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The Turkish Competition Authority decides that delays by mobile operators regarding the signing of interconnection agreements do not amount to an anti-competitive constructive refusal to deal *(NetGSM / Turkcell-Vodafone)*

UNILATERAL PRACTICES, REFUSAL TO DEAL, RELEVANT MARKET, TELECOMMUNICATIONS, ACCESS TO FACILITIES, OBJECTIVE JUSTIFICATION, OBLIGATION TO SUPPLY, TURKEY

Turkish Competition Authority, *NetGSM / Turkcell-Vodafone*, 20-06/67-36, 23 January 2020 (Turkish)

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The Turkish Competition Board ("Board") concluded that Turkcell İletişim Hizmetleri A.Ş. ("Turkcell") and/or Vodafone Telekomünikasyon A.Ş. ("Vodafone") did not violate Law No. 4054 on the Protection of Competition ("Law No. 4054") as their conduct did not amount to an anti- competitive constructive refusal to deal, and therefore, did not infringe Article 6 of the Law No. 4054 which prohibits the abuse of dominance.

Introduction

On 23 January 2020, the Turkish Competition Board ("Board") concluded its investigation against two of the three mobile network operators in Turkey, namely Turkcell İletişim Hizmetleri A.Ş. ("Turkcell") and Vodafone Telekomünikasyon A.Ş ("Vodafone"), and found that their conduct did not violate the Law No. 4054 on the Protection of Competition ("Law No. 4054"). [*1*] The investigation was based on NetGSM İletişim ve Bilgi Teknolojileri A.Ş.'s ("NetGSM") complaints that Turkcell and Vodafone had abused their dominant positions in the markets for call termination services [*2*] on their respective networks, by way of delaying the provision of interconnection services to NetGSM.

Background

As its name suggests, NetGSM III was the third decision that the Board rendered with respect to the same exact issue.

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In NetGSM I, [3] the case under which these allegations were heard by the Board for the first time, the Board cited the regulations in the telecommunications sector and noted that; (i) Turkcell and Vodafone were both designated as operators with Significant Market Power ("SMP") in the relevant markets for call termination services on their own networks by the Information Communications and Technology Authority ("ICTA"), (ii) they had a regulatory duty to provide interconnection to all operators, (iii) NetGSM had already initiated a process before the ICTA for the determination of terms and conditions under which interconnection services shall be provided, (iv) the process before the ICTA was still ongoing and (v) terms and conditions to be determined by ICTA as a result of this process would become binding for all parties. Considering these, the Board decided that there was no need to initiate a separate administrative action within the scope of the Law No. 4054. This NetGSM I decision, however, was set aside by the Council of State ("CoS"). In its decision, [4] the CoS emphasized that the Board has jurisdiction to investigate anti-competitive behaviours in the telecommunications markets, whereas the ICTA is responsible for ensuring that these markets attain a competitive structure by way of ex-ante regulations that aim to remedy structural problems. The CoS further stipulated that the ex-post nature of competition law investigations differ from the ICTA's ex-ante rule making procedures, and that the presence of ex-ante regulations does not absolve regulated undertakings from the responsibility to abide by the Law No. 4054. Finally, the CoS added that the Board would have discretion not to initiate an administrative action regarding the complaints, if it was determined, inter alia, that the anti-competitive conduct was decisively brought to an end by the ICTA's regulations and that the damages which may have resulted from the said actions were removed in their entirety. Hence, the CoS concluded that the Board had erred in law by deciding that further administrative action within the scope of the Law No. 4054 may not be initiated due to the ongoing regulatory process, and requested the Board to conduct its own analysis.

Subsequently in NetGSM II, [5] the Board conducted a preliminary examination in light of the CoS's annulment, and decided that Turkcell and Vodafone did not infringe the Law No. 4054. After clarifying that both Turkcell and Vodafone held dominant positions in the markets for call termination services on their respective networks with 100% market shares, the Board moved on to assess whether their conducts amounted to an abuse. However, the Board refrained from making any substantive evaluations on the grounds that interconnection agreements had already been signed between Turkcell/Vodafone and NetGSM as a result of the regulatory process and thus any potential infringement had already been terminated along with any risk of residual competitive harm. Yet, the court of first instance ("CFI") was not satisfied with the Board's reasoning and annulled NetGSM II. [6] The CFI engaged in a highly fact-intensive review and referred to certain documents obtained from Turkcell and Vodafone during the dawn-raids conducted during the preliminary examination, which may indicate that both Turkcell and Vodafone had, at the time, been purposefully delaying the signing of an interconnection agreement. The CFI also noted that the significant increase in Vodafone's requirements regarding the security amount to be deposited for signing an interconnection agreement also called for additional scrutiny, as it made it more difficult for NetGSM to obtain interconnection services. Consequently, the CFI set aside the NetGSM II decision and required the Board to make a more thorough substantive assessment in light of the available evidence, by initiating a full-fledged investigation.

