

# e-Competitions

Antitrust Case Laws e-Bulletin

Preview

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The Turkish Administrative Court annuls the fining decision of the Competition Authority because it failed to meet the required standards for establishing a competition law infringement based on excessive pricing (*Sahibinden.com*)

**UNILATERAL PRACTICES, DOMINANCE (ABUSE), DOMINANCE (NOTION), BURDEN OF PROOF, EXCESSIVE PRICES, PRICES, SANCTIONS / FINES / PENALTIES, AUTOMOBILE, JUDICIAL REVIEW, ADVERTISING, TURKEY, ANNULMENT, ONLINE PLATFORMS, REAL ESTATE**

Turkish Administrative Court, *Sahibinden.com*, 2019/2625, 18 December 2019 (Turkish)

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This case note analyses Ankara 6th Administrative Court's (the "**Administrative Court**") annulment judgment (18.12.2019; 2019/946 E., 2019/2625 K.) through which the Administrative Court reviewed the Turkish Competition Board's (the "**Board**") decision dated 01.10.2018 and numbered 18-36/584-285, regarding the allegations that Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. ("**Sahibinden.com**") – an online platform which acts as an intermediary for online advertising in terms of various categories such as real estate, automotive, spare part and accessories and construction machines – violated Article 6 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**") by way of abusing its dominant position through excessive pricing. [1] In its decision, the Board decided that Sahibinden.com abused its dominant position in the markets for online advertisement services for real estate and vehicle by way of applying excessive pricing and thus, imposed an administrative monetary fine against Sahibinden.com. Following the appeal of Sahibinden.com, the Administrative Court annulled the Board's Sahibinden.com decision on the grounds that the Board did not meet the necessary standards of proof required for determining a competition law infringement based on excessive pricing.

## Background information on the Board's Sahibinden.com decision

In its decision, the Board considered that Sahibinden.com has a dominant position in the two relevant product markets not only based on its higher market share compared to its competitors and considerable market power to set prices but also on the insufficient level of competitive pressure over Sahibinden.com in these markets. As for the abuse of dominant position, the Board considered that Sahibinden.com's price increases were much higher than its competitors in both markets; this pricing is far from what should have been observed in competitive markets; and the market does not have the necessary competitive structure to correct itself in the short and mid-

terms. Accordingly, and contrary to the case handlers' majority opinion, the Board concluded, with one dissenting vote, that Sahibinden.com's pricing behaviors constitute abuse of dominance through excessive pricing and thus imposed an administrative monetary fine against it in the amount of TL 10,680,425.98.

Accordingly, Sahibinden.com lodged an appeal before the Administrative Court against the Board's infringement decision.

### **The Administrative Court's annulment on the grounds that the Board did not meet the applicable standards of proof**

In its judgment, the Administrative Court first recalled the importance for competition authorities not to intervene into the pricing policy of undertakings except in exceptional circumstances where there are no any other possibilities to protect consumers in the relevant markets. The Court recognised the difficulties in demonstrating the existence of an abuse of dominance through excessive pricing but underlined the necessity for competition authorities to prove the existence of such a practice through certain and indisputable evidence which leaves no room for hesitation or doubt.

The Court then assessed every findings of the Board in light of the standards of proof to determine whether the Board has sufficiently demonstrated its findings and assessments. To that end, the Court observed that when comparing Sahibinden.com's prices with competitors' prices, the Board did not take into consideration the same markets as those of Sahibinden.com nor conducted a comparison with the market position of other global players in different countries. The Court also considered that the Board failed to provide concrete and certain evidence or economic analysis which would substantiate the Board's assertion that Sahibinden.com is expected to dominate the market in the long term.

The Court also censured the Board's conclusion that the perception of the domain name "Sahibinden" (meaning rent/sale by the owner) in the eyes of consumers and the platform's provision of services in more than one category should be considered as entry barriers. This is because such a conclusion is a mere assertion which has not been substantiated with concrete evidence or market analysis. The Court noted that the decision does not contain any concrete evidence on the reasons why the consequences of a business decision to be active in multiple categories of product would have an impact on the abuse of dominance finding.

The Court also found that the Board failed to sufficiently prove the incapacity of the relevant markets to correct themselves in short or medium term but instead the Board based its assessment on such an affirmation without any concrete analysis or data.

As for the position of competitors, although the Board observed in its decision that there are several new entries of global players into the market, it was considered that these new entries did not have any impact on the market position of Sahibinden.com. However, by stating so, the Board failed to sufficiently assess the capacity of the relevant global market players to grow rapidly in the relevant markets, the level of their current popularity, and their growing process in other similar geographic markets while the Board was expected to assess all these factors and the evolution of Sahibinden.com's market position in view of the short, medium and long term conditions of the relevant markets.

The Court also considered that the Board failed to prove the negative impact of excessive pricing on the market entries since generally speaking; excessive prices might lead commercial members to use other competitive platforms that offer lower prices or free services, and thus this would create a positive impact and incentive on

new market entries. The Board failed to demonstrate how the new players might exert competitive pressure on Sahibinden.com in case the latter decreases its membership prices.

Finally, the Court observed that there are three types of users of services provided by Sahibinden.com, namely individual members, commercial members and consumers which use the platform as customers. While individual members and consumers do not pay any fee for the platform's services, only commercial members pay a membership fee to Sahibinden.com. The Court considered that the Board failed to explain how a decrease in the membership fee amount paid by the commercial members would have an impact on the other type of users in the mid and long terms.

Based on the foregoing, the Court concluded that the Board failed to meet the required standards of proof to establish undoubtedly that Sahibinden.com's practices constitute an abuse of dominance through excessive pricing. The Court highlighted that a finding of excessive pricing should have a very limited and exceptional application and competition law does not accept an intervention on pricing where there is no clear and absolute evidence that competition conditions and thus consumer welfare have been disrupted by the relevant excessive pricing. As a result, the Administrative Court annulled the Board's infringement decision.

## Conclusion

The Court's annulment judgment is highly crucial as it underlines the necessity for higher standards of proof in excessive pricing cases and draws the limits of the competition authorities' intervention in companies' pricing policy. The judgment provides an instructive precedent in terms of standard of proof not only in excessive pricing cases but also generally for the competitive assessment conducted by competition authorities—especially in multi-sided online platforms—which must be based on concrete and convincing findings and evidence that leave no room for doubt.

[1] The case note on the Board's Sahibinden.com decision of October 1st, 2018 numbered 18-36/584-285 1 October 2018, e-Competitions Bulletin October 2018, Art. N° 89255, available at <https://www.concurrences.com/en/bulletin/news-issues/october-2018/the-turkish-competition-authority-finds-that-an-online-platform-services-for>