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The Turkish Competition Authority revisits the agreement and decision of association of undertakings concepts in a cartel case between electrical engineers (*Ahmet Batuhan BURAKÇIN / Alanya Sistem / Emre TAŞCI / Fatih AKÇOCUK / Hakan PEKUYGUN / Murat Fevzi YILDIZ...*)

ANTICOMPETITIVE PRACTICES, PROFESSIONAL ASSOCIATION, CARTEL, PRICE FIXING, SETTLEMENT, HARDCORE RESTRICTION, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT, ELECTRICITY

Turkish Competition Authority, *Ahmet Batuhan BURAKÇIN / Alanya Sistem / Emre TAŞCI / Fatih AKÇOCUK / Hakan PEKUYGUN / Murat Fevzi YILDIZ...*, Decision, 5 January 2023 (Turkish)

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This case summary aims to offer insight regarding the Turkish Competition Board's ("Board") Chamber of Electrical Engineers Decision [1] ("Decision"), where the Board assessed whether a group of electrical engineers who are members of the Chamber of Electrical Engineers, District Representation in Alanya ("Chamber") has violated Article 4 of Law No. 4054 on the Protection of Competition ("Law No. 4054") by way of fixing minimum prices. The Board concluded that the electrical engineers, either personally or via the companies they control have been engaged in a cartel. The investigation [2] ("Investigation") concluded by way of settlement involving all the parties to the Investigation.

The Board's Assessment on the Nature of the Conduct

By way of a summary, the Board noted that a group of electrical engineers operating in Alanya district have agreed through WhatsApp correspondences and prepared a protocol with the intention of implementing it. Before delving into the question on whether the alleged conduct actually have violated Article 4 of Law No. 4054, the Board initially made an assessment to determine whether the conduct could be characterized as an agreement or an association of undertakings decision, considering that the correspondences included in the findings have occurred between electrical engineers that are members of a professional association.

In determining whether the protocol prepared by the electrical engineers could be characterised as an association of undertakings decision, the Board referred to the academic literature. The Board noted that according to certain authors in order for a conduct to be characterised as an association of undertakings decision, such a decision should (i) stem from the status of the association, (ii) reflect the will of the bodies of the association and (iii) be approved by the members of the association [3]. The Board remarked that the Chamber did not have any decision-making or executive bodies, thus the protocol and the decisions taken in the WhatsApp correspondences do not reflect the will of the association's bodies. Additionally, the Board concluded that the decisions made in the WhatsApp correspondences did not stem from the status of the association, despite the fact that persons involved in such decision making process were members of the Chamber.

Furthermore, the Board remarked referring to another opinion in the academic literature [4] that in order for a conduct to be characterised as an association of undertakings decision, such a decision must be legally valid. In that context, the Board indicated that the Chamber was authorized to implement decisions that are taken by its parent organization, the Chamber of Electrical Engineers ("EMO"), but lacks the authority to take independent decisions itself. To that end, under the assumption that a decision was taken by the Chamber, the Board stated that such a decision could not be deemed legally valid.

The Board further examined whether the will of the group is binding among the parties. In this respect, the Board concluded that the decisions taken in the WhatsApp group are binding among the members of such group and the decisions taken in the group could be characterised as an agreement between undertakings.

Moreover, the Board referred to *COAPI decision [5]* of the European Commission regarding the distinction between agreements and decisions of association of undertakings. By way of referring to the criteria set forth in the respective decision, the Board remarked that the conduct at hand could not be characterised as a decision of association of undertakings, given the absence of a regulation put into effect by bodies that are competent to make decisions.

Furthermore, the Board examined whether the electrical engineers could be characterised as undertakings individually. The Board concluded that the electrical engineers fall within the definition of undertaking set out under Law No. 4054, which is as following: "Natural and legal persons who produce, market and sell goods or services in the market, units which can decide independently and constitute an economic whole". The Board also noted that the electrical engineers also satisfy the criteria of operating independently of another undertakings' will and operations, hence could be qualified as undertakings. Against the foregoing, the Board remarked that each of the freelance consulting engineers, who are parties to the Investigation, would be qualified as an undertaking.

