The Council of State Dismissed Tüpraş's Appeal against the Turkish Competition Authority's Record Fine for Abuse of Dominance

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I. Introduction

On October 15, 2017, the Council of State ("***Court***") upheld[1] the Turkish Competition Board's ("***Board***") 2014 decision on Türkiye Petrol Rafinerileri A.Ş. ("***Tüpraş***").[2] The Board had imposed a fine on Tüpraş for abuse of dominance, which amounted to 1% of Tüpraş's total turnover in the previous financial year (approximately EUR 141.6 million).[3] This is the highest fine ever imposed on a single undertaking by the Board.

Tüpraş appealed against the Board's decision, which had found that Tüpraş was dominant in the markets for the wholesale (i) unleaded gasoline, (ii) diesel, and (iii) black petroleum products. According to the Board's decision, Tüpraş had abused its dominance by (i) pricing unleaded gasoline and diesel excessively for a period of three months between October 2008 and December 2008, and (ii) tying rural diesel with other products, including gasoline, fuel oil and jet oil for OMV Petrol Ofisi A.Ş. ("***POAŞ***") and tying black liquid petroleum products (*i.e.*, fuel oil and heating oil) with white liquid petroleum products (*i.e.*, gasoline, diesel, gas oil and jet fuel) for Altınbaş Petrol ve Ticaret A.Ş. ("***Alpet***").

The Court's judgment includes a detailed analysis with respect to both procedural and substantial arguments put forth by Tüpraş, and a number of its findings are particularly noteworthy. The Court assessed, *inter alia*, (i) whether using "*such as*" in Article 5(2) of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions

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1 The Council of State, 13th Division, Decision no. E. 2014/2458 K. 2017/2511.

2 *Tüpraş*, Competition Board Decision of January 17, 2014, no. 14-03/60-24.

3 The Euro amount is calculated on the basis of the EUR/TRY average exchange rate for the year of the judgment (*i.e.*, 2014).

Limiting Competition, and Abuse of Dominant Position ("***Regulation on Fines***") complies with the law, given that this phrase allows the Board to determine the fine amount based on factors other than those listed in this provision, (ii) whether the Board had a quorum to determine the fine amount, (iii) the legal test to be applied for establishing excessive pricing, and (iv) the legal test to be applied for establishing unlawful tying.

II. Whether the Unlimited Criteria in Article 5(2) of the Regulation on Fines for Determining the Base Fine Complies with the Law

Article 5(2) of the Regulation on Fines sets out a non-exhaustive list of criteria for determining the base fine against anti-competitive practices. This list includes "*issues <u>such as</u> the market power of the undertakings or associations of undertakings concerned, and the gravity of the damage which has occurred or is likely to occur as a result of the violation shall be taken into account*" (emphasis added). Tüpraş claimed that using "*such as*" herein, and not limiting the criteria that will factor into the calculation of the fine amount, violates the principle of legality and leads to uncertainties regarding the application of the law.

In its assessment, the Court cited Article 124 of the Turkish Constitution, which entitles public entities to issue by-laws in order to implement laws, provided that these by-laws do not contradict the underlying laws. Accordingly, the Turkish Competition Authority ("***Authority***") has discretion to adopt regulations to provide and establish the criteria that are applicable to the fine calculation. The Court further held that the same criteria that the Board adopted in Article 5(2) of the Regulation on Fines are also listed in Article 16 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), and therefore, these criteria had already been recognized by the law. The Court also decided that the Regulation complied with Article 17 of the Law of Misdemeanors No. 5326 applicable to administrative fines, which provides that "*when determining the amount of the fine, the wrongfulness of the misdemeanor and the perpetrator's culpability and economic condition will be taken into account*." Accordingly, the Court concluded that the Authority had not exceeded its discretion, and thus the provision did not violate the principle of legality, nor did it lead to any legal uncertainties.

Since the Regulation on Fines entered into force in 2009, the Council of State has dealt with, and dismissed, numerous requests for the annulment of this regulation in part or in whole.[4] In the case at hand, the phrase "*such as*" in Article 5(2) of the Regulation on Fines was specifically challenged and, not surprisingly, the Council of State once again refused to annul a provision of the regulation.

