

# e-Competitions

## Antitrust Case Laws e-Bulletin

### Preview

---

## The Turkish Competition Authority issues settlement decision following investigations on a home appliances manufacturer for resale price maintenance (*Arnica Pazarlama*)

**ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, RESALE PRICE MAINTENANCE, OTHER SERVICES, SETTLEMENT, PRICE INCREASE, TURKEY**

Turkish Competition Authority, *Arnica Pazarlama*, Case law, 30 September 2021

---

**Gönenç Gürkaynak** | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

**Beyza Nur Adıgüzel** | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

**Dilara Yesilyaprak** | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

e-Competitions News Issue Preview

### Background

On September 29, 2020, a complaint was brought to the Turkish Competition Authority's ("**Authority**") attention, where it was alleged that Arnica Pazarlama A.Ş.'s ("**Arnica**") sales representative had called the complainant (who was one of Arnica's authorized sellers, engaged in the sale of Arnica products via online marketplaces and e-commerce websites) and stated that the prices of the products sold by the complainant are low and needed to be increased. It was claimed that the complainant had to increase its prices involuntarily, contemplating the possible risk that Arnica would refrain from supplying it with products unless it did so, and indeed, Arnica sales representative sent an updated price list to the complainant and subsequently warned the complainant for not updating its prices.

After the complaint was submitted to the Authority, the Board decided to initiate a preliminary investigation against Arnica. Within the scope of the preliminary investigation, the Authority carried out an on-site inspection at the premises of Arnica and requested the entity to provide certain information. Consequently, the Board decided to initiate an investigation against Arnica to find whether Article 4 of Law No.4054 on the Protection of Competition ("**Law No. 4054**") has been violated. Following the Board's decision, Arnica received the Investigation Notice officially on March 15, 2021 and submitted its first written defense on April 14, 2021.

After the submission of the first written defense, Arnica made an application on June 10, 2021 to benefit from both the commitment and the settlement mechanisms. The Board rejected Arnica's application for the commitment mechanism, since the relevant competition law concerns were deemed as naked and hard-core violations. On the other hand, the Board accepted Arnica's settlement application.

The negotiations for the settlement began on July 5, 2021. After the completion of settlement negotiations, an interim order for settlement was issued on September 9, 2021 and Arnica submitted the final agreed settlement text. As a result, in its final decision the Board ruled that (i) Arnica violated Article 4 of Law No.4054 by way of determining the resale price, (ii) an administrative fine should be imposed on Arnica pursuant to Article 16 of Law No. 4054 and Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("**Regulation on Fines**"), (iii) the administrative fine should be discounted by 25% pursuant to Regulation on the Settlement Procedure ("**Settlement Regulation**"), and (iv) the investigation carried out against Arnica may be concluded with the settlement procedure.

## Information on Arnica and the Relevant Market Assessment

The Board, in its decision, explained that Arnica is active in the small house appliances market, which was described as a market where new products were discovered and put on the market constantly, ensuring that higher quality products were offered at a lower cost.

The decision also provided information regarding the distribution channels of Arnica. Accordingly, the characteristics of three different distribution channels, which ARNICA basically classifies as, retail dealers, wholesale dealers and the internet sales, are as follows:

- Traditional stores/local distributors (e.g. small shops)
- Local chain stores (e.g Evkur)
- E-commerce platforms (e.g Hepsiburada, Amazon, markadayım.com)
- Technology markets (e.g. Media Markt, Teknosa, Vatan)
- Hypermarkets (e.g. CarrefourSA, BİM) Overall, in line with its case law<sup>[1]</sup> regarding definition of the market for the relevant products, the Board did not specifically define the relevant product market for this matter as it would not have changed the analysis; whereas it noted that the geographical market can be defined as "*Türkiye*".

## Evaluation under Article 4 of Law No 4054

In its decision, the Board evaluated Arnica's 2017 Dealership Agreement, as well as its practices on the field. Accordingly, it assessed its resale price maintenance related practices and the online sales restriction related practices, in detail. Similar to the Groupe SEB decision <sup>[2]</sup> ("**Groupe SEB**"), the Board analyzed the how restriction of internet sales may amount to a resale price maintenance violation.

In relation to the assessment of the Dealership Agreement, *inter alia*, the Board:

- Highlighted that essentially four clauses regulated dealer prices.
- Evaluated that the relevant clauses (i) provided that dealers were expected to comply with a minimum price, (ii) enabled Arnica to demand compensation from dealers who sell below the determined price level, and (iii) indeed, imposed an additional obligation on the dealers, preventing them from selling products to real persons or legal entities who (would) sell below the minimum price set by Arnica, which were also backed up with a compensation demand in case of non-compliance of the dealers.

