

# e-Competitions

## Antitrust Case Laws e-Bulletin

September 2022

### The Turkish Competition Authority approves a household appliances manufacturer's commitment package regarding online sales restrictions in a split decision (*Arçelik*)

**ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, INVESTIGATIONS / INQUIRIES, SELECTIVE DISTRIBUTION, BEHAVIOURAL REMEDIES, MANUFACTURING, REMEDIES (ANTITRUST), TURKEY, EXCLUSIVE PURCHASING AGREEMENT, ANTICOMPETITIVE OBJECT / EFFECT**

Turkish Competition Authority, *Arçelik*, Decision, 8 September 2022 (Turkish)

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e-Competitions News Issue September 2022

#### I. Introduction

The Competition Board ("**Board**") launched a full-fledged investigation against Arçelik Pazarlama AŞ ("**Arçelik**"), BSH Ev Aletleri San. ve Tic. AŞ ("**BSH**"), Gürses Kurumsal Tedarik ve Elektronik Tic. Paz. AŞ ("**Gürses Kurumsal**"), LG Electronics Tic. AŞ ("**LG**"), Samsung Electronics İstanbul Paz. ve Tic. Ltd. Şti. ("**Samsung**") and SVS Dayanımlı Tük. Mall. Tic. AŞ ("**SVS**") upon the allegation that these undertakings have violated the Article 4 of the Law No. 4054 on Protection of Competition ("**Law No. 4054**"). [1]

The allegations against Arçelik included that Arçelik (i) restricts online sales and (ii) determines the resale prices of its authorized resellers. Arçelik submitted an application before the Competition Authority ("**Authority**") to initiate the commitment process regarding its practices of restricting online sales. First set of commitments were rejected by the Board on the grounds that the commitments offered by Arçelik were not sufficient to eliminate the competitive concerns arising from Arçelik's restriction of online sales. Following the Board's rejection, Arçelik submitted a second set of commitments. The Board has evaluated the revised commitment package in order to determine whether proposed commitments are sufficient to eliminate the competitive concerns that were being investigated. Upon its evaluation, the Board accepted the revised commitments on the grounds that the commitments were sufficient enough to eliminate competitive concerns pertaining to the restriction of online sales of its authorized sellers and terminated the investigation against Arçelik with respect to Arçelik's practices regarding the restriction of online sales. [2]

## II. Background of the Case

Arçelik's activities include sales, marketing, and support services after sales of durable goods, consumer electronics, and small home appliances. In this decision, the Board's evaluation focused on Arçelik's selective distribution system, in scope of which the authorized sellers of Arçelik and Beko are operating as exclusive dealers. The authorized sellers of Arçelik and Beko are required not to sell large and small home appliances of other brands. Arçelik's selective distribution system for the sales of Arçelik and Beko branded products mandates an online sales restriction. There is no selective distribution system applied for other branded products of Arçelik.

Arçelik explained the purpose of their distribution system as "*the protection of the brand value of Arçelik and Beko branded products and dealership system*". By way of adopting necessary, uniform, and proportional criterion, Arçelik remarked that this distribution system works towards protecting the brand image, preventing freeloading, decreasing distribution costs, and ensuring customer satisfaction.

## III. Competitive Concerns Raised by the Board

In its decision, the Board evaluated the selective distribution system of Arçelik within the scope of the certain competition law regulations one of which is the Article 3 of the Block Exemption Communiqué on Vertical Agreements Communiqué No: 2002/2 ("**Communiqué No. 2002/2**") which regulates the definition of selective distribution system as follows: "*It means a distribution system whereby the provider undertakes to sell directly or indirectly, the goods or services which are the subject of the agreement, only to distributors selected by it, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorized distributors.*" [3]

The Board also referred to the paragraph 171 of Guidelines on Vertical Agreements ("**Guidelines**") which explains the criteria for a purely qualitative selective distribution system to be considered to fall outside of the scope of the Article 4 of the Law No. 4054 as follows: "*Purely qualitative selective distribution is in general considered to fall outside article 4 of the Law No. 4054 for lack of anti-competitive effects, provided that following three conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in order to preserve its quality and ensure its proper use; that is, a legitimate requirement must exist owing to the nature of the product. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature. These criteria must be laid down uniformly for all potential resellers and in a non-discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary.*" [4]

On the other hand, the Board also explained that according to the Article 4 of the Communiqué No. 2002/2 the restrictions that are directly or indirectly aim to prevent competition will not benefit from the block exemption granted under the Communiqué No. 2002/2. Therefore, restrictions of active or passive sales to end users by system members who are operating at the retail level as well as preventing purchase and sell transactions amongst system members are considered as hard-core restriction of competition. Accordingly, the Board evaluated the online marketplaces sales restrictions imposed by the suppliers to the dealerships within the scope of the legislations explained above.

