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Taxi, please! Has the Competition Board Chosen its Legislative Side Regarding the Liability of Facilitators?

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Cartel facilitators are viewed as possible instruments for undertakings to disguise their restrictive agreements and to get around competition law obligations.[1] The approach that enables third parties to be held liable as "*cartel facilitators"* under the EU competition law dates back to the 1980s, when the European Commission ("***Commission***") decided for the first time in *Italian Cast Glass*[2] that the third party, which was not active in the affected market but enabled and assisted the implementation of the restrictive behavior, was jointly liable for the cartel.

Although the Commission did not impose any fines on the facilitator in the *Italian Cast Glass* decision, this was not the case in the *Organic Peroxides,*[3] in which the Commission imposed a symbolic monetary fine on a consultancy firm, AC-Treuhand, which was the first penalty of its kind. Subsequently, the Commission investigated AC-Treuhand's activities once again in the *Heat Stabilisers*[4] case, where it deemed that AC-Treuhand played a central role in the cartel by producing, distributing and collecting the agreed market shares and prices, and imposed fines on the facilitator.[5]

[1] IBA Competition Law International, Volume 13, No. 1, April 2017, 79-95 - Gonenc Gurkaynak, Ceren Özkanlı, Su Şimşek, and Nazlı Ceylan Mollaoğlu, Shady Contours of Cartel Liability of Service Providers.
[2] Case V/29.869, *Italian Cast Glass*, December 1980.
[3] Case COMP/E-2/37.857,*Organic Peroxides*, December 2003.
[4] Case COMP/38.589, *Heat Stabilisers*, November 2009.
[5] IBA Competition Law International, Volume 13, No. 1, April 2017, 79-95 - Gonenc Gurkaynak, Ceren Özkanlı, Su Şimşek, and Nazlı Ceylan Mollaoğlu, Shady Contours of Cartel Liability of Service Providers.

In the Commission's *Yen Interest Rate Derivatives (YIRD)*[6] decision ICAP, a broker, was also issued a significant fine for its role in six cartels. Although ICAP was deemed as a cartel facilitator, it differed from the previously mentioned decisions, in that ICAP's relations with the other cartelists were more direct and its connection to the affected market much closer while in *Organic Peroxides* and *Heat Stabilisers* the facilitators were not active in the affected market and their relationship with the cartelists were solely limited to that of a service provider and its client.[7]

There are cases about cartel facilitators also at the national level in the EU member countries. For instance, in the Finnish Competition and Consumer Authority's *FMCG market*[8] decision it was decided that Finnish retailers may not disclose their sales data to any third party aggregator, which serves as a reminder of the liability that data aggregators can face as facilitators. Another example is the decision regarding software and algorithm developers by the Spanish Competition Authority ("***CNMC***") where it was investigated whether two real estate intermediation franchises and five suppliers of IT solutions for real estate brokerage breached antitrust rules with their use of software and digital platforms, and whether the conduct has been facilitated by firms specialized in IT solutions through the design of real estate brokerage software and the algorithms embedded in them.[9] Lastly, in *Eturas*[10] decision the online framework used by customers to purchase tours on the travel agencies' websites via the e-turas system was investigated and the Supreme Court of Lithuania decided that Eturas had implemented a discount limit in the system and thus violated the Law on Competition.

The Turkish Competition Board's ("***Board***") approach regarding third party cartel facilitators was first revealed in its *Duru Bilişim*[11] decision, and later reinforced with the Board`s investigation into the price fixing allegations in the sale of taximeter market, to determine whether the relevant undertakings had violated Article 4 of the Law No. 4054 on Protection of

[6] Case COMP/AT.39861, *Yen Interest Rate Derivatives (YIRD)*, February 2015.
[7] Competition Law & Policy Debate, Volume 1, Issue 2, May 2015 - The service provider as cartel facilitator: assessing 'third party' liability under Article 101 TFEU - Brian N. Hartnett and Will Sparks
[8] See www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=tiedotteet&-sivu=tied/t-2008-11
[9] Unofficial document of the CNMC; see https://www.concurrences.com/IMG/pdf/2020219_np_intermediation_market_en.pdf?64220/f2ae1bee33239a03501c685479c7dfa508171675
[10] Case No A-97- 858/2016, judgment of 2 May 2016, Lithuanian Supreme Court. See: https://www.lvat.lt/en/news/sacl-has-rendered-a-decision-in-the-travel-agencies-case/390
[11] Turkish Competition Board's decision dated December 2, 2013 and numbered 13-67/929-391 ("*Duru Bilişim")*.

