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Recent decision by Turkish Competition Board offers further guidance on standard of proof in exchange of information cases

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Introduction

On 26 October 2022, the Turkish Competition Authority published the Turkish Competition Board's reasoned decision[(1)] regarding whether the undertakings operating in the ophthalmic (corrective) lens production and wholesale market violated article 4 of the Law No. 4054 on the Protection of Competition (Law No. 4054) by determining prices together.

The board held that there was not sufficient evidence of information exchange and price fixing between the undertakings operating in the ophthalmic lens production and wholesale market and, therefore, there was no need to initiate a full-fledged investigation under article 41 of Law No. 4054.

This article explains the board's assessment and the criteria it took into consideration to determine whether the undertakings in question violated article 4 of Law No. 4054 in light of the findings obtained during on-site inspections. It also provides a brief analysis on the decision.

Undertakings and relevant markets for pre-investigation

Following an application for a request of confidentiality received by the authority in May 2021, it was claimed that EssilorLuxottica SA (Essi-Lux) violated articles 4 and 6 of Law No. 4054 through potential exclusionary practices. Upon a preliminary review, the board initiated a preliminary investigation regarding the allegations. The undertakings subjected to the pre-investigation were:

- Essi-Lux;
- Beta Optik San ve Tic Ltd Şti (Beta);
- Cemfa Optik San ve Tic AŞ (Cemfa);
- Gelişim Optik AŞ (Gelişim Optik);
- Hoya Turkiye Optik Lens San ve Tic AŞ (Hoya) and Seiko Optical Europe GmbH Germany Istanbul Central Office (together, Hoya-Seiko);
- Merve Gözlük Camı San ve Tic AŞ (Merve Optik);
- Opak Lens San ve Tic AŞ (Opak Lens); and
- Turkish Eyewear Manufacturers Association (TGSD).

The activities of most of these undertakings encompass:

- production;
- sales and/or wholesale of various types of lenses, prescription and other glasses, contact lenses, frames and parts of frames for glasses and ophthalmic machinery and equipment.

However, TGSD represents the manufacturers of optical lenses, prescription glasses and sunglasses across Turkey, with its aim stated as contributing to the industry by increasing the domestic eyewear production power in Turkiye.

Although the board's evaluations focused on ophthalmic lenses (excluding contact lenses used to change eye colour or treat corneal diseases) and referred to the ophthalmic lens production and wholesale market, it was ultimately held that a precise relevant product market does not need to be defined as per paragraph 20 of the Guidelines on the Definition of Relevant Market, as it has no impact on the outcome of the case at hand.

Similarly, as it does not influence the conclusion of the case at hand, the board defined the relevant geographic market as the entirety of Turkiye rather than at the regional level.

Overview and board's assessment of findings obtained during on-site inspections

The authority conducted on-site inspections at the premises of Essi-Lux's Turkish subsidiaries within the scope of the preliminary review and pre-investigation in November 2021, which included:

- Altra Optik San ve Tic AS (Altra);
- Opak Optik ve Ticaret AŞ (Opak);
- İşbir Optik Sanayi AŞ (Işbir);
- Beta;
- Hoya-Seiko;
- Opak Lens;
- Merve Optik;
- TGSD; and
- Cemfa.

The authority used a total of forty findings in the pre-investigation report, with:

- three findings from Altra;
- 15 findings from Beta;
- one finding from Cemfa;
- four findings from each of Hoya-Seiko, Işbir and Merve Optik;
- three findings from Opak; and
- six findings from Opak Lens.

While a majority of the findings used in the pre-investigation report were the undertakings' internal correspondence (most of them demonstrated discussions as to prices, price increases, discounts and strategies of competitors in the optics sector), the board focused on a select few which were found to particularly raise suspicion of collusion between the competitors in the market through information exchange. In this regard, the board stated that findings one and 18 obtained from Altra and Beta, respectively, pointed towards a potential consensus among competitors to determine prices as both referred to plans or amounts of price increases of competitors. Further, findings 39 and 40 obtained from Opak Lens indicated a gentlemen's agreement between Opak Lens and Gelişim Optik from which it was inferred that Opak Lens and Gelişim Optik agreed not to offer lower prices than each other.

Board's assessment of findings one through 18

In relation to findings one through 18, the board firstly explained that correspondence between employees of competitor undertakings regarding the establishment of an agreement restricting competition, without the need for any other evidence or market data, on a standalone basis places the burden of proof on the undertakings and is considered a violation unless the undertakings can prove otherwise, even if the relevant agreement has no effect on the market.

However, the board stated that statements indicating the establishment of an agreement to determine prices in inter-company correspondence rather than intra-company correspondence may not be sufficient each time to prove the establishment of an anti-competitive agreement between competitors, and internal correspondence obtained from a competitor may not meet the standard of proof unless it is supported by other evidence and data.

Pursuant to the principle of freedom of evidence applicable in competition law, the board stated that although the evidence obtained in accordance with the law may be freely interpreted, the evidence obtained must be sufficiently favourable to prove the material facts claimed.

The board further demonstrated that, although an agreement restricting competition does not have to be legally binding or subject to any formal requirement, in order to hold undertakings liable for a competition violation, evidence (ie, written, verbal, physical and electronic) and supporting documents are needed to demonstrate the existence of a meeting of wills between the employees of competitors.