According to the Guidelines, online sales are considered as passive sales. In accordance with the paragraph 25 of the Guidelines, restrictions on the ratio of sales to be made through online channels and determining a maximum sales ratio are considered to be hard-core competitive restrictions that causes the respective vertical agreement to be excluded from the scope of the block exemption in terms of Communiqué No. 2002/2. Nonetheless, the Board also noted that the paragraphs 28 and 29 of the Guidelines allows to determine certain quality standards/conditions for online marketplaces as long as those standards/conditions are objectively concrete and reasonable and aim to

protect the quality of the distribution, enhance the brand image and/or potential effectiveness etc. In this respect, the Board remarked that the conditions set forth for physical and online marketplaces do not have to be the same and should be adjusted by the criterion that serve the same purpose. In any case, mentioned standards/conditions must not aim to restrict price competition and discourage online sales.

## IV. Evaluation of the Commitments Proposed by Arçelik

### 1. First Commitment Package

Within the scope of the investigation, Arçelik proposed its first commitment package ("**first commitment package**") to the Authority in which included provisions to eliminate the competitive concerns arose from the restriction of online sales of its authorized sellers in scope of the Article 43 of the Law No. 4054. In its evaluation, the Board categorized the first commitment package proposed by Arçelik as follows:

*(i) conditions pertaining to the prices for dealerships that will conduct sales on online marketplaces:*

Conditions pertaining to determination of the prices proposed by Arçelik were considered unacceptable given that the provisions included under this section contained restrictive and dissuasive provisions against Arçelik's authorized sellers. The Board evaluated that withdrawing the support from online marketplaces provided to physical stores for rent, decorations, marketing etc. would result in discouragement and negative effects on motivations of authorized sellers to conduct online sales. In terms of the condition on reflecting the national campaign and communication costs of the authorized sellers operating in the online marketplaces proportionally to the turnover of the respective online marketplace, the Board evaluated that Arçelik failed to reasonably justify the purpose of such application as well as pointed out the possible deterrent effects that may prevent the effective use of the online marketplaces channel.

*(ii) condition on the restriction of sales to be conducted on online marketplaces by 10% of the dealer's turnover:*

The Board assessed the 10% threshold within the scope of the paragraph 25 of the Guidelines. Accordingly, the Board ruled that the respective threshold was unnecessarily restrictive. Furthermore, the Board emphasized the ambiguity of the working conditions for authorized sellers who sell more than the threshold determined by Arçelik on online marketplaces. The Board also rejected the provisions that fall within this category.

*(iii) condition for change in the guarantee structure of the dealers:*

In terms of the conditions on guarantee structure, the Board remarked that Arçelik failed to justify how the proposed structure would contribute to the quality of distribution and brand image. The Board rejected the proposed commitments noting the fact that subjecting all the authorized seller who wish to conduct sales on online marketplaces to the same guarantee structure as the sellers operating through physical channels regardless of the other risk factors would result in dissuasive effects.

*(iv) condition on requesting momentary and free-of-charge data from the online marketplaces:*

The Board evaluated the proposed commitments under this category within the scope of both Guidelines and Law No. 6698 on Personal Data Protection ("**Law No. 6698**"). The Board ruled that the nature of the conditions set forth under this category obliged authorized sellers to sign an additional protocol with Arçelik which stipulates that the authorized seller must convey daily data to Arçelik free-of-charge. The Board inferred that if the authorized seller

does not sign the additional protocol, the seller would not be able to conduct sales on online marketplaces. According to the Board, the additional protocol deprived small and medium enterprises from taking place in online marketplaces. Therefore, the Board rejected these conditions on the grounds that they would foreclose the online marketplaces channel for those enterprises.

*(v) other conditions that aim to ensure the quality standards/conditions in accordance with Arçelik's selective distribution system:*

The Board ruled that the conditions stipulated pertaining to ensuring quality standards/conditions in accordance with Arçelik's selective distribution system are acceptable given that the conditions serve the same purpose as the restrictions brought to the physical channel.

Overall, the Board rejected the first commitment package of Arçelik on the grounds that the commitments set forth were insufficient for resolving the competition law issues within the scope of the investigation. The Board allowed Arçelik to submit a revised commitment package by way of changing the certain conditions that were not found suitable.

## **2. Revised Commitment Package**

The Board evaluated the conditions to be established through the revised commitments package regarding the competitive concerns of authorized sellers' sales on online marketplaces.

