

Competition - Turkey

Competition Board withdraws predatory pricing allegation

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Introduction

The Turkish Competition Board recently concluded its investigation against Turkish Airlines with no condemnation.

On July 8 2010 the Competition Board initiated an investigation (10-49/923-M) against Türk Hava Yolları AO (Turkish Airlines), based on a complaint made by Pegasus Hava Taşımacılığı AŞ. Pegasus, a low-cost airline with the biggest flight network in Turkey, alleged that Turkish Airlines had abused its dominant position by engaging in exclusionary practices with its domestic and international flights departing from Istanbul.

As officially announced on January 5 2012, the Competition Board's 18-month investigation was concluded at its meeting held on December 30 2011,⁽¹⁾ after extremely high levels of data collection and processing, three sets of written defences and an oral hearing. In its unanimous decision, the Competition Board decided that Turkish Airlines did not abuse its dominant position by engaging in exclusionary practices against the competing undertaking, within the scope of Article 6 of Law 4054 on the Protection of Competition, in terms of its domestic and international flights departing from Istanbul. For this reason, an administrative monetary fine could not be imposed.

However, the Competition Board's decision should be notified to the relevant undertakings and public institutions and organisations in order to preserve healthy competition on the relevant market, in view of issues such as slot allocations and international bilateral aviation conventions.

Investigation Committee position

The Investigation Committee of the Competition Authority, as tasked by the Competition Board with conducting the investigation, brought the following allegations against Turkish Airlines and suggested to the Competition Board that an administrative monetary fine be imposed on Turkish Airlines due to infringement:

- Turkish Airlines enjoyed a dominant position and conducted predatory pricing, in violation of Article 6 of Law 4054.
- When determining the geographic market used to evaluate dominant position, Sabiha Gökçen International Airport (SGIA) and Istanbul Atatürk Airport (IAA), which are located on opposite sides of Istanbul (ie, the Anatolian side and the European side, respectively) could be considered substitutable - for this reason, both airports should be considered within the same relevant geographical market.
- When evaluating dominant position, matters including market shares, status of the flag carrier airline, slot allocation, historical rights, the structural junction with the General Directorate of State Airports Authority, horizontal and vertical agreements, hub and spoke facilities, allocation of airport gates, marketing strategies and brand value were taken into consideration.
- In scrutinising flights departing from and arriving at SGIA on a route basis, save for a very small number of routes (eg, Trabzon, Diyarbakır, Van, Ercan, Cologne and Basel), Turkish Airlines was dominant across all routes.
- A similar revenue-cost analysis of the routes of Turkish Airlines flights departing from and arriving at SGIA demonstrated predatory pricing on routes where sales

below the average avoidable costs were made.

- It was alleged that when calculating the administrative monetary fine, a higher rate should be taken into consideration given Turkish Airlines' market position and economic power.

Turkish Airlines' response

In response to the allegations made by the Investigation Committee, counsel for Turkish Airlines argued the following, in both the three rounds of written defences and the three-hour oral hearing.

Substitutability

Arguing that there was neither demand-side nor supply-side substitutability between SGIA and IAA, Turkish Airlines's counsel made the following points:

- SGIA and IAA are substantially geographically distant from each other and there are significant differences in terms of the means of transportation to both airports.
- In flights from the same point of arrival, the IAA market can accommodate relatively higher prices due to demand and market dynamics. IAA's occupancy rate is higher than (or on a par with) that of SGIA. Furthermore, no passenger transition could be observed from IAA to SGIA or from SGIA to IAA (even following a sustained small but significant price increase at SGIA).
- There are significant differences between the two airports in terms of:
 - flight services;
 - customer preferences;
 - hinterland;
 - operational costs;
 - transit flight capability - IAA is a central airport for transit flights, but SGIA is not;
 - number of passengers;
 - capacity used;
 - size;
 - runway facilities;
 - routes; and
 - slot allocations.
- The statements submitted by Turkish Airlines' competitors to the Competition Board made clear that SGIA and IAA are indeed different markets.
- In a correctly defined relevant market (ie, where points of origin and destinations are determined based on the airport rather than city), Turkish Airlines is not in a dominant position, given the dynamic nature of the market and the evolution it has undergone.

Predatory pricing

Counsel for Turkish Airlines further argued that none of the criteria that must be satisfied for a determination of predatory pricing were met.

When determining whether prices in the aviation and passenger transportation industries are below cost, instead of assessing profitability on a route basis only, the calculation should also have taken into consideration:

- total revenue and profitability;
- ticket prices;
- number of flights; and
- occupancy rates on a certain route.

In cases where the prices of a dominant undertaking are higher than those of its competitors and/or the average market, sales made below cost cannot be construed as an infringement. Turkish Airlines further argued that for allegations of predatory pricing to be upheld, the competitor must exit the market (or be at risk of exiting the market).

Therefore, in order for arguments on predatory pricing to succeed, an intention to exclude competitors should be justified. In this case the effect on competitors and the market dynamics of sales made below cost in the short term were also restricted in direct proportion. Accordingly, competitors were not at risk of exiting the market. Direct interventions on prices in competition law should always be the last resort. The aim of competition law is not to protect competitors, but to protect the competition process.

Comment

Until the reasoned decision is published, it is not possible to envisage how the balance between the allegations and defences resulted in a conclusion that there was no infringement. However, it can be anticipated that the Competition Board's decision will

include insightful evaluation on:

- whether airports located in cities can be automatically substitutable with each other in the airline and passenger transportation industries;
- which points of interest must be laid out when making predatory pricing analyses; and
- how sensitivity must be shown when intervening with those markets that are currently competitive.

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Endnotes

(1) The Competition Board's reasoned decision has not yet been published. However, the short-form decision has been published on the Turkish Competition Authority's official website. The press release notifying the short-form decision can be accessed at www.rekabet.gov.tr/dosyalar/images/file/tefhimler/metin.pdf.

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