

November 17 2022

Competition Board finds single violation comprising RPM, online sales bans and territorial and customer restrictions

ELIG Gurkaynak Attorneys-at-Law | Competition & Antitrust - Turkey



GÖNENC
GÜRKAYNAK



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Introduction

On 4 March 2021, the Turkish Competition Board initiated an investigation to establish whether Arnica Pazarlama AŞ (Arnica), a supplier of small home appliances, had violated article 4 of Law No. 4054 on the Protection of Competition (Law No. 4054)⁽¹⁾ through:

- resale price maintenance (RPM);
- restricting its distributors' online sales; and
- restricting sales with respect to certain customers or territories.

The investigation was finalised upon Arnica's settlement application and, after a 25% reduction, the Board imposed⁽²⁾ a total administrative fine of 2,469,756.14 lira on Arnica, after reaching the conclusion that Arnica had violated article 4 of Law No. 4054 by way of RPM.

This article:

- explains the Board's assessment on its findings of RPM as well as passive sales restriction, territory and customer restrictions;
- explains the Board's assessment with respect to Arnica's commitment and settlement applications; and
- analyses the decision.

Decision

Arnica's distributorship agreement

During the investigation, the case handlers reviewed Arnica's distributorship agreement. Following the review, the Board found that:

- the agreement prohibited distributors from selling Arnica products below a certain price;
- the term "recommended price" used in the agreement essentially referred to the minimum price determined by Arnica; and
- the agreement provided that various sanctions would be imposed on distributors that sold products below the minimum price.

The Board highlighted a provision under the distributorship agreement that prohibited distributors from making sales to real persons or legal entities that made sales below the minimum price. The distributorship agreement also provided additional sanctions for breaches of this obligation. The Board stated that although this provision was mainly aimed at determining the resale prices of Arnica products, it also constituted an intervention in terms of to whom Arnica's distributors could sell products.

To further understand the background of the provision, the Competition Authority requested additional information from Arnica with respect to its distribution network – article 4 of the Block Exemption Communiqué on Vertical Agreements No. 2002/2 (Communiqué No. 2002/2) allows suppliers that wish to establish a distribution network to assign exclusive sales territories or customer groups to themselves or to their buyers. However, Arnica responded to this additional information request to indicate that it did not implement an exclusive territory or customer system.

Correspondences detected during dawn raid at Arnica's premises

On 27 January 2021, the case handlers raided Arnica's premises and detected problematic correspondences on Arnica's employees' computers and mobile devices. After analysing such correspondences, the Board found the following:

- The correspondences predominantly related to interventions in prices implemented by resellers, especially in online sales.
- Arnica regularly monitored the prices of its distributors on both websites used for price comparison (eg, "akakce.com") and platforms (eg, "trendyol.com", "hepsiburada.com" and "gittigidiyor.com").
- There was a constant exchange of information between the general manager and sales representatives of Arnica about the prices applied by the distributors. Distributors that "disrupted" the prices were contacted and asked to raise their prices to the level set by Arnica.
- To keep the prices of the online sales of distributors under control, as well as terminating trade with certain distributors, Arnica determined minimum sales prices with the threat of discounts and reduction in the amount of products to be supplied. This policy was also applied to chain technology markets.
- Entities other than Arnica's distributors that made online sales were also monitored. Arnica purchased products from such entities to determine:
 - from which distributor the product was purchased; and
 - how distributors could lower prices and how to prevent this, by tracking stock and sales numbers.

- Arnica controlled the purchase quantities that could lead to a decrease in sales prices, particularly in the case of wholesalers from which retail sellers selling at reduced prices bought their products. Arnica limited the amount of products to be supplied to such wholesalers.
- Arnica's intervention in prices was not limited to online sales – the same policy was adopted for physical sales.
- It was notable that Arnica's price interventions always aimed to increase the resale prices.
- The correspondences also indicated that Arnica aimed to prevent its distributors from selling to third parties that sold at a lower price than the level set by Arnica.
- Although Arnica's interventions towards its distributors were mainly aimed at RPM, online sales were also occasionally prohibited.

Did Arnica engage in RPM or impose passive sales restrictions, or territory/customer restrictions?

The Board concluded that Arnica had violated article 4 of Law No. 4054 by way of determining the minimum resale prices to be applied by resellers and opting to subject those that did not comply with these prices to sanctions such as order cancellations or product delivery suspensions.

