processing to delete this message from the server(..)"

GEDIK's Product Cost Accountant and chairman of the executive board exchanged the following statements, which were obtained from another e-mail dated February 1, 2012:

"(…) the price increases we have made with rival firms on 03.01.2012 determined as (…)% and list prices have been revised accordingly.(…)"

The decision remarked that the legislator, who considered the challenges experienced in proving agreements, established a presumption in order to facilitate the proof of concerted practices through Article 4/3 of the Law No. 4054. This provision states that *"In cases where the existence of an agreement cannot be proven, similarity of price changes in the market, the balance of supply and demand, or the activity areas of the undertakings to those in markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.".* The Board stated that the wording of this article indicates that presumption of concentrated practices can be implemented in the presence of absolute economic evidence demonstrating parallel behaviour. In terms of the standard of proof, determining the existence of parallel behaviour based on the presumption of concerted practices differs from determining the existence of parallel behaviour by using

established legal frameworks and situated practices in the presence of a communication evidence. The Board stated that, if the presumption is operated and the undertaking does not prove otherwise, concerted practices may also be determined without the need for ordinary concrete communication evidences due to the fact that purely economic evidence has developed in such a way as to constitute a presumption of communication.

The fact that concrete communication evidence could not be obtained in terms of the statute of limitations in question and the following period necessitated the presumption-based examination of the alliance, which is indicated by the price parallelism independent of the costs observed between the parties. Accordingly, the Board assessed these two periods separately and under two separate concepts:

- the concept of '*agreement*' in terms of documents belonging to 2011; and
- the concept of '*presumption of concerted practice*" in terms of pricing behaviours observed since 2017.

(b) Elements of the Cartel as Stated in the Decision

The Board determined that the e-mail messages obtained in 2011, which included active participation by the general managers of the investigated undertakings, indicated establishment of an anti-competitive agreement on price-fixing as per Article 4/1(a) of the Law No. 4054. After simultaneously evaluating all of the documents, the Board concluded that three major players of the welding sector, namely ASKAYNAK, GEDIK and MAGNAWELD/OERLIKON, (i) got together various times in 2011, (ii) determined product prices, and (iii) exchanged information on the sector. Some of these correspondences between general managers included statements such as:

- "…we have been talking for 13 months. Everyone has to take action now."

- "The calculation is very clear: if each of us sold 10,000 tons of wire for 5kr̨/kg more, it would be worth 500,000 TL. This is for a single product line only!"

- "That's why I repeat: We can't get anywhere by saying 'let's take the opportunity', please do what is necessary. Otherwise, 2011 will be lost, too."

The Board determined that the statements made by the general managers contained all key elements to designate the establishment and the continuation of a cartel, drawing attention to the fact that having a joint intention is the most crucial element when defining a cartel. It was specified that documents obtained demonstrate a joint intention of the general managers who are the decision-makers of the investigated undertakings. The Board also underlined that each general manager not only received the mentioned e-mails but also pursued the communication which suggests approval of the anti-competitive alliance.

The Board remarked that the documents also contained an attempt to enable monitoring and punitive mechanisms against the threat of "*deception*", which is interpreted as the main obstacle before the continuance of a cartel. The Board assessed that the "*opportunism*" phenomenon that appeared in the mentioned documents corresponds to "*deception*" in the cartel terminology. Based on this, it was interpreted that the parties embraced a "*warning*" mechanism to dissuade the deception. The warning pertains to be under no illusion of selling more products in the market by the means of lowering agreed prices and the fact that this deception have been monitored and noticed by the other undertakings party to this agreement. Therefore the Board determined that mentioned correspondences not only demonstrated the intention to establish a cartel but also an intention to continue the

cartel along with the joint wills that shaped these intentions. The board determined that evidence from 2011 also presents an effort to hide the mentioned alliance remarking that the parties endeavored to overcome the obstacles concerning establishment and continuance of the cartels. While doing so parties not only made an effort to eliminate the internal threads, by means of coming to terms on the focal points of the agreement and dissuading the deception, but also their effort included elimination of external threats, such as interference of the competition law. The Board assessed that it can be seen that, even though the oligopolistic structure of the market and having the transparent characteristics due to the homogenous structure of the products facilitated monitoring behaviors of the competitors, it was understood that undertakings remained alert in case if monitoring becomes challenging in the light of reduced transparency due to discrete rebates.

