

Employee Declarations in Competition Law: Linker, Not?

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The Competition Board ("the Board ") issued a decision indicating that the attitude of acceptance of statements received from employees of the undertakings under investigation has changed. The Board, with its broad authority in requesting and evaluating information in the course of the investigation, concludes with its final decision that it will no longer be bound by the declarations of employees whose undertakings do not have the authority to represent and bind the undertaking concerned.

The Board has a wide mandate to request information

The Competition Board is the decision-making body of the Competition Authority (" Authority ") and has the authority to conduct an extensive investigation / investigation. (Articles 14 and 15 of the Law on the Protection of Competition No. 4054, " Competition Law ").

Accordingly, the Board shall:

- may ask for any kind of information that he / she deems necessary from all public institutions and organizations, enterprises and associations of undertakings,
- examine books, documents of all kinds and documents of undertakings and associations of undertakings and, if deemed necessary,
- request a written or oral explanation of certain subjects,
- raids can take place.

In this context, the statements made after the interviews with the employees and / or representatives of the undertakings under investigation constitute a strong source for the relevant file. The Board used past employee statements as both primary and secondary evidence when making decisions.

In a recent decision, the Board stated that the attempt of a person who is not a signatory is not binding on the attempt. This new approach differs from the precedents in which employees' statements are taken into account, regardless of whether they represent the initiative or not in previous decisions.

Turkcell Resolution (18 May 2016, 16-17 / 285-128)

Mobile communication operator Turkcell ?leti?im Hizmetleri A.?. (" Turkcell ") has been allegedly abusing the dominant position in the market with its acts against distributors and franchisees. During the preliminary investigation, the employee of a Turkcell dealer (" Employee ") participated in a meeting held with the complainants in front of the Agency and was found against Turkcell. On June 2011, the Board decided against Turkcell and awarded a penalty of 91,942,343 Turkish Liras. (decision number 11-34 / 742-230).

Turkcell appealed the decision of the Council to the Council of State. The employee presented this to the Council of State together with a declaration approved by the notary in addition to the petition regarding the misrepresentation and falsehood of the false information. The employee alleged that all statements and information he provided were untrue and that the complainants had been bothered with proposals to act against Turkcell. (Council of State file

number 2011/4540).

The legal department of the Authority requested the Board to give an opinion on whether the employees' statements changed the health of the file and besides the fact that the employees' unlawful acts were evaluated under Competition Law.

The Board reviewed the investigation report and arrived at the conclusion that the employee's misleading statements did not affect the outcome of the decision and considered that:

- Not one of the complainants in the working file.
- The employee is a Turkcell dealer who has statements only in a meeting minutes. These statements do not have a significant influence on the evaluations and determinations of the Board.
- The name of the company in which the employee behaves like his or her own name or signature authority was not included in the investigation report.
- The Board's decision is based on a comprehensive evaluation and analysis of the following information and documents:
 - On-site inspections
 - Meetings with other players in the market
 - Statements given by Turkcell franchisees
 - precedents of the European Commission and the Supreme Court of the United States

The Board has stated that the rules governing misleading information are applied only to enterprises. The Board has decided that if the Employee is not a natural person who is an economic person in his own right, the Employee shall not be regarded as an enterprise and therefore does not violate the provisions of the Competition Act for this reason.

The Board also assessed the relationship between the employee and the undertaking it was working on, as long as the employee acted as the signatory and provided misleading information to the Board. The Board has ruled that the Employee shall not be held accountable under the Competition Act because it does not have the authority to represent and bind the undertaking concerned. However, the Board believes that the facts of the employees cause the crimes of the Turkish Penal Code to "lie" and "defamation" in the official document issued, and accordingly the Presidency has been tasked to prosecute the Chief Public Prosecutor.

Result

It is stated in the Board's judgment that the binding of the declaration made by the employees of an undertaking under investigation depends on whether the person concerned has the authority to represent and bind the company. This approach raises question marks as to whether there is a change in the established case-law on the use of the Agency's employee statements as evidence. If the Board adheres to this approach, it means that the employee statements used as evidence in the Board's review / evaluation and decision-making phase may lose importance.

In this context, it can be argued that the Board limits its own authority. In the opinion of the opposition, the following points are stated:

- It is not necessary for the Council to limit its authority to request information solely to employees who have authority to represent the enterprise.
- The employee actually represents the undertaking and there is an organic link between them. When the Board decides, it should evaluate two elements.

(Decision of 16-17 / 285-128 and 18 May 2016, published on the Competition Authority website on 16 January 2017)

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