III. Whether the Board had a Quorum to Determine the Fine Amount

Tüpraş's main plea on procedure is related to the quorum required for the Board to decide on an administrative fine for competition law infringements. In the Tüpraş case, seven members attended the Board meeting for the final decision and five attendees voted in favor of a ruling that a violation of Article 6 of the Law No. 4054 had occurred. Of these five attendees, three voted for a fine of 1% of Tüpraş's total turnover in the previous financial year, one Board member voted for a fine of 0.5%, and one Board member voted for a higher fine. As the Board members did not reach a consensus on the fine amount, Tüpraş claimed that the Board had lacked a quorum to determine the fine amount.

Under Article 51 of the Law No. 4054, for final decisions, at least five Board members—including the Chairman or the Deputy Chairman—must be present at the Board meeting, and at least four members must be in agreement (*i.e.*, vote the same way) in order to reach a valid decision. The law, however, does not provide any guidance on how the requirement that "*at least four board members shall vote the same*" should be interpreted when the Board members' view on the appropriate fine amount is too diverse to achieve the required majority.

As the Law No.4054 is silent on this particular matter, the Court held that Article 229 of the Code of Criminal Procedure No. 5271 shall apply by analogy, and that the least favorable vote for the defendant shall be added to the votes on the closest fine amount until the required majority is achieved. In the case at hand, as three members had voted for a fine of 1% of Tüpraş's turnover, one member had voted for 0.5% and another member had voted for a higher fine, the Court decided that the last vote should be added to the votes favoring 1% fine.

[4] *See e.g.*, Council of State, 13th Division, Decision no. E. 2011/4084, Decision no. E.2011/2500, Decision no. E. 2011/2499, Decision no. E. 2013/225, Decision no. E. 2011/4484, Decision no. E. 2012/337.

After applying this methodology, the Court found that the threshold for imposing 1% fine had been met and, therefore, dismissed Tüpraş's plea.

The Law of Misdemeanors No. 5326, which sets forth the general principles applicable to administrative fines, refers to the Code of Criminal Procedure No. 5271 in certain provisions.[5] Applying criminal law principles to administrative procedures is therefore not uncommon in Turkish law. Procedural rules related to imposing administrative fines, however, are not among those referring to the criminal procedure. The Court therefore expanded the scope of criminal law principles applicable to administrative law procedures. Further, this is the first decision where the Court applied the Code of Criminal Procedure No. 5271 to an issue related to competition law.

IV. The Legal Test for Establishing Excessive Pricing

Tüpraş asserted a number of pleas related to the Board's excessive pricing analysis. In theory, excessive pricing may distort competition and thus can be prohibited as an abuse of dominance under Turkish competition law. In practice, however, the Authority follows a similar approach as its counterparts in most other jurisdictions and is usually reluctant to intervene against businesses' pricing strategies. Indeed, so far the Authority has considered such a practice an infringement only in a few cases with exceptional circumstances.[6] The Turkish courts affirmed that the Authority's intervention in excessive pricing may be justified in "*markets where there is no competition, the market cannot correct itself, excessive pricing does not encourage new entry, barriers to entry are high, and information flow is not homogeneous.*"[7]

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5 Articles 22(4), 28(5), 29(1), 29(5), 40(2) of the Law of Misdemeanors No. 5326.

6 *Tüpraş*, Board's Decision of January 17, 2014, no. 14-03/60-24; *Tüpraş*, Board's Decision of November 4, 2009, no. 09-2/1246-315; *Ataköy Marina*, Board's Decision of April 24, 2008, no. 08-30/373-123; *Belko*, Board's Decision of July 8, 2009, no. 09-32/703-163, *OTAŞ/EGO/İZGAZ/İGDAŞ*, Board's Decision of March 08, 2002, no. 02-13/127-54; *Çakıroğlu*, Board's Decision of May 12, 2010, no. 10-36/577-207; *TMST*, Board's Decision of June 10, 2010, no. 10-42/756-243; and *Bereket Jeotermal*, Board's Decision of February 14, 2008, no. 08-15/146-49.