The Board's Assessment on the Findings

It was found that a meeting was held between the electrical engineers on December 20, 2021 to determine project prices that electrical engineers offer for their services. It was also found that the participants of the said meeting drafted a protocol regarding the project prices and the draft protocol was presented to other members. The Board also found correspondences indicating that the parties to the Investigation have attempted to control the prices that did not comply with the agreed-upon minimum project fees, by way of delaying the municipal approvals.

Furthermore the Board found correspondences indicating that the parties to the Investigation made a protocol to fix project prices and also found the protocol documents itself. The Board found that project prices were fixed by the Investigation parties, in light of the following clauses of the protocol: *"Project fees will be offered based on the PID/2 cost over the minimum EMO prices determined for the relevant year + VAT, and invoices or self-employment invoices will be issued based on this amount. (...) Members are not allowed to engage in actions and behaviours that*

constitute unfair price competition. Members are not allowed include additional services, tasks, or projects from different engineering disciplines in the fees they charge for project service. Members are not allowed to refund or receive return invoice for the fees they have invoiced. Moreover, the Board found correspondences indicating that EMO had no influence or control over the agreement made by way of the protocol. These correspondences include the remarks of a representative of the Chamber explaining that the protocol was agreed upon by the members of the Chamber, individually, not as a group or under the Chamber itself.

Individual Exemption Analysis

The Board also assessed whether the conduct at hand could benefit individual exemption. In that context, the Board initially stated that the alleged conduct would be characterised as a cartel, since it concerned fixing of minimum project prices by a group of electrical engineers.

In terms of the individual exemption analysis, the Board remarked that cartel agreements are the most prominent type of agreements prohibited under competition law and cartels restrict competition, while not generating any benefits that may outweigh their negative effects. The Board further noted that cartels raise prices above the competitive level and harm consumers as well as society. The Board remarked that the conduct at hand could not satisfy the first condition of individual exemption, namely, ensuring new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services, let alone other conditions for individual exemption. To that end, the Board did not examine the other conditions for individual exemption and concluded that the alleged conduct could not benefit from individual exemption.

Assessment on Administrative Monetary Fine and Settlement Mechanism

While the investigation was ongoing, all of the parties to the Investigation requested to initiate settlement procedure as per Article 43 of the Law No. 4054. These requests were accepted by the Board and the Board decided to initiate the settlement process on December 1, 2022.

As a result of the settlement procedure, the Board and the parties to the Investigation settled the case and a reduction by 25% were applied to the administrative monetary fines that were determined to be imposed on parties. While the base fine ratio was determined within the limits of a cartel type infringement, the Board reduced the administrative monetary fine ratio of the parties to the Investigation by 60% taking a mitigating factor into account. In that context, the Board considered the minimal share that activities of the Investigation parties related to the infringement occupy within the parties' annual turnovers as a mitigating factor.

Conclusion

The Decision of the Board provides an up-to-date insight as to the distinction between the agreements and decisions of association of undertakings. Additionally, the Decision signifies Turkish Competition Authority's best efforts to tackle cartels without discriminating by the scale of undertakings involved thereof.

[1] Decision of the Board dated 05.01.2023 and numbered 23-01/25-11.

[2] Investigation launched with the Board's decision dated October 20, 2022 and numbered 22-48/699-M.

[3] GÜZEL, Oğuzkan (2003), Undertakings and Associations of Undertakings in Competition Law ("Rekabet Hukukunda Teşebbüs ve Teşebbüs Birlikleri"), Turkish Competition Authority, Expert Thesis, Ankara, p.51.

[4] TOPÇUOĞLU, Metin (2001), Associations of Undertakings in Competition Law Practice ("Rekabet Hukuku Uygulamasında Teşebbüs Birlikleri"), Ankara University Faculty of Law Magazine, p.154.

[5] JO L 122, 2.6.1995.