(c) How the Market Structure Facilitated the Cartel

The Board concluded that although documents from 2011 provide certainty on an joint objective to establish and sustain a cartel; the mentioned documents does not clarify the duration of this cartel because mentioned documents possessed (i) powerful concerns regarding deception among the parties and (ii) a short endurance such as 4 months. Therefore to clarify the duration of the Cartel, the Board analyzed undertakings' price-cost data in the respective period. Following this analyses the Board indicated that, although there is a significant parallelism between prices of the undertakings there is also similar parallelism in their costs. Considering the oligopolistic and homogenous product structure of the market, the Board decided that the parallelism in the prices could be explained via oligopolistic dependency. In this context the Board concluded that such parallelism was was insufficient to determine that the agreement had a lasting nature.

(d) Scope and the Findings of the Economic Analysis

Subsequently, the Board requested an economic analysis from EARD which revolved around factors that may have a possible impact on the prices, apart from costs. The mentioned EARD report failed to present a supporting argument with regards to the 2011 period and thus, the Board could not obtain economic evidence concerning mentioned period. As the documents from 2011 were characterized as the only evidence with regards to 2011 period, the Board determined that it would be suitable to designate the duration of the cartel based solely on these documents.

(e) Punishability of the Cartel (Limitation Period, Law of Misdemeanor)

From the evidences obtained during the investigation the Board concluded that ASKAYNAK, GEDİK and MAGMAWELD/OERLIKON participated in an obvious agreement from January 2011 to April 25th, 2011, the date of the final anti-competitive document obtained from 2011. The Board concluded that the mentioned undertakings violated the Article 4 of the Law No. 4054. Although the Board identified the presence of a violation of competition within the aforementioned grounds, the Board proceeded with its evaluations to determine whether this violation is punishable. The Board decided that the violation cannot be subjected to an administrative fine due to limitation period as the date of the final document demonstrating a violation was April 25th, 2011. The Board was unable to obtain (i) a concrete evidence or (ii) an economic evidence constituting a presumption to the communication regarding the ongoing period.

According to the Article 20 of the Law No. 5326 (Misdemeanor Law) *"If the limitation period has expired, an administrative fine cannot be imposed upon the person due to a misdemeanor. (…)The limitation period for misdemeanors requiring a relative administrative fine is eight years. The prescription period begins with committing the act or with materialization of the result defined in relation with the misdemeanor".* The decision

remarked that in this clause (i) provisions of criminal law are being implemented by analogy and (ii) legislator have separated inception of the limitation period upon dates when the act was committed and occurrence of the result, based on distinction between inchoate offence and continuing crime.

Therefore, as the Board's decision concerning the investigation was adopted on February 20, 2020, the Board concluded that the administrative fine cannot be enforced upon investigated undertakings as the violations of the competition law attributed to the relevant documents have suffered a limitation period.

(II) Concerted Practice in 2017-2019

As explained above, the Board has evaluated the acts of the investigated undertakings in two separate periods, namely (i) 2011 and (ii) 2017 to 2019, since the tools to be applied within the scope of Article 4 of the Law No. 4054 vary due to the information and documents obtained during the investigation.

Under this section, the Board's evaluations as to the period covering 2017 to 2019 will be explained.

The documents obtained during the on-site investigations, especially the e-mail dated 25.04.2011, revealed that the anti-competitive cooperation between the investigated undertakings is aimed to be carried out with *"great secrecy"* and accommodating measures. . The *"great secrecy"* was mentioned in the email dated 25.04.2011, between Askaynak, Gedik and Magmaweld/Oerlikon, as demonstrated below:

"As you may have noticed, I am using my personal email account. I will likewise ask you to reply to this message from your personal e-mail addresses. After that, let's communicate through these e-mail addresses. It also seems risky to communicate through cell phones. Meeting in our office creates a greater danger. Both the footage and the testimonies of our employees are risky... We have to figure out another solution. Please tell your IT people to delete this message from your servers as well."

Even though this email correspondence dates back to 2011, the Board has found it to be important for the evaluations concerning the period after 2011, since it showed that the investigated undertakings attributed great importance to hiding the cartel alonside trying to figure out a method that enable them to leave no evidence behind.