- Further noted that one of the contract clauses also obliged the dealers to regularly report their product sales and stock quantities to Arnica, which enabled close monitoring of dealer practices. Overall, the Board assessed that although the relevant clauses were mainly aimed at determining the resale prices of Arnica products, they also constituted an intervention in the sales of the dealers (i.e. with respect to customers or geographic region) especially considering that no exclusivity was granted within the scope of the contracted distribution relationship.

After examining the documents seized during the on-site inspections and based on its high number of findings (in total 68 findings were referred in the decision), the Board *inter alia* noted that:

- Certain communications verified that Arnica (i) set minimum resale prices for online sales, as well as in brick and mortar stores, and (ii) controlled adherence to minimum resale prices by (a) close monitoring of online or in-store sale prices (via monitoring SMS, mystery shopper practices etc), (b) through regular reports shared by the dealers on their sales and stock quantities, and (iii) terminated or reduced, or threatened to terminate or reduce the goods supplied to the relevant dealers, and/or discounts applied to the relevant dealers, in case of non-compliance with minimum prices.
- It was also found that some of the communications explicitly showed Arnica employees were constantly exchanging information on the prices applied by the dealers, and they would contact the dealers which “breached” the price and request them to “fix” their prices (i.e. increase their resale prices to the requested levels).
- Such resale price intervention related practices constituted an upward pressure (*i.e.*, aimed to increase resale prices).
- It was also observed that prices applied by non-dealers were also closely monitored via the above methods and this meant that besides the relevant reseller, the relevant dealer which supplied the product to the relevant reseller was identified and warned off from offering prices below the minimum prices recommended by Arnica.
- Moreover, it was observed that Arnica controlled the purchase quantities and restricted supplies in order to get ahead of a decrease in sales prices.
- Overall, it was seen that these practices concerned all sales channels.
- Besides, some correspondences also showed that Arnica restricted online sales and engaged in practices which amounted to hard restrictions. Moreover, certain exchanges also indicated that Arnica aimed to prevent wholesalers from selling to certain resellers. However, all in all, it was evaluated that such practices mainly concerned intervention to resale prices. In this regard, taking into account the Board’s assessment in the Groupe SEB decision, whereby resale price intervention and online sales restriction were evaluated as a single violation, and considering that Arnica’s sales restrictions were closely related with its general strategy to set resale prices, the Board concluded that Arnica engaged in one vertical violation.

## Conclusion of the Decision

In line with its evaluation, the Board concluded that Arnica’s actions were shaped by its strategy to determine the resale price of authorized dealers, and as these actions were considered to be continuous, and they must be evaluated as a whole. Accordingly, the actions in question which took place in the same market were deemed to

constitute a single violation, based on their being a part of the general strategy of the undertaking and also taking the timeline into consideration.

Based on this determination, the Board found that Arnica's actions constituted a violation of Article 4 of Law No. 4054 and must be considered under "other violations" as stipulated under the relevant Regulation on Fines. Accordingly, the applicable percentage for the base administrative fine was set between 0.5% and %3. In determination of the administrative fine, the Board took into account the dynamics of the relevant market subject to the actions and Arnica's share in the market. Moreover, it was considered that the violation lasted for more than 5 years since the first document showing a violation was dated December 25, 2015 and the last document showing a violation was dated January 18, 2021. Accordingly, the base fine determined for Arnica was increased by 100%. In calculating the administrative fine, no aggravating factors were taken into account. However, mitigating factors were taken into account in calculation of the administrative fine since Arnica went beyond its legal requirements and assisted the Authority with access to documents which showed a violation, and therefore, the base fine was decreased by 50%. This meant that the administrative fine was calculated as 3.293.008, 20 TL.

Notwithstanding the above, as a result of the successful settlement process, the Board decided to apply a 25% discount, which is the maximum allowed under the Settlement Regulation, over the administrative fine determined to be imposed on Arnica. As a result, the administrative fine to be imposed on Arnica was reduced from 3,293,008.20 TL to 2,469,756.14 TL. As per the Settlement Regulation, Arnica also accepted that it had been informed of the allegations and provided with the chance to present its case during the settlement process; and that it would not have further right of appeal against the administrative fine imposed, or the points raised within scope of the settlement.

[1] The Competition Board's decisions dated 21.12.2011 and numbered 11-62/1648-583; dated 27.6.2002 and numbered 02-41/472-19; dated 25.09.2008 and numbered 08-56/892-353; dated 04.03.2021 and numbered 21-11/154-63.

[2] The Competition Board's decision dated 04.03.2021 and numbered 21-11/154-63.