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## The Turkish Competition Authority fines a professional association for its protocol which resulted in prohibitions regarding competitors' offers and advertising activities (*The Customs Brokers Association of Istanbul / Ünsped Gümrük Müşavirliği ve Lojistik Hizmetleri*)

**ANTICOMPETITIVE PRACTICES, PROFESSIONAL ASSOCIATION, MARKET SHARING, SERVICES, SANCTIONS / FINES / PENALTIES, BARRIERS TO ENTRY, UNFAIR COMPETITION, ADVERTISING, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT**

Turkish Competition Authority, *The Customs Brokers Association of Istanbul / Ünsped Gümrük Müşavirliği ve Lojistik Hizmetleri*, 19-22/352-158, 20 June 2019 (Turkish)

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This case summary includes an analysis of the Turkish Competition Board's (the "**Board**") *Istanbul Customs Brokers Association* decision (20.06.2019; 19-22/352-158) in which the Board evaluated the allegations raised by Ünsped Gümrük Müşavirliği ve Lojistik Hizmetleri A.Ş. (a customs brokerage and logistics company) that the Customs Brokers Association of Istanbul ("**Association**") had violated Article 4 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") through its proposed protocol for the purpose of preventing unfair competition. The Association's protocol involved prohibitions for customs brokerage companies on providing offers and contacting customers, advertising activities, financing the costs and collaborating with non-registered persons for such activities etc.

### Background

The Board initially evaluated the sector and found that customs brokers were legally obliged to be affiliated with a customs brokers association. It, therefore, determined that the Association was established as a professional association in accordance with the Law on Customs numbered 4458 for protection of its members' benefits.

In its assessment of the relevant market, noting that the relevant product market can be defined as the market for "customs brokerage services," the Board nevertheless left the relevant market definition open in line with paragraph 20 of the Guidelines on the Definition of the Relevant Market which provides that the market definition

can be left open when the case in question does not give rise to competition law concerns regardless of how the market is defined. As for the relevant geographic market, while the Board acknowledged that brokerage services are offered nationwide, it left the ultimate geographic market definition open in the case.

The Association's decision subject to the complaint concerned prohibitions particularly on (i) providing offers and contacting customers without a written request, (ii) advertising activities, (iii) undertaking to finance the costs arising from the customs brokerage activities by offering a payment plan, and (iv) collaborating with non-registered persons for such activities. The Board found violation in the first three points of the decision.

As for the first prohibition, the Board assessed that the objective of the Association's decision was to restrict competition among members in terms of gaining customers, which is indeed against the nature of competition. It furthermore considered that the Association's decision would pose a significant barrier to entry into the relevant market, given that new entrants would lack customer portfolios at the outset, and accordingly, would not be able to provide offers to customers in their competitors' portfolios by any possible means. Accordingly, the Board noted that the members would not be motivated to improve their services, prices and commercial terms, as they would not face any competition pressure from other undertakings. In line with this reasoning, the Board evaluated that the Association's decision constituted a per se violation, considering that it aimed to eliminate the competition among members for gaining new customers.

In terms of the second prohibition, the Board considered that the first aspect of the prohibition related to the restriction of advertising activities. As customer-oriented information and marketing activities cannot be separately evaluated from competition and given that main elements of competition are commercial terms such as price and quality, the Board argued that a prohibition on advertising would indeed hinder supply of better services with more convenient prices with a better quality. From the Board's perspective, it could also result in asymmetric information that could prevent customers' access to better services as well and therefore this prohibition would adversely affect new entrants' abilities to compete against incumbents.

In relation to the second aspect, the Board stated that a prohibition on use of commercial titles should be evaluated on the same basis as the prohibition on advertising activities and found that the prohibition would lead standardization in the relevant market, which poses a risk of lowering benefits gained from competition. In this regard, the Board held that the Association's decision eliminated competition in the relevant market.

With respect to the third prohibition, the Board ascertained that a ban imposed on members by the Association concerning the financing their expenses arising from their services through payment plans would lead to a determination of sale conditions of its members. This, in turn, would amount to a restriction by object and violate Article 4 of the Law No. 4054.

As for the genesis of the Association's decision that entailed all these various prohibitions, the Board examined the evidence collected during the on-site inspections, and observed that the Association had been enforcing the same rules since 2006. The Board noted that the Association imposed sanctions on a member in 2017 who had failed to comply with the rules similar to those contemplated in the Association's decision.

Consequently, the Board evaluated the possibility of granting the Association's decision an individual exemption pursuant to Article 5 of the Law No. 4054. Due to negative consequences explained above, the Board eventually found that the Association's decision was a restriction on the members' abilities to compete each other and

therefore the protocol was detrimental for customers, which is found to be unlikely to create efficiencies that could eliminate those concerns arising therefrom. To the end, the Board concluded that an individual exemption cannot be granted to the Association's decision.

In light of the foregoing, the Board unanimously decided that the Association's decision violated the Article 4 of the Law No. 4054 and decided by a majority to impose an administrative monetary fine on the Association in the amount of TRY 31,076.89. This was calculated based on the observation that the Association had violated Article 4 of Law No. 4054 uninterruptedly between 2006 and 2018. Indeed, the Association had imposed sanctions in 2017 on a member who had failed to comply with the Association's decision.

### **Dissenting Opinion**

Prof. Dr. Ömer Torlak (the President of the Board at the time of the decision) dissented from the majority of the Board's approach and argued that no evidence found that could demonstrate the enforcement of the Association's decision for the years between 2006 and 2016, given that all of the findings obtained within the scope of the investigation related merely to 2017 and 2018.

### **Comments**

Istanbul Customs Brokers Association decision is a landmark decision as it sheds light on the Board's detailed analysis on decisions taken by associations of undertakings with respect to restriction of competition by object and effect. Furthermore, the decision is a useful example since it shows the Board's approach on how the prohibitions on advertisement and using commercial titles would be assessed from a competition law perspective. Finally, the decision also consists of a comprehensive analysis for the calculation of fines based on the controversial arguments regarding the duration of the violation.