
Integrated System in the Bus Transportation Services Market – A Type of Agency Agreement or Not?

Integrated System in the Bus Transportation Services Market – A Type of Agency Agreement or Not?

Article by Barış Yüksel, Mustafa Ayna, Mehmet Salan, and Emine Bilsin

On October 15, 2018, the Plenary Session of the Administrative Law Chamber of the Council of State ("PSALC") reversed the decision of the 13th Chamber of the Council of State, which annulled the Turkish Competition Authority's ("TCA") decision by which the TCA imposed a fine on Metro Turizm Seyahat Organizasyon ve Ticaret A.Ş. ("Metro Turizm") due to the violation of Article 4 of Law No. 4054 on the Protection of Competition ("Competition Law").

In 2010, a complaint had been submitted to the TCA on the grounds that certain conducts of Metro Turizm were in violation of the Competition Law. The allegations comprised of (i) concluding agreements that would hinder competition and (ii) engaging in predatory pricing. The TCA concluded that, Metro Turizm had violated Article 4 of the Competition Law, through agreements with the undertakings operating in the interurban passenger bus transportation services market and therefore, imposed a fine on Metro Turizm. Nevertheless, the TCA held that Metro Turizm did not infringe Article 6 of the Competition Law by predatory pricing, as its pricing system did not result to any anti-competitive effects in the relevant market.

Within the scope of the investigation conducted by the TCA, it is investigated whether Metro Turizm (i) restricted competition in the relevant market through its practices, namely "*Integrated System*"¹, (ii) pressurized its competitors to conclude agreements concerning the interurban passenger bus transportation services by using its market power, and (iii) thus, reduced the number of players operating in the market and restricted competition. The TCA defined the relevant product market as (i) interurban passenger bus transportation services market referring to the D1 License issued by Republic of Turkey Ministry of Transport and Infrastructure and (ii) interurban excursion ticket issuing services market referring to the F1 License issued by Republic of Turkey Ministry of Transport and Infrastructure; and the relevant geographic market separately as "*İstanbul-Edirne*", "*İstanbul-Tekirdağ*" and "*İstanbul-Kırklareli*" lines.

With regards to the relevant market, the TCA stated that the undertakings operating in the market are subject to strict regulation by a wide range of legislation, and transportation fees are strictly determined in accordance with the relevant legislation. Further, the TCA stressed that the relevant market maintains a competitive structure due to the reasons such as (i) the existence of alternative transportation means like railway and airway, (ii) low entry barriers along with the low exit barriers, and (iii) the effect of seasonality. Thus, the TCA evaluated that the undertakings operating in the relevant market may tend to conclude price agreements in order to cope with competition.

According to the relevant legislation, agent is defined as the person who mediates transport contract without having a dependent title to the represented company. However, by means of the agency agreement (within the scope of the "*Integrated system*") concluded between Metro Turizm and its competitor Volkan Metro Turizm Seyahat ve Nakliyat Tic. Ltd. Şti. ("**Volkan Metro**"), Volkan Metro was entitled to use the trade name of Metro Turizm and carry out passenger transport services on behalf of Metro Turizm. Thus, the TCA concluded that, the integrated system established between Metro Turizm and Volkan Metro was indeed a vertical integrated system than a regular agency relationship.

It is stated in the reasoned decision of the TCA that, on the one hand, the Integrated System is likely to contribute to an increase in efficiency by significant cost advantages and increase in service standards, on the other hand, such system establishes competition restrictions through cooperation with competitors that results competitors to exit from the market. In addition, the TCA underlined that anti-competitive effects of such practices precluded its pro-competitive effects.

Furthermore, in the decision, the TCA also assessed whether the Integrated System could benefit from an individual exemption. The TCA held that an individual exemption could not be granted to the Integrated System, as the efficiency gains generated by the system do not meet the competition restrictions in the market and that the related practice limits the competition more than what is compulsory.

As a consequence of the investigation conducted, the TCA ultimately held that the agreements concluded by Metro Turizm with regards to its practices in the (i) interurban passenger bus transportation services and (ii) interurban excursion ticket issuing services markets, were against the Competition Law and imposed an administrative fine of 2,427,016.69 TRY (approximately 409,083 EUR) to Metro Turizm.

Thereafter, the decision of the TCA was appealed before the Council of State by Metro Turizm. In consequence of the appellate review, the Council of State annulled the decision, by which the TCA imposed a fine on Metro Turizm, on the grounds that, even though the relevant system did not constitute an agency relationship between Metro Turizm and its competitors, there was no further adequate evidence to prove that Metro Turizm had entered into an agreement with its competitors or became a part of a concerted practice in a manner that would reduce the number of players in the market and in this regard harm competition. Following the Council of State's annulment, the TCA lodged an appeal to the PSALC against the Council of State's decision.

In this regard, as the ultimate decision maker on the matter, on April 11, 2018, the PSALC rendered its decision. The PSALC, parallel to the TCA, held that, the agency agreement subject to the appeal includes provisions, such as (i) authorization of the agent as to ticket sales on behalf of Metro Turizm, (ii) enable the agent to conduct passenger transport services on behalf of Metro Turizm, (iii) authorization of the agent as to the determination of transportation fees and (iv) exclusivity clauses. Thus, in line with the TCA, the PSALC stressed that the relevant agency agreement contains provisions which are against the very nature of agency relationship set forth in the relevant

legislation. Accordingly, the PSALC concluded that the decision of the TCA, by which the TCA imposed a fine on Metro Turizm due to the anticompetitive provisions within the agency agreement, is lawful, and thus reversed the annulment decision of the Council of State.

The decision of the PSALC as of significance importance in the judicial review of TCA's decisions in general, as it reversed an annulment decision by which the Council of State held that the TCA's determinations were against the law.

Footnote

1. Integrated System is a practice that lets Metro Turizm's competitors, which are the local bus companies operating in the relevant market, to use Metro Turizm's trade name and sell tickets on behalf of Metro Turizm via agency agreements.