

e-Competitions

Antitrust Case Laws e-Bulletin

August 2020

The Ankara Administrative Court reassesses the Competition Authority's decision on price squeezing allegations in the telecommunications sector (*Türk Telekom / TTNET decision*)

ANTICOMPETITIVE PRACTICES, DOMINANCE (ABUSE), PRICES, TELECOMMUNICATIONS, MARGIN SQUEEZE, JUDICIAL REVIEW, ABUSIVE PRICING, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT

Ankara Administrative Court, *Türk Telekom / TTNET decision*, 12 March 2020 (Turkish)

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e-Competitions News Issue August 2020

Background

In 2012, the Board launched a full-fledged investigation against Türk Telekom and TTNET upon the complaints of certain Internet service providers ("ISP"), alleging that Türk Telekom and TTNET had abused their dominant positions in the wholesale and retail markets for fixed broadband Internet access services, through price-squeezing practices.

The Board defined "price squeezing" as follows: "*Price squeezing is the determination of the margin between the upstream market product price and the downstream market product price by an undertaking that is active in vertically integrated markets and in a dominant position in the upstream market, in a manner that does not allow even an equally efficient competitor in the downstream market to operate profitably on a lasting basis.*" Accordingly, the Board noted that, by doing so, the dominant undertaking could transfer its market power in the upstream market to the downstream market, and this could result in the restriction of competition.

Also referring to the "Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty (now Article 102 TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings," the Board set out that when determining whether the relevant conduct leads to anticompetitive foreclosure through price squeezing, the following factors should be taken into consideration: (i) vertically integrated structure of the undertaking, (ii) indispensability of the upstream market product for operating in the downstream market, (iii)

the undertaking's dominant position in the upstream market, and (iv) the margin between the upstream and downstream market products being so low that an effective competitor would be unable to gain profits and operate in the downstream market on a lasting basis.

Against this background, the Board concluded that: (i) TTNET and Türk Telekom constituted an economic unity which had a vertically integrated structure, (ii) the services provided by Türk Telekom were indispensable for the operators in the downstream market, (iii) Türk Telekom was in a dominant position in the "*wholesale fixed broadband Internet access services market*," which is the upstream market, and - although it is not necessary to be in the dominant position in the downstream market for price squeezing - the Board noted that TTNET was also in a dominant position in the "*retail fixed broadband Internet access services market*."

In terms of the fourth condition regarding the prices being lower than the costs, the Board concluded that: (i) the prices for certain promotions implemented by TTNET, including service bundles (*i.e.*, phone, TV and Internet for home use—known as "Tivibu Ev") did not cover their costs; however, there were no expected competition restrictive effects since the relevant promotion bundles were sold only for a very limited time period, (ii) in terms of the "50% Discount for 6 Months" offer, the price of certain promotional bundles would not cover their costs; however, such promotions did not lead to market foreclosure, and (iii) again, in the case of the "50% Discount for 6 Months" offer, a non-negligible amount of the promotions would barely cover their costs. In conclusion, the Board decided that there were no sufficient findings to conclude that the economic unity consisting of TTNET and Türk Telekom had violated Article 6 of the Law No. 4054 through "price squeezing." However, the Board also decided to send a warning letter to the economic unity, since it determined that the relevant conducts could lead foreclosure effects if: (i) the price of such promotions, including the "Tivibu Ev" service, remained below costs, and (ii) the discounts/benefits granted to prevent the cancellation of subscriptions (*i.e.*, retention offers) increased.

In the judicial review, appellant Vodafone Net İletişim Hizmetleri A.Ş. ("**Vodafone**") requested the annulment of the Board's decision, by arguing that: (i) Türk Telekom and TTNET fell under the same economic unity; therefore, their actions could not be examined separately, (ii) Türk Telekom and TTNET were in dominant positions in different product markets, (iii) TTNET had provided services below mandatory costs by using its power to affect the economic parameters of the relevant market due to Türk Telekom's dominant position in the wholesale fixed broadband Internet access services market, and that (iv) such conduct should be recognized as abuse of dominance through price squeezing, since it is not possible for ISPs to compete with TTNET even if, in theory, they provide such services with maximum efficiency.

Reviewing these allegations, the Administrative Court assessed TTNET's promotional bundles, which included "Tivibu Ev" services, and emphasized that: (i) the number of TTNET's promotions and their subscribers had increased substantially, (ii) the increase in the number of subscribers to Superonline (an ISP), which was its closest competitor, was relatively low, and (iii) the promotions that lasted for 4 months to prevent the cancellation of subscriptions were indeed sufficient to create a market foreclosure effect. Thus, the Administrative Court decided that TTNET had abused its dominance in the retail fixed broadband Internet access services market by way of price squeezing, and therefore annulled the Board's decision.

The Administrative Court's decision was appealed before the Council of State. The Turkish Competition Authority and TTNET claimed that the assessments concerning price squeezing and anticompetitive foreclosure should be made by the Board itself, and that the Administrative Court's assessment concerning the anticompetitive effects of the 4-month promotional campaigns were unsubstantiated. The Council of

State concluded that the Administrative Court, which had deemed that a 4-month promotional period was sufficient for abuse of dominance, had not explicitly demonstrated or established the grounds for a competition law violation. Thus, the appeal was upheld and the Administrative Court's decision was reversed. That being said, the Council of State also noted that launching another investigation concerning the activities of the economic unity that fell outside the investigated period, including the Tivibu Ev service and the promotions and retention offers that were extended to subscribers in order to prevent cancellations, would be permissible.

By complying with the reversal decision of the Council of State, the Administrative Court reassessed the allegations that Vodafone had set forth during its initial application for judicial review. The Administrative Court analyzed the position of the dominant undertaking and/or its competitors, customers and providers, as well as the dynamics of the relevant market, and stated that a period of 4 months was not sufficient to create a market foreclosure effect, since TTNET's sales did not reach the potential to effect competition until May 2013, and the ISPs that bore similar costs were active with a profit share above a certain level during the same period, and noted that such ISPs had, in fact, even increased their market shares during the investigated period.

On the other hand, the Administrative Court also stated that, within the scope of its full-fledged investigation, the Board had investigated Türk Telekom and TTNET's DSL and fiber Internet services, daily/hourly Internet tariffs and promotions which were offered during the period between December 1, 2008 and February 28, 2013. In this context, the Administrative court determined that certain services provided by TTNET (i.e., Tivibu Ev) that were offered after February 2013 could cause market foreclosure, and the promotional activities of the economic unity which comprised Türk Telekom and TTNET, that were offered after February 28, 2013, could be examined through a separate investigation. In light of the foregoing, the Administrative Court dismissed Vodafone's annulment request concerning the Board's decision.

Conclusion

The Administrative Court's *Türk Telekom/TTNET* decision is a significant precedent, since both the Board and the Administrative Court analysed the merits of the case, the price-squeezing theory and below-cost sales in considerable detail. To that end, the decision may shed light on the Board's approach to future cases regarding price-squeezing allegations and market foreclosure effects.