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The Ankara 7th Administrative Court annuls the Turkish Competition Board's dismissal decision regarding the allegations on the restriction of parallel imports in the market of energy system (*Mastervolt / Eltesan*)

ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, AGREEMENT, CONCERTED PRACTICES, DISTRIBUTION AGREEMENT, EXCLUSIVE DISTRIBUTION, ENERGY, PARALLEL IMPORTS, JUDICIAL REVIEW, TURKEY, ANNULMENT, TRANSPORT (SEA)

Ankara 7th Administrative Court, Mastervolt / Eltesan, n°2017/251 E. and 2018/2104 K., 28 November 2018

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The Ankara 7th Administrative Court (“**Court**”) annulled the dismissal decision of the Turkish Competition Board (“**Board**”) concerning the allegations that Mastervolt International Holding B.V. (“**Mastervolt**”) and its exclusive distributor in Turkey, Artı Marin Elektrik Dış Tic. Ltd. Şti. (“**Artı Marin**”), had imposed restrictions on parallel imports by Eltesan Mobil Teknoloji Sistemleri San. ve Tic. A.Ş. (“**Eltesan**”). According to the Court’s findings, Mastervolt informed its customers that Artı Marin was the exclusive distributor of Mastervolt products in Turkey, and that, bearing in mind that its products required technical expertise, Mastervolt would not provide any warranties for its products that were sold by unknown/unauthorized sellers. Moreover, the Court also noted that, between 2011 and 2015, Artı Marin had asked Mastervolt to prevent Eltesan’s sales, which, in turn, had led Mastervolt to intervene and subsequently instruct its distributors to cease supplying Eltesan with Mastervolt products. Even though the Board determined that the relevant actions had not resulted in a significant decline in Eltesan’s sales of Mastervolt-branded products, and therefore could not be deemed as a systematic and successful restriction of competition, the Court nevertheless concluded that the relevant communications and actions of Mastervolt and Artı Marin were sufficient to establish a concerted practice and/or an anticompetitive agreement, regardless of whether or not they had succeeded in preventing or restricting the sales of Eltesan.

This case summary includes an analysis of the annulment decision rendered by the Ankara 7th Administrative Court (“**Court**”). [1] The Court annulled the dismissal decision of the Turkish Competition Board (“**Board**”) with respect to the allegations that Mastervolt International Holding B.V. (“**Mastervolt**”) and its exclusive Turkish distributor, Artı Marin Elektrik Dış Tic. Ltd. Şti. (“**Artı Marin**”), had imposed restrictions on parallel imports by Eltesan Mobil Teknoloji Sistemleri San. ve Tic. A.Ş. (“**Eltesan**”). [2]

According to the Court's findings, Mastervolt informed its customers that Arti Marin was its exclusive distributor in Turkey, and that, bearing in mind that its products required technical expertise; Mastervolt would not grant or provide any warranties for the sales of its products by unknown/unauthorized sellers. Moreover, the Court noted that, between 2011-2015, Arti Marin had asked Mastervolt to prevent Eltesan's sales, which, in turn, had led Mastervolt to intervene and subsequently instruct its distributors to cease supplying Eltesan with Mastervolt products. Even though the Board concluded that the relevant actions had not led to a significant decline in Eltesan's sales of Mastervolt products, and therefore could not be deemed as a systematic and successful restriction of competition, the Court nevertheless determined that the relevant communications/actions of Mastervolt and Arti Marin were sufficient to amount to a concerted practice and/or an anticompetitive agreement, regardless of whether or not they had actually succeeded in restricting the sales of Eltesan.

Background

Mastervolt is engaged in the production and procurement of accumulators, generators, charging units, rectifiers, converters, invertors, alternators, isolators, interfaces, and cabling equipment. Arti Marin sells energy systems, generators, accumulators, satellite dish and communication systems, internet systems, underwater lighting systems, maneuvering and hydraulic propellers, wind generators, among others. Since 2007, Arti Marin has been the exclusive distributor of Mastervolt products in Turkey.

Eltesan, which had been selling Mastervolt-branded products in Turkey since 2009 through its parallel importing activities, filed a complaint before the Turkish Competition Authority. In its complaint, Eltesan argued that: (i) Eltesan started to import Mastervolt-branded products into Turkey upon seeing that it was possible to sell Mastervolt products at lower prices than Arti Marin, (ii) after Eltesan entered the market, Arti Marin not only spread false rumors that the Mastervolt-branded products sold by Eltesan had been illegally imported, but also complained to Mastervolt that Eltesan was distributing its products in Turkey, (iii) following Arti Marin's complaint, in addition to sending Eltesan an e-mail in which Mastervolt declared that Eltesan's sales in Turkey were illegal, and therefore must be terminated, Mastervolt also forced its distributors abroad to stop supplying Eltesan with its products, (iv) Arti Marin and Mastervolt subsequently informed their customers that the Mastervolt products sold by Eltesan would not benefit from the Mastervolt product warranty, since they had been procured from an unauthorized seller.