The Board also detected that Arnica, which did not implement an exclusive territory or customer system, had imposed online sales bans on some of its distributors and aimed to prevent wholesalers from selling to retailers outside their own regions, which were likely to reduce prices. Accepting that such vertical restrictions were within the scope of the prohibition under article 4 of Law No. 4054, the Board concluded that the mentioned restrictions were adopted within Arnica's overall strategy regarding RPM and, accordingly, constituted a single violation.

The Board adopted the same approach in its *Groupe SEB* decision⁽³⁾ of March 2021, to which the Board also referred in its decision. This decision concerned the allegation that Groupe SEB (a supplier in the small home appliances market) and its wholesale distributor İlk Adım had implemented RPM practices against and restricted the passive sales of their distributors. In *Groupe SEB*, the Board imposed monetary administrative fines against Groupe SEB and İlk Adım due to RPM. Significantly, the Authority found email correspondences indicating online sales bans implemented by Groupe SEB against its distributors both as a part of its RPM conduct and separately. Despite these findings, the Board did not separately penalise Groupe SEB for RPM and online sales bans and instead opted to impose a single fine against Groupe SEB due to its RPM conduct. Parallel to its approach in the decision in the *Arnica* case, the Board justified this stance by stating that online sales bans implemented by Groupe SEB were tools to facilitate its RPM conduct.

Arnica's commitment and settlement applications

After approximately three months from the commencement of the investigation, Arnica made a commitment and settlement application on 10 June 2021.

As RPM is deemed a "hard-core violation" and commitments are not to be accepted for hard-core violations as per the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position No. 2021/2, the Board rejected Arnica's commitment application and proceeded with the settlement negotiations upon its settlement request.

Following the settlement negotiations, the Board's interim settlement decision and the submission of Arnica's settlement letter, the Board rendered its final settlement decision and accordingly decided to apply a reduction of 25% to the administrative monetary fine to be imposed on Arnica. Accordingly, the Board calculated the full amount of the administrative monetary fine to be 3,293,008.20 lira and then applied the reduction and imposed a total administrative fine of 2,469,756.14 lira on Arnica. As Arnica accepted the alleged infringements and therefore the case was settled, Arnica is unable to bring the final decision to judicial review as per article 4 of the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position (the Settlement Regulation).

The Board applied the highest reduction rate under the Settlement Regulation, underlining the importance that it attributes to the timing of the settlement application while making its decision on the reduction rate to be applied. Indeed, as per the decisional practise of the Board, it could be argued that the Board may be inclined to grant a lower reduction to late settlement applications. For instance, in *DyDo Drinco*⁽⁴⁾ the Board granted a 20% reduction to DyDo Drinco's settlement application in the fifth month of the investigation (ie, roughly a month before the deadline for the case handlers to finalise the investigation report). In the same vein, in *Numil Gıda*⁽⁵⁾ as Numil Gıda made its application to settle in the 10th month of the investigation (ie, two months before the deadline for the case handlers to finalise the investigation report with the six-month time extension), the Board granted a 15% reduction.

Comment

The Board's *Arnica* decision is significant on two separate fronts:

- First, parallel to its *Groupe SEB* decision,⁽⁶⁾ the Board once again accepted that online sales restrictions and restrictions over customers and territories comprise part of an overall strategy regarding RPM and therefore constitute a single violation.
- Second, the Board's application of the highest reduction rate under the Settlement Regulation upon Arnica's settlement application after three months of the commencement of the investigation underlines the importance that the Board attributes to the timing of the settlement application while making its decision on the reduction rate to be applied.

For further information on this topic please contact [Gönenç Gürkaynak](mailto:gonenc.gurkaynak@eliglegal.com) or [Cansu İnce](mailto:cansu.ince@elig.com) at ELIG Gürkaynak Attorneys-at-Law by telephone (+90 212 327 17 24) or email (gonenc.gurkaynak@eliglegal.com or cansu.ince@elig.com). The ELIG Gürkaynak Attorneys-at-Law website can be accessed at www.elig.com.

Endnotes

(1) Article 4 of the Law No. 4054 prohibits agreements and concerted practices between different undertakings and decisions of association of undertakings that have as their object, effect or potential effect the restriction of competition.

(2) 30 September 2021, No. 21-46/671-335.

(3) 4 March 2021, No. 21-11/154-63.

(4) Available in Turkish [here](#). The reasoned decision of the Board is yet to be published.

(5) Available in Turkish [here](#). The reasoned decision of the Board is yet to be published.

(6) 4 March 2021, No. 21-11/154-63.