Employee Statements in Turkish Competition Law: Binding or Not?

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The Turkish Competition Board ("**Board**") recently published a decision which could signal a changing stance on the admissibility of statements from employees of investigated undertakings. The Board continues to have wide powers to request and consider information during investigations. However, the recent decision suggests the Board may no longer attach as much weight to statements which are made by employees who do not have official capacity to bind the undertaking.

The Board holds wide legislative power to request information

The Competition Board is the decision-making body of the Competition Authority ("**Authority**") and holds wide investigative powers (Article 14 and 15 of Law No. 4054 on Protection of Competition; the "**Competition Law**").

Accordingly, the Board can:

- Request any information it deems necessary from any public institution, organization, undertaking and association of undertakings. Officials must provide the requested information within the determined period.
- Examine the books, paperwork and documents of undertakings and associations of undertakings, plus take copies if needed.
- Request written or oral statements about particular issues.
- Perform dawn raids.

Under this framework, statements received from representatives and/or employees of undertakings under investigation are powerful tools in the Board's arsenal. In the past, the Board had used employee statements as both primary and supporting evidence when concluding competition law violations.

A recent Board decision states that a person cannot represent and bind an undertaking in an investigation unless the person is in the authorized signatory list. The new approach contradicts prior decisions on the topic, where the Board based its decisions on interviews with employees of undertakings regardless of their authority to represent and bind the undertaking in question.

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

Mobile phone operator, Turkcell ?leti?im Hizmetleri A.?. ("**Turkcell**"), was alleged to have abused its dominant market position via actions towards distributors and dealers. At the preliminary stage, a Turkcell's dealer's employee ("the Employee") attended a complainants' meeting with the case-handlers and made statements against Turkcell. The Board ultimately ruled against Turkcell in June 2011, fining the company 91,942,343 Turkish Lira (decision number 11-34/742-230).

Turkcell appealed the Board's decision to the Council of State. During these procedures, the Employee submitted a petition and a notarized statement confessing to earlier providing misleading information and false statements. He claimed all of his statements and information were untrue and he had been tempted by the complainants' offers to act against Turkcell (Council of State's file number 2011/4540).

The Authority's legal department asked the Board to provide an opinion on whether the Employee's statements would change the merits of the case, as well as an assessment of the Employee's wrongful acts within the Competition Law's scope.

The Board reviewed the investigation report and concluded that it was satisfied that the Employee's misleading statements had not impacted the decision's outcome. It noted that:

- Employee was not one of the complainants in the case.
- Employee was a Turkcell dealer, whose statements had only been recorded in one set of meeting minutes. These statements had no prominent effect on the Board's assessment and determinations in the investigation report.
- Neither employee's name, nor the company which he acted as an unauthorized signatory for were included in the investigation report.
- The decision was based on extensive assessment and analysis of information and documents from:
    - On-site inspection
    - Interviews with other market actors
    - Statements by Turkcell's dealers
    - Precedents from the EU Commission and US Supreme Court.

The Board noted that rules regarding submission of misleading information only apply to undertakings. It ruled that since the Employee is a natural person, who does not operate as an economic entity by himself, he could not be deemed to be an undertaking and had therefore not breached the relevant provisions of the Competition Law.

The Board also considered the relation between the Employee and related undertaking, on the basis that the Employee acted as an unauthorized signatory for the related undertaking and submitted misleading information to the Board. The Board held that the Employee has no liability under the Competition Law because he could not legitimately represent or bind the related undertaking. However, it noted that his actions could violate the Turkish Criminal Code in terms of giving false statement when preparing official documents, as well as slander. Thus, the Board decided to file a criminal complaint against the Employee via the public prosecutor's office.

Conclusion

The Board's decision suggests the binding nature of statements from employee of investigated undertakings depends on whether he/she has the official capacity to bind the company. This indicates a shift in Board's established position on admissibility of employee statements. If the Board sticks with this approach, it could mean employee statements will lose their importance as evidence which the Board uses to consider and rule on infringements.

In this regard, the Board could be argued to be shooting itself in the foot by unnecessarily limiting the scope of its own powers. The decision's dissenting minority opinions argue that:

- The Board's is not required to limit information to employees who have the power to officially bind the undertaking.
- The Employee was de facto representing the related undertaking and an organic link existed. The Board should have considered these two factors.

(decision number 16-17/285-128, dated 18 May 2016; published on the Competition Authority's website on 16 January 2017)B

Related Practices

- Antitrust and Competition

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