The fact that no concrete evidence of communication after 2011 was obtained during on-site investigations brought into the view concerns that this may be due to the cartel's secrecy rather than its absence. Therefore, it became significant to search for economic evidence constituting a presumption of communication, within the scope of the *'presumption of concerted practice'.*

Article 4(3) of the Law No. 4054 introduces a presumption of concerted practice, which reads 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."* Accordingly, the presumption of concerted practice, enables the Board to decide that Article 4 of the Law No. 4054 had been violated based on mere economic evidence, without having to show any other circumstantial basis, especially an evidence of communication.

Within the scope of the presumption of concerted practice, the Board has initiated this investigation against the undertakings, since the findings during the preliminary investigation indicated that the market behaviour of the undertakings starting from October 2017 cannot be justified either with cost or demand. Therefore, the Board has requested an economic analysis report from the Economic Analysis Department of the Authority ("**EAD**") in order to determine whether the pricing behaviours of the undertakings had a certain communication pattern.

The EAD has conducted (i) regression analysis, (ii) structural break tests, (iii) stationarity test and (iv) variance scanning, covering the period from 2011 to 2019. After these analyses, the EAD has reached the following conclusion; *"…in the light of the findings obtained as a result of the analysis of the available data, although the prices have been parallel and close to each other and the profit rates have increased recently, the effect of a possible violation behaviour, adjusted for these effects, could not be observed due to the dominance of the cost and dollar exchange rate effect in the change in the market price."* The EAD has also concluded that there was no price rigidity that is normally expected to be observed during agreements between competitors.

In line with the information obtained during the investigation and the findings in the EAD Report, the Board has found out that:

- The prices in the welding sector are affected by the increases in the exchange rate, before such increase is reflected on the costs, over the expectations.
- Since the beginning of 2017, the increase in the exchange rate has contributed to the increase in prices.
- The sudden rise in in the exchange rate in 2018 triggered the rate of price increase.
- As of the middle of 2019, prices started to decline with the decrease in the expectation towards a rapid increase concerning exchange rate.
- Although being supplied from domestic producers to a significant extent, the main raw materials of welding products are indexed to the prices determined by the global metal markets, and therefore the fluctuation in the exchange rate is the primary factor affecting the cost and price of the products.
- The increase in the exchange rate, which gained momentum in the middle of 2018, was reflected to the prices by the investigated undertakings with the increasing PPI (Producer Price Index) rates in this period, before it was reflected to the costs. This led to an increase in the profitability of the investigated undertakings. As a result of its analysis as to the period covering 2017 to 2019, the Board could not detect a market behaviour constituting a presumption of communication between ASKAYNAK, GEDIK and MAGMAWELD/OERLIKON in 2017 to 2019. Consequently the Board was unable to apply the presumption of concerted practice as the price fixing also could not be determined. Therefore, the Board has concluded that the investigated undertakings did not violate the Law No. 4054 in 2017 to 2019, due to lack of evidence.

Decision

As a result of its analysis that is explained in detail above, the Board has concluded that;

- In 2011, ASKAYNAK, GEDIK and MAGMAWELD/OERLIKON fixed the prices of the products in the welding sector and therefore violated Article 4 of the Law No. 4054. However, since the 8-year statute of limitation has expired, there is no ground to impose monetary administrative fines against ASKAYNAK, GEDIK and MAGMAWELD/OERLIKON.

- ASKAYNAK, GEDIK and MAGMAWELD/OERLIKON did not violate the Law No. 4054 after 2011, since not enough evidence was gathered proving otherwise. When delivering its judgement the Board evaluated various factors, including macroeconomic developments such as increase in exchange rates and producer price index while explaining pricing activities of the investigated undertakings. The decision is also noteworthy as the absence of explicit communication evidence led Board to implement the presumption of concerted practices, a presumption exclusively used in Turkish competition discipline. The decision further shows tendency towards stricter approach in application of the presumption of concerted practice in the absence of communication evidence. Nevertheless, the decision set forth that pure price parallelism that cannot be explained by costs is not sufficient for the application of presumption of a concerted practice but rather a thorough economic analysis that would include other determinants of price is needed. Thereby, the Board's Welding Sector decision is a key judgement showing that the Board introduced further significance to the role of economic analysis in its evaluations. In conclusion, it appears as if the Board will not refrain from using detailed assesments based on the findings of economic analysis while concluding its following practices.

[*1*] European Holding Interota's other commercial name is Europaische Holding Intercito GmbH.