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The Turkish Competition Authority fines ship operators for price fixing cartels (*Tramola / Kale*)

ANTICOMPETITIVE PRACTICES, CARTEL, EXCHANGE OF INFORMATION, INVESTIGATIONS / INQUIRIES, PRICE FIXING, SANCTIONS / FINES / PENALTIES, LENIENCY, HARDCORE RESTRICTION, REQUEST FOR INFORMATION, TURKEY, RULE OF REASON, LIMITATION PERIOD / PRESCRIPTION, ANTICOMPETITIVE OBJECT / EFFECT, TRANSPORT (SEA)

Turkish Competition Authority, *Tramola / Kale*, 19-16/229-101, 18 April 2019 (Turkish)

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Upon a complaint, the Turkish Competition Board (TCB) found information exchanges on future prices between certain ro-ro ship operators and following a thorough investigation, imposed administrative monetary fines on five ro-ro ship operators active in Turkey's Ambarlı region for two price fixing cartels through its decision of 18.04.2019 no. 19-16/229-101.

Tramola Gemi İşletmeciliđi ve Ticaret A.ř. (Tramola), İstanbullın Denızcılık Yatırım A.ř. (İstanbulın) and Kale Nakliyat Seyahat ve Turizm A.ř. (Kale), which is the leniency applicant, were fined for the cartel in Ambarlı – Bandırma ro-ro route whereas İstanbul Deniz Nakliyat Gıda İnřaat Sanayi Ticaret Ltd. řti. (İDN) and İstanbul Deniz Otobüsleri Sanayi ve Ticaret A.ř. (İDO) were fined for the cartel in the Ambarlı – Topçular ro-ro route for infringing Article 4 of the Law No. 4054 on Protection of Competition (Law No. 4054), which prohibits anticompetitive agreements. In addition, the TCB imposed a separate fine on İstanbulın for false/misleading information. Kabotaj Hattı Ro-Ro ve Feribot İşletmecileri Derneđi (ROFED), an association of undertakings active in the market, which was also under investigation, was ultimately acquitted.

I. Grounds for the cartel findings

A total of 42 documents/evidences were taken into account; 22 of which submitted by Kale within the scope of its leniency application, 19 seized during the dawn raids and one being the minutes of the meeting held between Kale and the case handlers. The earliest of the 42 documents is dated 28.11.2005 whereas the latest is 20.12.2017. The e-mails provided by the leniency applicant and those found during the dawn-raids constitute the backbone of the case since they demonstrate the existence of regular information exchange on future prices. In addition, the TCB conducted a price analysis evaluating whether the exchanges of information actually led to changes in the prices.

Content of the e-mails

Most of the e-mails consist of direct information exchanges on future prices between Kale and Tramola concerning the cartel in the Ambarlı – Bandırma route. It is understood from the content of the e-mails between Kale and Tramola that there was regular information exchange between the parties concerning future prices. Circulation of price lists appears to be a regular business practice of Kale and Tramola (and allegedly, Istanbulines). Furthermore, certain e-mails were found demonstrating the parties' commitment to the cartel and the expectancy from their counterparts in the same manner where they thought other cartelists were cheating.

No e-mails or other kind of evidence were found where Istanbulines was directly a party to; yet the TCB referred to the standards of burden of proof in cartel cases and set forth that Istanbulines participated to the Ambarlı – Bandırma cartel along with Kale and Tramola. In his dissenting opinion the TCB's then chairman evaluated the standards of the Anic presumption, referred to the oligopolistic structure of the market within the context of the parallelism in the prices and mentioned the fact that Istanbulines objected the third item of the vague agenda in ROFED's e-mail (see below) and accordingly, he stated that he does not agree with the finding that Istanbulines was party to the cartel as its involvement to the cartel was not duly proven.

The determination of the cartel in the Ambarlı – Topçular route of IDO and IDN is based on only one correspondence. An IDO employee sent a price list to an IDN employee stating that, as they had discussed over the phone, IDO will be applying the attached prices, which was replied by the IDN employee with an acceptance statement. The TCB found this single exchange sufficient to conclude that there was a cartel between IDO and IDN.

The involvement of ROFED is attested by one e-mail inviting the market players to a meeting with a relatively vague agenda, which had three items: (i) port tariffs, vehicle toll prices, (ii) presentation and briefing on the draft regulation contemplated for construction of a ro-ro jetty and (iii) 2017 service & vehicle carriage price increase rates. Istanbulines replied the e-mail on the same day, stated that they accepted the first and second items of the agenda and requested clarification on the third item by stating that ROFED meetings cannot have such an item in the agenda. Again, on the same day, ROFED replied back and explained that the third item concerned potential price increases of the ports where the ro-ro ship operators obtain services. This item was further clarified within the investigation and it was found that it did not relate to an agreement between the cartelists, rather it concerned the prices of the ports the lines berth and thereby concluding that there was no anticompetitive object, the TCB acquitted ROFED.

