

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Administrative Court of Ankara annuls a decision of the Turkish Competition Authority in the electronic communication sector due to the incomplete examination (*Dogan / Cisco*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), INVESTIGATIONS / INQUIRIES, TELECOMMUNICATIONS, SERVICES, COOPERATION AGREEMENT, REQUEST FOR INFORMATION, TURKEY, ANNULMENT, ONLINE PLATFORMS

Administrative Court of Ankara, *Dogan / Cisco*, E. 1315, K. 2115, 24 October 2019 (Turkish)

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This case summary includes an analysis of Ankara 11th Administrative Court's (the "**Administrative Court**") decision (24.10.2019, E. 1315, K. 2115) in which the Administrative Court annulled the Turkish Competition Board's (the "**Board**") decision (15-28/317-95, 07.07.2015) due to the incomplete examination, because the Board rendered its decision without obtaining the necessary opinion of Information and Communication Technologies Authority ("**ICTA**") including the substantial assessment regarding the case.

Background

Firstly in order to provide a chronological order, the stages of the judicial review are as follows: (1) The Board examined and rejected the complaint of PlatformTurk Dijital Platform Hizmetleri A.Ş. ("**PlatformTurk**") with its 2015 decision. (2) The Administrative Court annulled the Board's decision due to the incomplete examination on December 16, 2016. (3) Upon the annulment decision, the Board re-examined the complaint by obtaining the opinion of ICTA and again decided not to launch a full-fledged investigation with its 2017 decision. (4) Following this, 13th Chamber of Council of State annulled the Administrative Court's decision due to procedural law (namely as the local court did not notice the proceeding) on December 27, 2018. (5) Thereupon, the Administrative Court re-examined the case and annulled the Board's 2015 decision on October 24, 2019 by way of reiteration its justifications in its previous decision. Although the judicial review has taken a few years and included several stages due to procedural law issues, this analysis mainly focuses on the Administrative Court's justifications for annulment of the Board's decision due to incomplete examination in the telecommunication sector.

In 2015, the Board launched preliminary investigation against Doğan TV Digital Platform İşletmeciliği A.Ş./Mozaik

İletişim Hizmetleri A.Ş. (“Doğan TV”) and Cisco Systems Internetworking İletişim Hizmetleri Ltd. Şti. (“Cisco”) in order to evaluate whether Doğan TV prevented PlatformTurk from entering into the market by way of restricting PlatformTurk’s access to set top boxes. PlatformTurk is a platform operator trying to enter the satellite platform market. In its decision, the Board noted that in Turkey, there are two main platform operators, i.e. D-SMART (formerly known as Doğan TV) and Digiturk (formerly known as Digital Platform Teknoloji Hizmetleri A.Ş.). The satellite platform services are provided to customers through set top boxes by coding systems and the conditional access modules decode the broadcasts and the customers may watch the channels without codes according to their subscription plans. PlatformTurk claimed that Doğan TV sells set top boxes which enable the consumers to watch Digiturk as well and therefore, the consumers purchase D-SMART set top boxes with the expectation that the conditional access modules of other operators will be operated in the relevant set top boxes. PlatformTurk emphasized that access to relevant subscribers are essential for entering the market and it is trying to access D-SMART consumers that already have the set top boxes and purchased D-SMART broadcasts, since they can watch PlatformTurk’s broadcast without purchasing a second device. However, PlatformTurk argued that although it was possible to access PlatformTurk broadcasts through the relevant devices at the beginning of 2014, it was no longer possible due to D-SMART’s restrictions.

In terms of the analysis on abuse of dominant position allegation (under Article 6 of Law No. 4054 on Protection of Competition (“Law No. 4054”)), the Board defined the relevant product market from widest to narrow respectively as “market for paid television broadcasting”, “market for satellite platform services or paid television broadcasting through satellite” and “market for set top boxes for conditional access modules entry”. Upon its assessment on market dynamics, number of the subscribers and the turnover generated from subscription, the Board determined that brand specific market definition would not be realistic since it leads to an extremely narrowed down market; thus concluded that D-SMART is not in dominant position in any plausible market definition except for the brand specific market definition. Thus, even if D-SMART makes conditional access modules in satellite receivers unusable and prevents other broadcasters to use the relevant devices and forecloses the satellite receivers in a way that receives only D-SMART’s broadcasts allegedly, it would not violate Law No. 4054 since D-SMART is not in a dominant position in the relevant market.