Considering that the WhatsApp correspondence in findings one and 18 are only internal and that no competitor ophthalmic lens manufacturer is included within this correspondence, and that all other documents, including the dates of price transitions, show that the undertakings effectively compete with each other, the board held that findings 1 and 18 are not sufficient to reveal the existence of an agreement restricting competition between competitors.

Findings excluding one, 18, 39 and 40

The board observed that in many of the internal findings, statements indicating distinction between undertakings with respect to price increases and explanations to customers as to these distinctions particularly stand out. In addition, it was observed that promotional practices (eg, special campaigns, gift vouchers and decoration gifts to opticians) are used by undertakings to gain customers from each other.

On the other hand, it was understood from many findings that ophthalmic lens manufacturers try to learn their competitors' price lists, discount rates and promotional practices and that they usually exchange this information through opticians (ie, their customers). It was understood that undertakings constantly compare their prices with those of their competitors and set their own prices accordingly. They also closely follow new price lists, discount rates and other practices of their competitors through opticians. The board stated that the reason for this may be that opticians work with more than one ophthalmic lens manufacturer, and that such opticians can use this information for bargaining purposes.

The board referred to its previous assessments[(2)] where it was concluded that it is in accordance with the ordinary course of commercial life that competitors track each other's conduct and determine their own commercial strategies in this context. It was also concluded that the information obtained by the undertakings about their competitors from the market through their own means is not considered as conduct restricting competition. Further, the board reiterated[(3)] that it is difficult for price increases at similar rates and in

close proximity to each other to constitute a presumption of an agreement, concerted practice or a direct future-oriented information exchange between undertakings.

Based on the facts of the case, the board determined that the undertakings subjected to the pre-investigation obtained the price information of their competitors solely for the purpose of comparing them with their own prices. Further, the board stated that certain findings indicate that although competitors are aware of each other's price transitions, they do not implement similar price transitions. For instance, it was observed that the relevant undertakings updated their prices on mostly different dates and in different frequencies in various findings, with a limited number of price transitions occurring on the same dates.

Accordingly, the board stated that the documents and information obtained during the on-site inspections demonstrated the existence of competition between the undertakings subjected to the pre-investigation rather than indicating an anti-competitive agreement and, therefore, concluded that the price transitions implemented by different undertakings on the same date were not the result of an exchange of information between the undertakings, but of similar events impacting the sector (eg, an impulse to implement new prices on the New Year's Day or drastic increases on the exchange rates between mainstream foreign currencies and the Turkish lira).

Based on the foregoing, the board concluded that:

- the correspondence in findings one and 18 are not sufficient to establish an agreement between competitors to restrict competition on their own;
- the other documents obtained during the on-site inspections do not support any allegation of an agreement arising from findings 1 and 18; and
- the dates of price transitions of competitors do not coincide.

Therefore, the board held that findings one through 38 do not demonstrate an anti-competitive agreement between the undertakings subjected to the pre-investigation.

Board's assessment of findings 39 and 40

Findings 39 and 40 demonstrate correspondence between Opak Lens and its subsidiary, Akay Optik San ve Tic AŞ. Based on these findings, the board inferred that there has been a cooperation between Opak Lens and Gelişim Optik for three years (between 2016 and 2019) and that within the scope of this cooperation, Opak Lens has refrained from some marketing activities against Gelişim Optik, limited to a certain region and 15 opticians.

The board held that the business relationship between Opak Lens and Gelişim Optik included the production of lenses by Opak Lens in Gelişim Optik's machine park. It also held that after three years this cooperation ended upon Gelişim Optik leasing the machine line to another undertaking. The board further evaluated that the end of the cooperation on production accordingly ended cooperation on sales and stated that the conduct relating to Opak Lens and Gelişim Optik's sales within the scope of the gentlemen's agreement were closely related to the production relationship.

Although, at first, the case handlers held that a full-fledged investigation should be initiated against Opak Lens and Gelişim Optik despite the foregoing assessments, the board ultimately decided against a full-fledged investigation in light of the companies' statements and remaining evidence.

As a result, upon evaluating Opak Lens's statements and other findings obtained from Opak Lens demonstrating the competitive nature of the sector as a whole, the board concluded that findings 39 and 40 do not indicate an anti-competitive agreement between Opak Lens and Gelişim Optik.

In light of the above, the board held that there is no evidence of a detailed, comprehensive, systematic and mutual exchange of competitively sensitive information between competitors, and the undertakings operating in the ophthalmic lens production and wholesale market are not in an agreement with the purpose and/or effect of restricting competition.

Therefore, the board decided not to initiate a full-fledged investigation against the undertakings subjected to the pre-investigation pursuant to article 41 of Law No. 4054.

Comment

The decision is significant due to the board's analyses that internal correspondence of an undertaking indicating exchange of information between competitors does not meet the standard of proof on a standalone basis in terms of revealing the existence of an agreement to fix prices between competitors, unlike correspondence between competitors of this nature. As such, the board set forth clearly with the decision that such internal correspondence of an undertaking, if not substantiated by other evidence or pricing actions of the undertakings, would not be considered as constituting an anticompetitive agreement between undertakings. Therefore, the decision provides further guidance on the board's approach towards standard of proof in exchange of information allegations and article 4 cases under Law No. 4054. if not supported by other evidence and/or pricing actions of the undertakings.

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Endnotes

(1) Board's decision dated 5 January 2023 and numbered 23-01/6-5.

(2) Board's decision dated 13 February 2020 and numbered 20-10/109-65.

(3) Board's decision dated 23 November 2017 and numbered 17-38/609-265.