In its preliminary assessment of Eltesan's complaint in 2010, the Board found that the complaint's subject matter did not fall under the scope of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), and thus, it refused to review the substance of the complaint. However, the 13th Chamber of the High State Court did not agree with the dismissal and annulled the Board's decision. [3] Following the annulment decision of the 13th Chamber of the High State Court, the Board initiated a full-fledged investigation regarding Eltesan's complaint. As a result of its investigation, the Board reached the conclusions below:

- Since 2009, Eltesan had sold Mastervolt-branded products that it had procured via parallel imports. Arti Marin took certain measures and actions to prevent Eltesan from selling Mastervolt products in Turkey. Among these actions, spreading groundless rumors about Eltesan fell within the scope of the "unfair competition" provisions of the Turkish Commercial Code No. 6102. However, actions which might be deemed to constitute an anticompetitive agreement between Arti Marin and Mastervolt would fall under the scope of the Law No. 4054, and would therefore be evaluated by the Board.
- There had been several correspondences between Arti Marin and Mastervolt in the period between 2011-2015, in which Arti Marin had asked Mastervolt to prevent Eltesan from selling Mastervolt-branded products in Turkey. Consequently, Mastervolt had instructed its Austrian distributor, Doma (along with its other distributors in

Central and Eastern Europe), to cease selling Mastervolt products to Eltesan. These correspondences led to the Board's conclusion that there had been an agreement between Mastervolt and Arti Marin, at least with regards to preventing Doma from selling Mastervolt-branded products to Eltesan.

- According to the correspondences between Mastervolt and Arti Marin, Mastervolt had repeatedly declared to Arti Marin that it was impossible to prevent parallel imports completely. The Board also noted that it was doubtful that the attempted supply constraint could be deemed as a systematic and successful restriction, bearing in mind that Eltesan's sales of Mastervolt products had not decreased significantly between 2009-2015.
- In light of the decisions of the EU Court of Justice (particularly, *Consten and Grundig v Commission*), [4] the Board considered that Mastervolt and Arti Marin's actions to prevent parallel imports had the object of restricting the competition, and thus may suffice to breach competition law rules.
- However, the Board also noted that preventing parallel imports may lead to differing outcomes in Turkey and in the EU (which comprises various national markets). In particular, the Board observed that the EU competition law principles fundamentally aim to maintain the EU single market and to prevent different treatment of customers across the EU. In this context, the Board determined that, as a national market, Turkey's market dynamics differ from the EU's single-market dynamics, and although this would not be sufficient grounds to rule that parallel imports are categorically excluded from constituting competition law violations, the Board concluded that the specifics of the case at hand should be taken into account.
- In its findings, the Board concluded that the evidence at hand suggested that, although Arti Marin had attempted to prevent Eltesan's parallel imports, Mastervolt had not complied with this request between 2010-2015. Moreover, the Board found that the sales of Mastervolt-branded products constituted only a very small fragment of Eltesan's aggregate turnover between 2009-2015.
- As a result, the Board ruled that the evidence at hand was insufficient to establish that a restrictive agreement existed between Mastervolt and Arti Marin or that it created any effects on the relevant product market. Hence, the Board decided not to impose any administrative fines on Arti Marin or Mastervolt, concluding that neither of the undertakings had violated Article 4 of the Law No. 4054.

Court Decision

Following the Board's decision, Eltesan decided to seek judicial remedies and appealed the Board's decision to the Court. Consequently, the Court annulled the Board's decision on the grounds that (i) the correspondence between Mastervolt and Arti Marin should be treated as an agreement, practice, or decision restricting competition, and (ii) such actions do not further require a degree of success in order to breach competition law rules, contrary to the Board's analysis. The Court disagreed with the Board's decision that utilizes the effects-based analysis in the case at hand, and emphasized that, in cases involving concerted practice allegations, resorting to economic data obtained through a market analysis would be acceptable, unless the existence of communications/correspondences between the investigated parties can be proven. Noting that there were certain correspondences which indicated that communications had taken place between Arti Marin and Mastervolt, the Court rejected the Board's findings that there had been no systematic and successful restriction of competition merely because Eltesan's sales had not decreased significantly between 2009-2015. As a result, the Court declared that the correspondences between Arti Marin and Mastervolt could be deemed as an anticompetitive agreement, concerted practice or decision, and consequently annulled the Board's decision.

Comments

Although there are certain decisions in which the Board considered that restrictions on parallel imports fall under the scope of the Law No. 4054, [5] what separates the Board's approach in *Mastervolt/Eltesan* is the fact that it employed the effects-based analysis in evaluating the case at hand. The Board's analysis was struck down by the Court on the grounds that parallel import restrictions constitute a competition law violation by object. However, the Court's decision is not yet final, since an appeal may be filed against it before the Ankara Regional Administrative Court. Therefore, further developments may occur with respect to this highly significant decision in the next possible stages of the judicial process.

[1] The Court's decision (2017/251 E., 2018/2104 K.; 28.11.2018).

[2] *Mastervolt/Eltesan* (16-16/278-122; 11.05.2016).

[3] The 13th Chamber of the High State Court's decision (2010/4464 E., 2014/3480 K.; 12.11.2014).

[4] Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, ECR 1966/299 [1966].

[5] See, *Sesa* (00-44/472-257; 06.11.2000), *Vira Kozmetik*, (07-63/767-275; 02.08.2007), *Armada Bilgisayar* (08-54/852-340; 18.09.2008).