The most controversial condition set forth under the revised commitments is the 15% threshold which regulates the ratio of sales that may be conducted via online marketplaces. In its commitment package, Arçelik included a clause which regulates that physical sales must comprise 85% of the authorized sellers' turnover. Arçelik revised the clause that was previously proposed as "*(...) online sales will not exceed 10% of the authorized seller's annual turnover*" within the scope of the first commitment package. The Board assessed this condition within the scope of the paragraph 25 of the Guidelines. In this regard, the Board made a detailed analysis which included the assessments regarding the total sales of household appliances and small home appliances as well as Arçelik's dealers' sales and their ratios compared to overall market for the years 2018, 2019, and 2020. Consequently, the Board's assessment showed that total sales of household appliances and small home appliances through online marketplaces did not significantly exceed the 15% threshold. Therefore, the Board evaluated the conditions set forth in the paragraph 25 of the Guidelines which indicated that the supplier may adopt a certain ratio for online sales if (i) the ratio does not hinder the resellers' online sales, and (ii) the ratio aims to maintain the effectiveness of physical sales channels. The Board ruled that considering the data pertaining to online sales of Arçelik's competitors in the market for household appliances, the proposed 85% ratio will not result in restriction of online sales in short term and therefore, this restriction complies with the above-listed conditions included in the Guidelines.

Additionally, the Board noted that the 85% ratio may be re-evaluated and decreased if the Authority detects the 15% threshold is met via sales through non-physicals channels.

Arçelik will attest the data and the information on its authorized sellers, and which channels those sellers use, the sales numbers, and value-based ratios as well as the information on the authorized sellers who terminated their sales, and their reason for termination to the Authority after the end of 12 months after the reasoned decision of the Board is officially served. The Board stated that by way of adopting this approach, the Board will be able to examine whether the conditions of Arçelik meet the inclinations of its authorized sellers and the market dynamics. The Board

also noted that it would be possible to observe if the commitments are sufficient to eliminate the competitive concerns in the market within a reasonable time period. Therefore, the Board reached the conclusion that the said commitments may be accepted.

Overall, the Board stated that Arçelik removed or revised certain conditions that are sought for conducting sales on online marketplaces within the scope of the first commitment package in order to resolve the competitive issues regarding online sales restrictions. The Board concluded that the conditions within the scope of the revised commitment package for online sales are objectively concrete, reasonable, and acceptable in terms of the factors that enhance the quality of distribution, brand image and potential effectiveness. Therefore, the Board deemed the commitment package proportionate to address the competitive concerns, suitable to fulfil in a short period of time, and effectively applicable.

On the other hand, as stated above, the Board noted that the minimum sales condition (*i.e.*, the obligation to conduct the 85% of the sales through physical sales channels) must be monitored in order to be determined sufficient for resolution of long-term competitive concerns. Nonetheless, the Board deemed the respective condition as acceptable as a short-term solution. Accordingly, the Board considered that these commitments remedied competition law concerns and rendered them binding, therefore, ending the investigation against Arçelik with respect to the online sales restrictions.

## V. Dissenting Opinions of Board Members

Even though the majority of the Board rendered the commitments submitted by Arçelik as adequate to address the competition law concerns, three Board members have against the acceptance of respective commitments stating among others that 15% threshold may have deterrent effects on online sales, and Arçelik failed to sufficiently explain how this threshold will play a role in maintaining the effectiveness of physical stores. Therefore, according to the dissenting Board members, this particular commitment was not acceptable whereas the other commitments included in the package were acceptable.

## VI. Conclusion

Online marketplaces and online sales restrictions seems to be under the Board's radar in recent years. Indeed, Arçelik is only one of the many undertakings that caught the Board's eye for its anti-competitive practices in this regard. Still, the evaluations made under this decision,

especially the ones pertaining to the controversial 85% ratio, may be an indicator to comprehend the Board's approach towards the application of the Guidelines as well as the application of the Communiqué No. 2002/2.

Despite the controversy of the Board members over the online sales threshold brought by Arçelik to its authorized sellers, Arçelik seems to be at a safe harbour for now. It is yet to be seen whether the Board will render the respective condition, after 12 months, for online sales threshold as an effective way to resolve the competitive concerns that drove the Board to initiate an investigation against Arçelik in the first place.

[1] The Competition Board's decision dated 09.09.2021 and numbered 21-42/617-M.

[2] The Competition Board's decision dated 08.09.2022 and numbered 22-41/580-240.

[3] Block Exemption Communiqué on Vertical Agreements Communiqué No: 2002/2, art. 3.

[4] Guidelines on Vertical Agreements, para. 171.