7 Decision of the 10th Chamber of the Court, dated December 5, 2003, and numbered 2001/4817 E., 2003/4770 K.

In the present case, the Board found Tüpraş dominant in all the three relevant markets where Tüpraş's market shares were 56%, 91% and 97.8%, barriers to entry were high and there was no significant countervailing buyer power. Further, following a price comparison analysis based on Platts Italy CIF Med (i.e., an international company providing reference prices for petroleum trade) prices and export market prices as a benchmark, the Authority concluded that Tüpraş's domestic market refinery sales prices were approximately 15% - 20% higher than the market prices for the last three months of 2008, and thus excessive.

On appeal, Tüpraş first challenged the Board's dominance analysis and argued that the Board had failed to consult other actors in the market such as importers and distributors. Second, Tüpraş claimed that the Board's excessive pricing analysis had been flawed because (i) excessive pricing could only be applied by legal or natural monopolies, (ii) due to the nature of the industry, the most accurate cost metric the Board should have used in its price-cost analysis was "total costs" instead of "product-based costs" (iii) for excessive pricing to occur, the relevant pricing policy should continue for a long period of time, whereas Tüpraş had allegedly applied excessive prices for only three months, (iv) there is no generally accepted benchmark that can be used to determine whether a price is excessive, and further, in its previous decisions, the Board had found profit margins that were higher than those of Tüpraş to not be excessive, (v) the Board should have conducted a price comparison analysis by reference to adjacent geographical markets with similar conditions, instead of comparing Tüpraş's prices in a domestic market with Platts Italy CIF Med and export prices, and (vii) the Board's decision did not account for the economic crises in 2008, which lead to fluctuations in petroleum prices as well as exchange rates, and ultimately caused Tüpraş to suffer a financial loss during the relevant time period.

The Court dismissed all these pleas and affirmed the Board's finding that Tüpraş is dominant in the markets and abused its dominance. In its assessment, the Court held that (i) Tüpraş had maintained a high market share in the relevant markets despite fluctuations over the years, (ii) the relevant markets were characterized by substantially high barriers to entry, (iii) distributors did not possess significant countervailing buyer power against Tüpraş, and that (iv) Tüpraş was the only player in the petroleum refining market in Turkey.

As regards the arguments against the Board's excessive pricing analysis, the Court found the Board's price comparison methodology valid as the market conditions did not allow a geographic price comparison due to dissimilar market conditions in adjacent markets. In its assessment, the Court first cited Article 10 of the Law No. 5015 on the Petroleum Market, which provides that "*the pricing for the purchase and sales of petroleum shall be determined according to the nearest accessible global free market conditions*." Second, the Court emphasized that the European Court of Justice ("***ECJ***") had not limited the methodology for the Economic Value Test and, on the contrary, had acknowledged that other methods can also be used for price comparisons. The Court also rejected the argument that the Board cannot deviate from the time period and profit-margin levels it used to assess excessive pricing in previous cases, and held that these factors would be considered on a case-by-case basis.[8]

Besides upholding a record fine for an exceptional type of infringement, this Court decision is also prominent given its detailed assessment of the legal test applicable to excessive pricing cases. In order to determine whether the Authority's test was accurate, the Court used the approach employed in the EU as a reference point. In particular, the Court cited the ECJ's *United Brands* decision, where excessive pricing was characterized as a strategy where the price charged "*has no reasonable relation to the economic value of the product supplied*."[9] This ECJ decision sets out a two-step test: (i) whether the difference between the actual costs and the price is excessive, and if so, (ii) whether the price is either unfair in itself or when compared to competing products. For the second step of the test, prices are usually compared geographically (*e.g., United Brands,*[10] *Lucazeau*[11]), and across competitors' prices (*e.g., United Brands*, *British Leyland*[12]).