In this final stage of the saga (namely, NetGSM III), the Board made detailed assessments regarding the negotiation processes between Turkcell/Vodafone and NetGSM to determine whether the delays regarding the singing of interconnection agreements were stemming from potentially anti-competitive behaviours of the two mobile operators. As a result of a comprehensive assessment of all the facts and circumstances surrounding the case, the Board concluded that there was not sufficient evidence to hold Turkcell and/or Vodafone responsible for the apparent delays. On the contrary, the Board held that there were objective

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reasons justifying these delays. Specifically, the Board held that it was normal for the negotiations to take relatively long because; (i) the subject of interconnection was new when the negotiations began, (ii) there were uncertainties in some demands of NetGSM and that some of these had been subject to changes during the negotiations, (iii) the regulations concerning interconnection were interpreted differently by the parties and by the ICTA, (iv) the ICTA's involvement in the negotiations to settle the parties had prolonged the process, (v) it took time for the ICTA to clarify certain technical questions, and (vi) the parties were able to come to an agreement in the end. Consequently, the Board concluded that the evidence at hand was not sufficient to characterize Turkcell's and/or Vodafone's conduct as a constructive refusal to deal and decided that Article 6 of the Law No. 4054, which prohibits the abuse of dominance, was not infringed.

Key Takeaways

NetGSM III provides important insights concerning the interplay between telecommunications regulations and competition law in Turkey. It is fair to say that in 2010 and 2014, the Board was inclined to adopt an approach that evoked the Supreme Court of the United States' dictum in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, [7] that marginal benefits of antitrust enforcement against its costs where a regulatory scheme exists with the purpose of fostering competition, does not justify additional antitrust scrutiny. Yet, this stance was rejected by the courts, which called the Board to action regardless of whether the applicable regulations were well-suited to solve the problem at hand or not. It may be argued that the courts followed the European Commission's line of reasoning in the Deutsche Telekom [8] case that was later upheld by the European Union courts, whereby it was stated that sector-specific regulations would never absolve regulated undertakings from competition law liability, as long as the undertakings continue to have even the slightest margin of discretion with respect to their conducts. However, it should be noted that the interpretation of the Turkish courts may have gone even further, as the Board's assessment that the regulations had already removed all competitive harm was not taken into consideration, and additional competition law scrutiny was still deemed necessary.

In addition to that, NetGSM III is noteworthy due to the Board's analysis regarding the effects that the nature of delays in the negotiation process would have on the characterization of undertakings' conducts. Although the Board mentioned that the signing process of interconnection agreements between Turkcell/Vodafone and NetGSM was protracted, taking longer time than the market-average, it further assessed the cause of these delays by taking into consideration the circumstances surrounding the case. Despite noting that some of these delays may be attributable to the investigated parties, the Board found them to be reasonable due to the complicated nature and novelty of the rules governing the negotiations, and the confusions these led to on part of the investigated undertakings. This may indicate that the Board prefers to conduct a subjective assessment that gives weight to the peculiar conditions of each case, rather than merely sticking to objective outcomes, when determining whether a conduct constitutes a constructive refusal to deal.

An Opportunity Missed?

While NetGSM III shed light on some important issues, it nevertheless left a critical question unanswered. Namely, the Board chose not to take into account the investigated parties' claims that there would have been no violation of Article 6 even if it was assumed that their conducts amounted to a constructive refusal to supply, since the conditions for anti-competitive refusal to supply that are laid down in the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("Dominance Guidelines") were not satisfied in any case. Inter alia, it was claimed that even though there exists separate wholesale markets for

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terminating calls on the individual networks of all operators and that each operator holds a dominant position in their respective markets, call termination services provided by a single operator may not be deemed as an indispensable input for operating in the downstream market (i.e., retail SMS services market) due to the fact that downstream operations would still be possible (albeit partially) by purchasing termination services from other operators. The Board's evaluations regarding these claims would have crucial significance as it had the opportunity to lay down general principles with respect to the way in which refusal to supply claims would be handled in regulated industries, where duty to deal is imposed by ex-ante regulations. Most importantly, the Board could have clarified whether the conditions laid down in the Dominance Guidelines would still be relevant in the presence of a regulatory duty to deal and, if not, whether the mere presence of refusal (constructive or outright) would be sufficient for establishing a violation.

[*1*] The Board's NetGSM III decision dated 23.01.2020 and numbered 20-06/67-36.

[*2*] Call termination services include the termination of voice and video calls as well as SMS/MMS on mobile networks.

[*3*] The Board's NetGSM I decision dated 17.06.2010 and numbered 10-44/768-251.

[*4*] Council of State 13 th District's decision dated 11.03.2014 and numbered E.2010/4805-K.2014/832.

[*5*] The Board's NetGSM II decision dated 12.11.2014 and numbered 14-45/816-368.

[*6*] Ankara 11 th Administrative Court's decision dated 22.08.2018 and numbered E.2015/477-K.2018/366.

[*7*] 540 U.S. 398 (2004).

[*8*] Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG

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