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The Turkish Competition Board fines Turkcell for resale price maintenance after the Council of State annulled its first decision finding no infringement regarding prepaid card prices *(Turkcell II)*

UNILATERAL PRACTICES, DOMINANCE (ABUSE), EXCLUSIVE DISTRIBUTION, RESALE PRICE MAINTENANCE, TELECOMMUNICATIONS, SANCTIONS / FINES / PENALTIES, EXCLUSIVE RIGHT (ART. 106 TFEU), JUDICIAL REVIEW, TURKEY, EFFECT ON COMPETITION

Turkish Competition Board, *Turkcell II*, Case 19-03/23-10, 10 January 2019

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The Turkish Competition Board published its reasoned decision on an additional investigation on whether Turkcell İletişim Hizmetleri A.Ş. has violated the Law No. 4054 on the Protection of Competition through resale price maintenance and exclusivity practices (19-03/23-10; 10.01.2019). The additional assessment has been carried out in order to implement the decision of the 13th Chamber of the Council of State (16.10.2017; E. 2011/4560, K. 2017/2573) which annulled a certain part of the Board's decision dated 06.06.2011 and numbered 11-34/742-230.

Background

The Turkish Competition Board ("Board") has recently published its reasoned decision regarding an additional investigation on whether Turkcell İletişim Hizmetleri A.Ş. ("Turkcell") infringed the Law No. 4054 on the Protection of Competition ("Law No. 4054") through resale price maintenance ("RPM") ("*Turkcell II*"). This additional investigation was opened in order to implement the decision of the 13th Chamber of the Council of State (the "Court") which partially overruled the Board's decision on June 6, 2011 (decision no: 11-34/742-230, "*Turkcell I*").

In *Turkcell I*, the Board investigated allegations against Turkcell concerning RPM regarding prepaid cards under Article 4 of the Law No. 4054 and de facto exclusivity obligation upon sub-dealers under Article 6. The Board ultimately dismissed the RPM allegation and decided against an Article 4 infringement. The Board however found Turkcell dominant in the markets for "GSM services" and "the wholesale and retail sale of sim cards, credit vouchers cards and digital credit vouchers, activation and other user services". The Board also decided that Turkcell abused its dominance and imposed an administrative monetary fine on the ground that Turkcell indeed imposed *de facto* exclusivity on its sub-dealers by interfering with their signboard choices, decoration and other

sale practices and preventing competitors to be included in the sub-dealer channel.

One of Turkcell's sub-dealers, Doğan Dağıtım Satış Pazarlama ve Matbaacılık Ödeme Aracılık ve Tahsilat Sistemleri A.Ş, brought a legal action against the decision before the Court. The Court annulled the Board's *Turkcell I* decision regarding the finding that Turkcell had not violated Article 4 of the Law No. 4054 through RPM. The Court held that there was ample evidence proving that Turkcell had set the retail price of credit vouchers sold by distributors, dealers and sub-dealers. Further the Board emphasized the Board's finding that Turkcell was dominant with a market share over 60% and RPM by dominant firms would infringe Article 4.

In order to comply with the Court's decision, the Board initiated an additional investigation against Turkcell under Article 4.

Turkcell II Decision

The Board did not re-evaluated in detail whether the evidence indeed proved an Article 4 infringement but simply referred to the Court's assessment on this evidence. The Board rather emphasized its statutory obligation under the Law No. 2577 on the Administrative Judiciary Procedure to comply with the Court's decision.

In particular, the Board cited the Court's assessment on the documents such as tables prepared by Turkcell to set the profit margins for all levels of the supply chain; detailed price tables including the sale price of Turkcell, distributors, dealers and sale to the final customer; internal correspondence which was considered as supporting evidence for an RPM and findings that Turkcell applied fixed prices prior to the Authority's investigation. The Board further rejected Turkcell's arguments that the conditions for RPM had not been met and the prices in the evidence had only been recommended prices; and stated that the Court considered the evidence in the filing sufficient for proving RPM and the Board had to comply with the Court's decision.

Turkcell also argued that its price policy should benefit from an exemption. In its analysis of this argument, the Board listed the four conditions for an individual exemption, namely:

a) Ensuring new developments and improvements, or an economic or technical development in the production or distribution of goods and in the provision of services,

b) Benefitting the consumer from these developments and improvements,

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than necessary for achieving the goals in sub-paragraphs (a) and (b).