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8 Tüpraş also argued that the petroleum market is regulated by the Turkish Energy Market Regulator (EPDK), and therefore, the Authority did not have jurisdiction in this case, and that the EPDK had investigated the same allegations but had not found a violation of the law. The Court dismissed this plea stating that the Turkish Competition Authority still had jurisdiction in competition-law-related matters in the energy market, even though the market is regulated by another public body. Furthermore, the Court noted that Tüpraş had been free to set the prices for the relevant products because they had not been subject to the EPDK's 2006 tariffs for petroleum.

9 ECJ Case 27/76 *United Brands*, 14 February 1978.

10 *Ibid.*

11 Judgment of 13 July 1989, *Lucazeau and Others v Sacem and Others*, Joined C: 110/88, 241/88, 242/88, EU:C:1989:326.

12 Judgment of 11 November 1986, *British Leyland Public Limited Company v Commission*, C: 226/84, EU:C:1986:42.

The Court emphasized that the Turkish competition law regime usually applies a two-step test as well, but unlike the European approach, the Board prioritizes price comparison over a price-cost analysis and only compares prices with costs if costs can be calculated with certainty.[13] Moreover, the Court noted the lack of EU and Turkish precedent regarding a standard duration or profit margin that would be applicable to all cases for assessing whether a price is excessive, and that the competition authorities do a case-by-case analysis. In this respect, the Court affirmed the Board's methodology, which demonstrated that Tüpraş's prices had been approximately 15%-20% higher on average than Platts Italy CIF Med prices for about three months.

Another noteworthy aspect of the decision is the Court's finding that a dominant firm can abuse its position regardless of whether it recorded profit or loss in the relevant period. The Court declared that the assessment of excessive pricing allegations should focus on whether consumers were harmed by the investigated practice rather than whether the company made a profit or sustained a financial loss during the relevant period. This approach is in line with previous Board decisions on excessive pricing, where the Board rejected financial loss defenses and determined that such pricing practices may harm consumers even if the relevant undertaking did not earn a profit in the relevant period.[14]

V. The Legal Test for Establishing Tying

The Court's decision also includes an extensive analysis on Tüpraş's pleas against the Board's findings with respect to tying practices. Tüpraş argued that (i) the Board's assessment on tying practices had been based on an inadequate review, (ii) the Board had not specifically identified tying and tied products, (iii) the Board had not investigated whether Tüpraş's alleged tying practices foreclosed the market, (iv) the relevant practices concerned issues of

[13] For instance, in the *Soda* decision (Board's Decision of April 20, 2016, no. 16-14/205-89), the Board compared the prices of Soda with its competitors' prices in order to assess whether Soda's prices were excessive. A similar methodology was applied in other decisions, such as *Belko* and *Tüpraş*.

[14] *See, e.g.*, *Belko*, Board's Decision of April 6, 2001, no. 01-17/150-39; *Congresium*, Board's Decision of October 27, 2016, no. 16-35/604-269.

contract law rather than competition law, and (v) Tüpraş's practices had aimed to maintain refinery production balances and thus had an objective justification.

In line with the Board's recent decisions[15] and Paragraph 86 of the Authority's Guidelines on Exclusionary Practices of Dominant Firms of 2014 ("***Dominance Guidelines***"), the Court held that the following three conditions must be cumulatively met for tying practices to be prohibited as an abuse of dominance: (i) the undertaking must be dominant in the market for the tying product, (ii) there must be separate markets for the tied and tying products, and (iii) tying practices must carry a potential of foreclosing the market. The Court also referred to the recent change in the Board's decisional practice regarding the third condition and affirmed that, for tying practices to be deemed unlawful, the Board must prove actual or potential foreclosure of the relevant market.[16]