Price analysis

Article 4 of the Law No. 4054 is almost identical with Article 101(1) of the Treaty on the Functioning of the European Union and similarly, prohibits all agreements, decisions by associations of undertakings and concerted practices which have as their object, effect or likely effect the prevention, restriction or distortion of competition. The e-mails summarized above are typical examples of infringements by object since they concern information exchanges on future prices. Nevertheless, the case handlers proceeded (by noting that determination of an anticompetitive object is indeed sufficient for the establishment of an infringement) with a rule of reason approach and analysed whether the undertakings' prices actually increased in line with the information exchanges.

In this regard, the case handlers requested from the investigated undertakings detailed information on their prices for designated periods and after collecting the requested data, they cross-checked the prices of the investigated undertakings with the future prices quoted in the relevant correspondences. Eventually, it was found that the information exchanges actually led to changes in the relevant undertakings' prices.

The TCB could have decided that the mere existence of information exchanges between competitors on future prices is sufficient to prove an infringement by object and imposed fines solely on that basis. In fact, this would have been consistent with the TCB's and European Commission's decision practice. Anyway, the TCB opted for a more detailed analysis, as a result of which both the anticompetitive object and the effect were established.

Contributions of the leniency applicant

It is important to highlight the contributions of the leniency applicant since most of the key evidences demonstrating the information exchanges on future prices were provided by Kale. Moreover, in line with the requirements set forth in the Regulation on Active Cooperation for Detecting Cartels, Kale provided crucial information and documents on other key aspects of the case such as the services affected from the cartel, the duration of the cartel with specific dates and the undertakings party to the cartel. The TCB acknowledged this contribution by granting Kale a fine reduction of 50%, maximum degree of fine reduction that can be granted in leniency applications submitted after the initiation of a preliminary examination by the authority.

II. Administrative fines

In Turkish competition law, the amounts of fines are calculated by determining the base fine rate first, then applying aggravating/mitigating factors and finding the fine rate to be applied on the relevant undertaking's annual gross revenue of the year preceding the decision.

In this particular case, the amounts of fines imposed on each undertaking are not disclosed. The fine rates applied on the relevant undertakings 2018 annual gross revenues (besides Istanbulines of which fine was imposed based on its 2017 annual gross revenue) and the points taken into consideration in determining the fine rates applied on each undertaking's annual gross revenue are outlined below.

Price fixing cartel in the Ambarlı – Bandırma ro-ro line

The TCB initially determined that the rate of the base fine to be applied on Kale is 2%. The TCB considered that Kale's involvement to the cartel was limited with the period between 29.04.2009 and 18.08.2017. However, the e-mail with the earliest date the TCB could reach besides the e-mails submitted within leniency application made by Kale was 24.02.2012. Therefore, TCB took into account this date as the date of initiation of the cartel. As Kale's involvement in the cartel lasted more than five years, the rate of the base fine was multiplied by two and thus, found as 4%. The fact that ro-ro carrying activities occupy a very small share in Kale's total annual revenue was considered as a mitigating factor and therefore, the base fine was reduced at 3/5 thus, resulting as 1.6%. Finally, the fine rate was further reduced by half due to the leniency application and set as 0.8%.

It is also worth noting that certain correspondences regarding an anticompetitive "cooperation agreement" which Kale was a party to were excluded from the scope of the investigation based on, among other factors, the eight years of time bar stipulated in the Law No. 5326 on Misdemeanours with regard to statute of limitations.

The TCB initially determined that the rate of the base fine to be applied on Tramola and Istanbulines is 2%. The involvement of Tramola was found to be limited with the period between 29.04.2009 and 18.08.2017 whereas the infringement period of Istanbulines was between 28.05.2010 and 18.08.2017. Due to the duration of the infringement, the base fine rates were multiplied by two and finally set as 4%. No mitigating or aggravating factors were found applicable for Tramola or Istanbulines.

Price fixing cartel in the Ambarlı – Topçular ro-ro line

The TCB initially set the rate of base fine to be applied on IDO and IDN as 2%. As the duration of IDO and IDN's involvement to the cartel was determined as the period between 15.06.2017 and 13.10.2017, the duration of the infringement did not lead to an increase in the base fine rate. Ultimately, IDO and IDN's fine rates were reduced by 3/5 and resulted as 0.8% due to the insignificance of relevant activities' share in their overall revenues.

False/misleading information

During the investigation, the case handlers requested certain market data from Istanbulines and although Istanbulines initially stated that it did not have such information, it was found that Istanbulines had actually provided the requested data within the scope of another investigation carried out by the authority. Therefore, in addition to the fine imposed for cartel, Istanbulines was fined with of 0.1% of its annual revenue for false/misleading information as it denied to provide the information that it actually had.

Conclusion

The case is noteworthy in terms of many contemporary discussions like the standard of proof, the concept of undertaking, statute of limitations, false/misleading information and leniency. In fact, the type of infringement in and of itself makes this case interesting as cartels are not among the most frequently determined type of anticompetitive conducts. It is always a challenging task for the competition authorities to determine and prove the existence of cartels and this case, once again, demonstrates the prominence of encouraging leniency applications.

The TCB's decision can be made subject to an annulment lawsuit (appeal) before administrative courts. Furthermore, the case appears to be a good candidate for claim for damages (i.e. private enforcement); therefore, it would not be a surprise if third parties claim treble damages as per Articles 57 and 58 of the Law No. 4054 based on the TCB's decision.