Competition ("***Law No. 4054***") which was finalized at the beginning of 2021 ("***Taximeter***").[12] The decision is particularly noteworthy as it is the second time that fines were also imposed on the cartel facilitators since the Board's *Duru Bilişim* decision back in 2013. The difference between the two decisions, however, is that in its *Taximeter Decision* the Board based its assessment on Article 4 of Law No. 4054, instead of Article 14 of Law No. 5326 on Misdemeanors ("***Law No. 5326***") that regulates complicity, which was the case in *Duru Bilişim*.

i. Evolution of the Board's Approach on the Facilitators

While significant in their own rights, *Taximeter* and *Duru Bilişim* decisions are not the first instances where the Board confronted facilitators. As a matter of fact, the Board has come across a number of other cases where it had to evaluate the position of facilitators in the past. For instance in its *Peugeot*[13] decision, the Authority investigated whether Peugeot Turkey Distributor Council had violated Law No. 4054 by way of setting the prices and profit margins of its distributors and fixing the discount rates for sales, distribution, and insurance companies with the help of a third party, *i.e.*, the Method Research Company. Ultimately, the Board decided that although Method Research Company`s acts assisted the undertakings to engage in continued price maintenance and price fixing, unlike in *Organic Peroxides*, the Method Research Company did not '*intentionally and actively*' participate in the cartel; concluding that a full-fledged investigation against the third party research company was not required at this stage.[14]

Other examples include the full-fledged investigations conducted against *Citroen Dealers*,[15] *Toyota Dealers*,[16] and *Hyundai Dealers*[17] concerning the allegations that certain car dealers agreed to determine the sales prices and conditions of their branded cars with the help of a third party consultancy firm and kept tabs on the participating dealers, so that the dealers who acted in violation of the agreed price would be fined at an increasing rate in the first three instances of violating actions, and that the dealership would be cancelled upon the fourth

[12] Turkish Competition Board's decision dated March 11, 2021 and numbered 21-13/174-75 (*"Taximeter")*.
[13] Turkish Competition Board's decision dated January 8, 2009 and numbered 09-01/8-7.
[14] IBA Competition Law International, Volume 13, No. 1, April 2017, 79-95 - Gonenc Gurkaynak, Ceren Özkanlı, Su Şimşek, and Nazlı Ceylan Mollaoğlu, Shady Contours of Cartel Liability of Service Providers.
[15] Turkish Competition Board's decision dated September 23, 2010 and numbered 10-60/1274-480.
[16] Turkish Competition Board's decision dated November 20, 2012 and numbered 12-58/1556-558.
[17] Turkish Competition Board's decision dated December 16, 2013 and numbered 13-70/952-403.

instance. In these cases, it is seen that a report was received from the audit firm for the implementation of this fine that could be imposed on the dealers; and the penalty was decided by the majority of the members of the council that the dealers had formed amongst themselves. While the third party consultancy firm could be held liable according to the principles established in EU cases despite not being active in or nor having any direct connection to the product market, in these cases the Board did not touch upon this issue, and thus did not hold the consultancy firm liable for providing these services which enabled the dealers to actively seek out any violations of their price agreement.

Similarly, in its *Yeast Producers*[18] decision, the Board launched a full-fledged investigation against four fresh yeast producers to determine whether they had violated Article 4 of Law No. 4054 through colluding to set prices for fresh bread yeast by way of appointing an ombudsman for coordinating, overseeing and other services of the cartel such as carrying out communications between the competitors. While the Board established that the ombudsman had facilitated the cartel and ensured that it operates effectively, once again, it did not hold the facilitator responsible for the conduct in question.

ii. The Board's Duru Bilişim Decision

The decisions referred above should not, however, be interpreted to set a precedent for the Board`s approach, as the Board chose to impose fines upon the facilitator of a cartel pursuant to Article 14 of Law No. 5326, in the *Duru Bilişim* decision dated 2013.

In the *Duru Bilişim* case, the investigation was launched upon allegations that the building inspection undertakings hindered competition in the market via price determination or customer sharing through a system established among them by way of software developed by a third party, *i.e.,* Duru Bilişim. The Board determined that Duru Bilişim, which is active in the market for software production, promoted its software products as a "*Pooling system that allows the equal sharing of construction areas in cities, based on a certain order*." In light of this, the Board stated that Duru Bilişim's software is used as a platform to facilitate the cooperation between undertakings in the building inspection market and thus dove deeper into Duru Bilişim's status and liability with regards to allegations.

[18] Turkish Competition Board's decision dated October 22, 2014 and numbered 14-42/783-346.

In line with this, the Board concluded that although Duru Bilişim was not active in the building inspection market itself, its practices in the software market constituted facilitating acts for the investigated infringements. Pursuant to Article 14 of Law No. 5326 which states that in the event that more than one person participates in the commission of a misdemeanor, an administrative fine is imposed on each of these as the perpetrator, those cartel facilitators are regarded the same as cartelists themselves, and therefore, they are also fined accordingly.

