

## **Judicial Review Informs the Turkish Competition Authority about the Appropriate Standards of Proof in Excessive Pricing Cases: Sahibinden.com Decision Is Cancelled by Administrative Court**

Authors: Gönenç Gürkaynak, Esq., Onur Özgümüş, Simru Tayfun, Efe Oker, ELIG Gürkaynak Attorneys-at-Law

### **(1) Introduction**

The decision<sup>1</sup> of the Turkish Competition Board (the “**Board**”) concerning the full-fledged investigation of the Turkish Competition Authority (the “**Authority**”) against Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. (“**Sahibinden.com**”) has been unanimously overturned by Ankara 6<sup>th</sup> Administrative Court (“**Court**”).<sup>2</sup>

Within the scope of its decision, the Board has resolved that Sahibinden.com abused its dominant position in the markets for online advertisement services for real estate and vehicle through applying excessive prices and imposed an administrative monetary fine against Sahibinden.com in the amount of TL 10,680,425.98 (approximately EUR 1.618.246 based on today’s exchange rate).

The Board’s Sahibinden.com decision has been widely criticized given that the enforcement of excessive pricing, which should be carried out very carefully, is applied on an online platform market by the same manner in which it is implemented to brick-and-mortar markets. Indeed, the decision remains to be rather unique on a worldwide level in terms of the approach taken for the excessive pricing analysis in an online market.

### **(2) Background**

The Board had decided that Sahibinden.com enjoys dominant position in the markets for online advertisements in real estate and vehicle by unanimous vote, whereas it resolved by majority that Sahibinden.com abused its dominant position by applying excessive prices in terms of its services.

Sahibinden.com challenged the Board’s infringement decision in accordance with Article 11 of Law No. 2577 on Administrative Procedure (“**Law No. 2577**”). However, the Board rejected Sahibinden.com’s request concerning the reassessment of the infringement decision against itself.

Subsequently, Sahibinden.com appealed against both the infringement decision and the decision of rejection before the Court. Upon the appeal, the Court annulled the Board’s Sahibinden.com decision

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<sup>1</sup>The Board’s Sahibinden.com decision dated 01.10.2018 and numbered 18-36/584-285.

<sup>2</sup>The decision might be subject to appeal before the appellate courts.

as well as the decision<sup>3</sup> regarding the application challenging the Sahibinden.com decision in accordance with Article 11 of Law No. 2577, highlighting that the Board's infringement decision against Sahibinden.com did not meet the necessary standards of proof required for determining an excessive pricing violation.<sup>4</sup>

### **(3) The Findings of the Court: Standards of Proof**

The Court's annulment decision sheds light on the standards of proof in excessive pricing cases. To that end, the ruling of the Court is based on the grounds that abuse of dominance through excessive pricing has a very limited and exceptional application and unless it is clearly and expressly proven that the price increases in question distort competition and therefore consumer welfare, interfering with those price increases should be unacceptable. According to the Court, the Board's assessments and findings should be proven in an almost absolute manner without causing any hesitations or doubts.<sup>5</sup> In this respect, the Court indicated that the Board's findings are not supported with any concrete evidence and are merely opinions reached through evaluating hypothetical situations. The Court further contends that the Board's reasoning lacks comprehensive and scientific consumer behaviour analysis and it does not go beyond an observation or a hypothesis.

In this respect, the arguments raised by Sahibinden.com during the investigation and the judicial review as well as the assessments of a Board member, Mr. Adem Bircan, set forth with in his dissenting vote within the scope of the Board's reasoned decision were also highlighted by the Court in relation to the merits of the case to indicate the appropriate standards of proof on these fronts.

The Court concluded that the Board could not prove (i) its claims concerning the inability of the relevant markets to correct themselves in the short, medium and long term, (ii) whether the determination of excessive pricing solely through analysis of high pricing behaviour constitutes a reasonable approach (particularly in multi-sided platform economies), and (iii) that suppressing the prices through an intervention outside of the market mechanisms would possibly have positive outcomes on the market. Furthermore, the Court also stressed that Sahibinden.com has basically three types of users (i.e. individual members, commercial members, and consumers which uses the platform as customers) and the Board did not assess the potential negative effects of the interference on Sahibinden.com's pricing behaviour on consumer welfare as well as the new entries to the market.

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<sup>3</sup> The Board's decision dated 02.05.2019 and numbered 19-17/239-108.

<sup>4</sup> The Administrative Court's decision dated 18.12.2019 and numbered 2019/946 E., 2019/2625 K.

<sup>5</sup> See in this respect the 13th Chamber of Council of States' precedents, e.g. dated 21.05.2019 and numbered E. 2016/4069 K. 2019/1783; dated 18.06.2015 and E. 2014/2360, K. 2015/2296; and dated 30.11.2011 and numbered E. 2008/3117 K. 2011/5424 T.

The Court's assessments concerning the standards of proof in excessive pricing cases are rather aligned with the approach adopted by the European Commission and the European Court of Justice.<sup>6</sup> The Court emphasized the importance of selecting the comparators in accordance with objective, appropriate and verifiable criteria, and indicated that the Board compared Sahibinden.com's pricing behaviour with undertakings which are active in irrelevant markets, rather than benchmarking its prices with the prices in different countries where global market players operate. Additionally, the Board's approach to rely on certain comparisons, which were deemed also rather difficult and problematic by the Board itself, is also found to be incongruous and without any merit by the Court.

#### **(4) Conclusion**

The Court's annulment decision paves the way for targeting higher standards of proof in excessive pricing cases, especially in terms of multi-sided online platforms. In addition to providing significant added value for the excessive pricing cases, by way of analogy, the annulment decision also provides valuable insight in terms of standards of proof in general and accentuates the crucial importance of employing thorough analysis methods on this front to ensure that the assessments are based on solid and concrete findings.☐

Article contact: Gönenç Gürkaynak, Esq.

Email: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)

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<sup>6</sup> See, Case C-177/16, AKKA/LAA, Judgment of the Court (Second Chamber) ruling of 14 September 2017; C-52/07, Kanal 5 and TV 4 v STIM, Judgment of the Court (Fourth Chamber) of 11 December 2008; Case COMP/A.36.568/D3, Scandlines Sverige AB v Port of Helsingborg, Commission decision of 23 July 2004; Case COMP/C-2/37.761, Euromax v/ IMAX, Commission decision of 25 March 2004.