Increased Interest of the Turkish Competition Board in Pricing Behaviors of the Undertakings

In Turkey, unilateral conduct of a dominant undertaking is restricted by Article 6 of the Law on the Protection of Competition ("Law No. 4054"). It provides that "any abuse on the part of one or more undertakings, individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited." Although Article 6 does not define what constitutes "abuse" *per se*, it provides five examples of forbidden abusive behavior, which comes as a non-exhaustive list, and falls to some extent in line with Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Accordingly, these examples include the following:

> *a. directly or indirectly preventing entries into the market or hindering competitor activity in the market;*
> *b. directly or indirectly engaging in discriminatory behavior by applying dissimilar conditions to equivalent transactions with similar trading parties;*
> *c. making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services or; acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;*
> *d. distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market;*
> *e. limiting production, markets or technical development to the prejudice of consumers.*

It is been apparent that similar to principles adopted under the TFEU, both exploitative and exclusionary abuses fall within the prohibitions provided under Article 6 despite the fact that the wording of the provision does not contain a specific reference to this concept.

Although the Competition Board has never (apart from the Turk Telekom decision dated 19.11.2008 and numbered 08-65/1055-411, which concerns margin squeeze rather than straight forward predatory pricing) condemned an undertaking on the basis of predatory pricing, as evidenced by many precedents, the Competition Board is considered fairly familiar with the elements of the predatory pricing (see e.g. Trakya Cam decision dated 17.11.2011

and numbered 11-57/1477-533, Denizcilik İşletmeleri decision dated 12.10.2006 and numbered 06-74/959-278, Feniks decision dated 23.08.2007 and numbered 07-67/815-310). That said, it can also be put forward that complaints filed on this basis are frequently dismissed because of the Competition Authority's reluctance to micro-manage pricing behavior. Therefore, an uncertainty remains on the conditions of pricing behavior that can be deemed as predatory.

At the end of 2011, the Competition Board issued a decision concerning predatory pricing in the airlines sector, which appears as quite promising in terms of setting a landmark case in relation to the predatory pricing issue.

The Competition Board initiated an investigation on July 8, 2010, with investigation number 10-49/923-M, against Türk Hava Yolları A.O. ("Turkish Airlines") based on the complaint that was made by Pegasus Hava Taşımacılığı A.Ş. ("Pegasus"), low-cost airline that has the widest flight network in Turkey, alleging that Turkish Airlines abused its dominant position by way of engaging in exclusionary practices with its domestic and international flights departing from Istanbul. The Competition Board's investigation was concluded at its meeting held on December 30, 2011. In its unanimous decision, the Competition Board decided the following:

- Turkish Airlines did not abuse its dominant position by way of engaging in exclusionary practices, within the scope of Article 6 of Law No. 4054, with its domestic and international flights departing from Istanbul, against the competing undertaking, and for this reason, an administrative monetary fine could not be imposed.
- Nonetheless, the Competition Board's decision should be notified to the relevant undertakings and public institutions and organizations in order to preserve a healthy competition milieu in the relevant market, in view of issues such as slot allocations and international bilateral aviation conventions.

The Investigation Committee that was assigned by the Competition Board to conduct the investigation brought forward the following allegations against Turkish Airlines and

suggested to the Competition Board that an administrative monetary fine be imposed on Turkish Airlines:[1]

- Turkish Airlines is in a dominant position and conducting predatory pricing. For this reason, it violated Article 6 of Law No. 4054.
- In the determination of the geographic market that was used to evaluate dominant position, the Sabiha Gökçen International Airport ("SGIA" or "SAW") and the Istanbul Atatürk Airport ("IAA"), which are located on two different sides of Istanbul (i.e. the Anatolian side and the European side, respectively), were substitutable and for this reason, both airports should be considered within the same relevant geographical market.
- In evaluating dominant position, matters such as market shares, status of 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.
- By basing on the revenue – cost balances predatory pricing was observed in routes where sales below the average avoidable costs were made.
- It has been alleged that when calculating the administrative monetary fine, a higher rate should be taken into consideration given Turkish Airlines' market position and economic power.

In response to the allegations brought by the Investigation Committee, ELIG principally argued the following in both the written and the oral defenses:

- ***There is neither a demand-side nor a supply-side substitutability between SGIA and IAA.***
  - SGIA and IAA are geographically distant from each other in a substantial manner and there are significant differences in terms of the means of transportation to both airports.

[1] ELIG acted on behalf of Turkish Airlines in the investigation. For this reason, this chapter comprises of the evaluations of the allegations and defenses, as ELIG directly is acquainted with, and aims to delineate the central issues which culminated in the final decision, without breaching any obligation that may arise as a result of confidentiality in respect of the investigation. Evaluations set out herein do not include or constitute any expression, finding, inference or evaluation on the Competition Board's reasoned decision regarding the investigation, nor can it be construed to include as such.

- In flights of same point of arrival, the IAA market can take on relatively higher prices due to demand and the market dynamics. IAA's occupancy rate is higher than SGIA or at par with SGIA. Further, there is no passenger transition observed from IAA to SGIA. The same also holds true for an analysis that is to be made vice versa: with a sustained small but significant price increase that may be observed at SGIA, there will be no passenger transition from SGIA to IAA. As a matter of fact, there is no passenger transition from SGIA to IAA.
- There are extremely significant differences between the two airports in terms of the flight services rendered to passengers.
- There are significant differences between the two airports in terms of customer preferences.
- The two airports have different hinterlands.
- There are significant differences between the two airports in terms of operational costs.
- IAA is a central airport for transit flights. The same is not the case for SGIA.
- There are indisputable differences between the two airports in terms of factors such as number of passengers, the capacity that is used, size, runway facilities and routes.
- There are significant differences between the two airports in terms of slot allocations.
- The statements submitted by Turkish Airlines' competitors to the Competition Board made evident that SGIS and IAA are indeed different markets.
- In a correctly defined relevant market (i.e. where points of origin and destinations 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 undergoes.