The legal basis for Article 14 of the Law No. 5326 indicates that there is no distinction between perpetrators and accomplices (instigator or helper) in the commitment of misdemeanors. Having said this, Article 14 of the Law No. 5326 explicitly requires the existence of intent for complicity, thus the Board also analyzed whether Duru Bilişim had any intent to engage in these acts. Accordingly, the Board found that Duru Bilişim was a vital element for the functioning of the system subject to investigation and that the information sharing, the infrastructure in which this information would be collated and its continuity was essential for the functioning of this system. Therefore, it was concluded that Duru Bilişim not only played an active role in committing the misdemeanor but also deliberately carried out its actions and expected the results; hence establishing the element of intent.

Thus, the Board decided that Duru Bilişim was complicit in the violation of Article 4 of the Law No. 4054 and would be fined according to Article 14 of the Law No. 5326, despite being the facilitator and not a direct participant within the cartel.

iii. The Board's Taximeter Decision

Upon allegations that certain suppliers are fixing the prices of taximeter devices and related services, a full-fledged investigation was initiated to determine whether Article 4 of the Law No. 4054 was violated. In its assessment of the e-mail correspondences, the Board found clear evidence that the parties are in an effort to fix the prices of various products and services for taxis, including how the bundled services and products prices will be provided to customers. During the inspections, the Board also came across various correspondences where Ata Taksimetre Muayene Servisleri Ltd. Şti. ("***Ata***") and Paşa Taksimetre Ltd. Şti. ("***Paşa***") sent daily cash reports on various products and services such as taximeters, payment methods and total fees. In this vein, the cash register reports are thought to be prepared in order to

monitor the transactions at first glance and contain information such as "*the nature of the transactions*" and "*total fees*". Thus, the Board considered that these reports could also serve to control the prices conferred to the dealers by those taximeter provider companies that jointly determine prices of various products and services, including the taximeters.

Against this background, which shows the correspondences and the parallel price increases, the Board determined that there was enough evidence to conclude that Alberen Elektronik İnşaat Sanayi ve Ticaret Ltd. Şti. ("***Alberen***"), Atak Taksi Elektronik İç ve Dış Ticaret Ltd. Şti. ("***Atak***") and Tetaş Elektronik Ltd. Şti. ("***Tetaş***") were fixing the prices among themselves. On the other hand, the Board found that there are no documents directly showing that Paşa and Ata, which had mainly provided inspection services, were in a price agreement with the other undertakings. However, the Board did not stop there and stated that since the cash reports sent by Paşa and Ata to Alberen, Atak and Tetaş included information on the "*nature of the transaction*" and "*total fees*", the Board determined that this could also serve to monitor the prices which were jointly determined by the taximeter supply companies and conferred to the dealers for their various products and services. In the same vein, Ata and Paşa stated in their defenses that the sharing of cash reports with taximeter suppliers was brought to an end after it was understood that it raised competitive concerns.

In this context, the Board concluded that while Ata and Paşa are not directly party to the cartel, their conduct facilitates the implementation, continuation and control of the cartel and should be considered as a violation within the framework of Article 4 of Law No. 4054.

iv. Conclusion

In light of the above, after a long timeline of mixed Board decisions on the liability of the facilitator entity, it seems that the Board has now chosen its side and adopted the approach to impose fines based on Law No. 4054, whereas previously, it had chosen to either overlook the facilitator completely, or impose monetary fines based on Law No. 5326. However, this new approach adopted by the Board in *Taximeter* fails to provide its reasoning on the limits of liability for cartel facilitators. It will certainly raise the question whether or not this method violates the principle of *nullum crimen, nulla poena sine lege* ('no crime or punishment without a law'), a cornerstone concept in criminal law which, in this case, emphasizes that distinguishing between perpetrators and accomplices is essential and reiterates the necessity

of a separate definition regarding the liability of accomplices under Turkish competition law.[19] While this may be so, facilitator undertakings would most probably argue that they do not fall within the "*restricting the competition*" aspect of the particular prohibited act, as the relevant legislation is directed only at the actual parties of such restrictive agreements.

The Board's recent *Taximeter* decision is of importance as, in addition to being the first time that fines were also imposed on cartel facilitators since the Board's *Duru Bilişim* decision back in 2013, there is a major twist on the statutory basis of the fine. While this may be the case, the *Taximeter* decision, although being the most recent, is perhaps not yet sufficient to state that the Board has definitively chosen a side and will apply Law No. 4054 on facilitators going forward, as we have yet to see whether the Board will persist on this front. Finally, although it can be argued that the approach regarding liabilities of third party facilitators in cartel cases is not yet consistent, upon further inspection it is looking more and more like data aggregators and software developers, who are in possession of commercially sensitive information, are being held liable as facilitators.

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[19] IBA Competition Law International, Volume 13, No. 1, April 2017, 79-95 - Gonenc Gurkaynak, Ceren Özkanlı, Su Şimşek, and Nazlı Ceylan Mollaoğlu, Shady Contours of Cartel Liability of Service Providers.