As Tüpraş's dominant position had already been established through the excessive pricing analysis, the Court focused on the other two conditions and referred to the Board's findings with respect to the business strategies that Tüpraş had employed against POAŞ and Alpet from 2007 to 2009. According to the Board's decision, Tüpraş had repeatedly warned POAŞ that unless it purchased a certain amount of rural diesel from Tüpraş, Tüpraş would not supply other products in the amounts that POAŞ had requested. Since POAŞ had not increased its rural diesel purchases, Tüpraş restricted the supply of certain products to POAŞ, including gasoline, jet fuel and fuel oil. The Board further found that POAŞ had not been able to find an alternative supplier in a reasonable time, and thus, had been unable to sell certain products to its customers and failed to fulfill its obligation to maintain national reserves. Consequently, POAŞ had agreed to increase its rural diesel purchases from Tüpraş, and only then did Tüpraş

[15] *See e.g.*, *Google*, Board's Decision of December 28, 2015, no. 15-46/766-281; *TFF*, Board's Decision of November 26, 2014, no.14-46/834-375; *Coca-Cola*, Board's Decision of February 26, 2014, no. 14-08/159-69; *Ziraat Bankası*, Board's Decision of December 5, 2013, no. 13-69/935-395; *Siemens*, Board's Decision of November 15, 2012, no. 12-57/1540-553; *TTNET*, Board's Decision of September 30, 2010, no. 10-62/1287-488.

[16] In a number of decisions in the past, the Board had referred only to the first two conditions and had found tying practices to be unlawful regardless of their actual or potential foreclosure effects (*see, e.g.*, *Digitürk*, Board's Decision of September 7, 2006, no. 06-61/822-237). However, in its recent case law as well as in the Dominance Guidelines, the Board has adopted a more effects-based approach and has acknowledged that tying practices must at least have a potential to foreclose the relevant market in order to infringe competition law rules.

end its supply restrictions against POAŞ. By the end of the year, POAŞ was forced to increase its purchases to the amount that had been specified by Tüpraş.

As regards Tüpraş's other customer (Alpet), the Board found that Tüpraş warned Alpet to purchase both black liquid and white liquid petroleum products in similar amounts. Given that Alpet's white liquid petroleum product purchases were lower than what Tüpraş had requested for the relevant period, Tüpraş subsequently decreased the quantity of its supply to Alpet for all products by 20%, except for heating oil. After continuing this supply restriction strategy for approximately three months, Tüpraş informed Alpet that if Alpet did not buy white liquid petroleum products in the amounts that Tüpraş specified, Tüpraş would stop selling heating oil to Alpet in the amounts that Alpet requested as well. Consequently, Alpet was forced to significantly increase its purchases of white liquid petroleum products compared to previous months.

Based on these findings, the Court first held that the Board had explicitly identified the tying product and the tied product separately and dismissed Tüpraş's plea. The Court also upheld the Board's conclusion that Tüpraş's tying practices had anti-competitive effects because Tüpraş's customers had to make their purchases from Tüpraş instead of being able to switch to alternative suppliers.[17] In light of these findings, the Court held that all three conditions for an unlawful tying practice had been satisfied in the case at hand. Furthermore, the Court did not find Tüpraş's objective justification defense plausible.

VI. Conclusion

The Court's Tüpraş decision not only upheld the highest fine ever imposed on a single undertaking in Turkish competition law history, but also shed light upon crucial and (to a certain extent) unprecedented procedural and substantive issues in abuse of dominance cases, as well as competition law practice in general.

[17] It should be noted that, following the Authority's investigation, two of the five case handlers dissented from the majority view that Tüpraş's tying practices were unlawful. The Board decision does not elaborate on or provide the reasoning of the dissenting opinions.

This decision may pave the way to filling certain procedural gaps in the Law No. 4054 on the Protection of Competition and the application of criminal law principles to administrative law proceedings. Given the detailed analysis in the decision with respect to the two legal tests used for abuse of dominance assessments, it would also be reasonable to expect that the Court will not shy away from similar complex discussions in the near future and will continue to critically review the Board's substantive analyses.

This decision is particularly important due to its emphasis on a less interventionist and more effects-based approach to tying practices. It also recognizes the Authority's discretion to choose the appropriate methodology that should be employed in excessive pricing cases, to determine what price level should be considered excessive in a given market, and how long the pricing strategy should continue for the conduct to be found to restrict competition.

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