    - ***None of the criteria that should be sought for the determination of predatory pricing was satisfied.***

- In determining whether prices in the aviation and passenger transportation industries are below the costs, total revenue and profitability, ticket prices, number of flights and occupancy rate at a certain route should be taken into consideration.

- In cases where the prices of the undertaking which is in a dominant position are higher than those of its competitors and/or the average market, sales made below costs cannot be construed as an infringement.
- The pre-requisite for allegations of predatory pricing is the competitor exiting the market or being under the risk of exiting the market.
- In order for the arguments on predatory pricing to succeed, the intention to exclude competitors should be justified.
- The effect on competitors and the market dynamics of sales made below cost in the short-term is also restricted in direct proportion. Accordingly, competitors cannot exit the market and a risk to exit the market does not arise.
- Direct interventions on prices in competition law should always be the last resort.
- Competition law's aim is not to protect the competitor, but to protect the competition process.

Naturally, it is not possible prior to the publication of the reasoned decision to foresee what the balance induced between the foregoing allegations and defenses was so as to result in a conclusion of no infringement. However, it can readily be anticipated that the Competition Board's decision includes a rather insightful evaluation on whether airports located in cities can be automatically substitutable with each other in the airline and passenger transportation industries, on which points of interest must be laid out when making predatory pricing analyses, and on how utmost sensitivity must be shown when intervening with the undertakings' pricing behaviors.

In addition to the foregoing case concerning predatory pricing, in line with Competition Board's clearly observed recent interest in pricing behaviors, there has also been a pre-investigation conducted by the Competition Board concerning excessive pricing through dynamic pricing.[2] The pre-investigation was conducted against Istanbul Deniz Otobüsleri ("IDO") (the undertaking that is active in ferry, sea bus and ferryboat operations in Istanbul) upon various complaints alleging that IDO has been conducting excessive pricing by using a recently launched dynamic pricing system and applying different prices through different

[2] Dynamic pricing can be described as a revenue management system that utilizes variable pricing for fares dependent on availability and how far in advance travel is booked, where cheaper fares can be found by booking further in advance and at off peak times, rising at peak times and for later booking.

sales channels. After careful examinations through its decision dated 31.05.2012 and numbered 12-29/854-254[3], the Competition Board dismissed the complaint and decided that there is no need to conduct a full-fledged investigation on the matter. While the reasoned decision is not available yet, it can already be anticipated that the dynamics surrounding the relevant case, discussions and conclusions will shed light on the controversial excessive pricing issue or at least provide some useful clues on the matter once the reasoned decision is out.

Competition Board's Fining Decisions

The Competition Board recently concluded its investigations in the airlines, cement and sodium sulphate and raw salt sectors.

The Competition Authority commenced its investigation against Güneş Ekspres Havacılık A.Ş. ("Güneş Ekspress") and Condor Flugdienst GmbH ("Condor") on June, 2010, to determine whether the investigated undertakings violated Law No. 4054 by conducting certain practices that restrict competition regarding flights between Germany and Turkey through various agreements. The investigation was triggered by a leniency application made by Güneş Ekspres, which was represented by ELIG Attorneys-at-Law. Therefore, although the Competition Board decided that the investigated parties indeed violated Law No. 4054, Güneş Ekspress was granted a total immunity from the administrative monetary fines, whereas an administrative monetary fine on Condor amounting to TL 733,016.80 (approx EUR 350.000) corresponding to 1.5% of their annual gross revenue was imposed. The relevant decision sets a decent example of a successfully implemented leniency application.

The Competition Board has also recently (April 2012) concluded its investigation in the cement sector. Following its investigation, which commenced at the end of 2010, regarding collusive behaviors in terms of pricing between 10 undertakings in the cement sector in Turkey, the Competition Board decided that the investigated undertakings had violated the Law No. 4054 and imposed total fines of approximately TL 23 million (approx EUR10 million). The relevant decision has once again showed that the chronic problem with respect to competition law related infringements within the cement sector are not easily to be cured.

[3] Reasoned decision had not been issued by the time when this article was written.

Finally, the Competition Board rendered its decision (dated 03.05.2012 and numbered 12-24/711-199) regarding two undertakings that are active in the sodium sulphate and raw salt. The Competition Board had launched an investigation against Otuzbir Kimya ve Sanayi Türk Ltd. Şti. and Sodaş Sodyum Sanayi A.Ş. at the end of 2010 to see whether the relevant undertakings had violated Article 4 of Law No. 4054 by fixing prices and sharing customers in the sodium sulphate market in Turkey. Accordingly, the Competition Board decided that the relevant undertakings had fixed prices and shared customers for a duration of six years (i.e. from September 2005 until April 2011) and imposed administrative monetary fines on the relevant undertakings, and on an executive official who was deemed to have had a determining effect on the creation of the violation. The total amount imposed on the undertakings and the individuals turn out to be approximately TL 1 Million. This is the second time in the Competition Board's decisional practice where in addition to the undertakings an individual had to incur administrative monetary fines due his/her heavy involvement in the creation of a competition law violation. Therefore, it can be expected that the reasoned decision regarding the case will include useful clues for understanding the concept of "executives and employees of parties that had a determining effect on the creation of the violation."

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