As per the analysis on restrictive agreement and concerted practices allegation (under Article 4 of Law No. 4054), the Board examined the claim as to whether D-SMART forecloses the set top boxes to competitors’ access by itself or in cooperation with Cisco, which is the company supplying the set top boxes’ software. The Board has not found any document proving that D-SMART prevents competitor platforms’ access to set top boxes either alone or with another company. In conclusion, the Board indicated that Doğan TV did not violate Article 4 and 6 of Law No. 4054 and did not launch a full-fledged investigation.

The Administrative Court indicated in its decision (16.12.2016, E. 2015/2776, K. 2016/4487) that ICTA is authorized to audit and impose sanctions for the competition law violations in electronic communication sector. More specifically, Article 7(2) of Electronic Communication Law states that “The Competition Board primarily takes into consideration the opinion of ICTA and the regulatory actions taken by ICTA in the decisions to be made in relation to the electronic communications sector, including the decisions to be made regarding the mergers and acquisitions.”. Thus, the Turkish Competition Authority (the “Authority”) requested the opinion of ICTA during its preliminary investigation in 2015. In summary, ICTA stated in its opinion that there is not an administrative action regarding the “conditional access systems” services; however, in order to assure that the relevant complaint will be evaluated in terms of the consumer rights and the relevant legislation, ICTA indicated that it will request certain information and documents from some of the undertakings as to whether the set top boxes which enable the consumers to watch other undertakings’ broadcasts have been sold and whether it is possible to reach the relevant devices remotely in order to prevent the consumers to watch other broadcasts. While ICTA was carrying

out studies for consumer rights, the Board rejected the complaint, finalized its preliminary investigation and decided not to launch a full-fledged investigation. The Administrative Court emphasized ICTA's authority to examine, investigate and take necessary measures as to establish competition and to impose sanctions in the electronic communication sector and also the Board's duty to obtain opinion of ICTA in its reasoned decision. In conclusion, the Administrative Court stated that the Board should have waited for rendering its decision until ICTA has completed its studies and provided its opinion. Therefore, the Administrative Court annulled the Board's 2015 decision on not to initiate a full-fledged investigation since the Board rendered the decision without obtaining ICTA's opinion including substantial analysis.

Upon the Administrative Court's annulment of the Board's 2015 decision, the Board initiated the preliminary investigation, this time to obtain the additional study and the opinion of ICTA including the substantial analysis in its re-assessment decision (17-10/117-52, 13.03.2017). In its written opinion, ICTA has indicated that (i) none of the undertakings has effective market power in the "market for broadcasting communication services to deliver broadcast content to end users", (ii) there is no primary regulation in the relevant market, (iii) platforms are clearly indicated in the subscription agreements and there are no provisions regarding the procurement of the services by more than one platform, and accordingly, (iv) subscription agreements do not contain any inaccurate information for the end users in terms of transparency and informing; therefore, platforms' actions are not subject to any administrative action to be imposed by ICTA. In its reasoned decision of March 13, 2017, the Board's analysis regarding the market dynamics and market power of the undertakings remained the same as its analysis in its 2015 decision and the Board decided to not launch a full-fledged investigation against Doğan TV and Cisco.

Conclusion

PlatformTurk is a significant decision that contains analysis regarding the market dynamics of the electronic communication sector. In addition to that, the Administrative Court's annulment decision is also significant because the lack of ICTA's full opinion on the case was considered as a lack of procedure by the Administrative Court. This caused the Board's 2015 decision to be annulled. Although the Board's initial assessment and result did not change and it decided not to launch a full-fledged investigation in its 2017 decision, the Board's and the Administrative Court's approach to this procedural issue and the sector along with the relation between Authority and the regulatory agency in the electronic communication sector sets a significant precedent.