The Board concluded that Turkcell's pricing policy subject to the investigation did not qualify for an exemption because (i) RPM practices restricted intra-brand competition and thus reduced consumer welfare, (ii) setting resale prices directly or indirectly was also considered as a restriction that is excluded from the scope of the Block Exemption Communiqué No:2002/2. Accordingly, the Board found that the conditions under (a) and (b) had not been met, and thus rejected Turkcell's request for an exemption.

Accordingly, the Board unanimously decided that Turkcell had infringed Article 4 of the Law No. 4054 through RPM practices.

The Board also dismissed Turkcell's argument on statute of limitation, which is eight years for competition law infringements, claiming that the statute of limitation was expired in 2016, and thus the Board could not have fined Turkcell for his conduct under investigation. While the Board acknowledged the documents the Court identified as incriminating evidence were related to the 2006-2008 period, since the lawsuit had continued from 2011 to 2017, the statute of limitations had not expired.

With regard to the fine calculation, the Board first considered recidivism as an aggravating factor since the Board had fined Turkcell in 2005. The Board held that while the law did not provide an explicit time limit for recidivism, the general statute of limitation for competition law infringements under the Law No. 5326 on Misdemeanour, i.e., eight years, should also apply also to increase the fine for repeating offences. As *Turkcell I* was based on documents from the period between 2006 and 2008, i.e., dated after the previous RPM decision, the Board held that recidivism was applicable and increased Turkcell's base fine.

With respect to recidivism, the Board rejected Turkcell's argument that the fine in 2005 was not related to RPM but to abuse of dominance, and thus could not be taken into account in recidivism. The Board, however, reinstated its approach in the Board's previous decisional practice, and held that the law did not limit recidivism to infringement of the same article of the Law No. 4054, nor was it necessary for the two infringements to be of similar nature. The Board further increased the fine due to the duration of the infringement, which was between 1-5 years. In terms of the turnover to be taken into consideration for calculating the base fine, the Board compared Turkcell's turnover for 2010 – the amount that would have been considered if the Board had decided on a fine in *Turkcell I* – against its turnover for 2017. The Board decided to proceed with the fine calculation based on Turkcell's turnover for 2010, which was in Turkcell's favour.

Finally, a majority of the Board decided to impose a fine of %1.125 of Turkcell's turnover from 2010, which amounted to approximately 92 million Turkish Liras.

While the Board unanimously found an Article 4 violation in this second decision, two Board members had dissenting opinion on the fine. These Board members argued that both types of violations (i.e., RPM and exclusivity practices) committed by Turkcell serve the same purpose, namely keeping the dealers under control. Accordingly, even if these two conducts were analysed under two different provisions of the Law No. 4054, namely, Articles 4 and 6, the acts pursuing the same goal cannot be deemed separate infringements. The dissenting opinion therefore found that since the Board had already fined Turkcell in the Board's *Turkcell I* decision for abuse of dominance, this second fine for RPM would not comply with the law and the fine amount for this second conduct should have been %0.25 instead.

Conclusion

Turkcell II and the underlying Court decision are noteworthy for several reasons: First, the Court decision is another example of a recent trend in the courts of first instance which more and more challenge the Board's substantive analysis and standard of proof. Second, the Board appears to be committed to continue its expansive interpretation of the law regarding recidivism and find any infringement of the Law No. 4054 sufficient for the next offence to be seen as "repetitive". Indeed, for the purposes of recidivism analysis, the Board considers RPM and abuse of dominance by exclusionary practices as the same infringement.

On the other hand, the Board considers RPM of Turkcell as a separate conduct in addition to the abuse of dominance fined in *Turkcell I*, while the Court held that RPM was also an "abuse of dominance". Interestingly, two Board members sided with the Court on this point and argued that Turkcell's conduct analysed in *Turkcell I* and *II*

should not be considered independently, by citing *Izocam* (decision of 8.02.2010, no: 10-14/175-66) and *Trakya Cam* (decision of 14.12.2017, no: 17-41/641-280) decisions where the Board imposed only one fine for infringements of Articles 4 and 6.

The decision also signals that the Board's approach to the time period for recidivism analysis has now become more consistent. Indeed, the Board followed its approach in previous cases where the statute of limitation for competition law infringements was used as a benchmark to determine how far back in time the Board should go to decide whether the relevant undertaking was repeating an unlawful conduct.