Beyond any Doubt: Administrative Court Decisions Setting the Bar for the "Standard of Proof" for Abuse of Dominance

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In 2019 and 2020, Turkish administrative courts handed down noteworthy judgments concerning two particular decisions of the Turkish Competition Board ("***Board***"). In both of these cases, namely the (i) Sahibinden Bilgi Teknolojileri Pazarlama ve Tic. A.Ş. ("***Sahibinden***") judgment rendered by the Ankara 6th Administrative Court ("***Sahibinden Judgment***")[1] and the (ii) Enerjisa Enerji A.Ş. ("***Enerjisa***") judgments rendered by the Ankara 13th Administrative Court ("***Enerjisa Judgments***"),[2] the courts have shed light on and set the bar for the "standard of proof" with respect to the Board's decisions. In both of the judgments, the administrative courts looked for whether the Board decisions had been based on sufficient evidence and analysis to prove the infringement "beyond any doubt". The Administrative Courts have unequivocally shown that they are expecting the Turkish Competition Authority ("***Authority***") and Board to run the extra mile and conduct more research, collect more data and base its analyses on these tangible results, rather than just relying on assumptions and mere observation of the current market status, to reach the decisions.

(I) The Sahibinden Judgment

Upon the complaints received from various applicants concerning Sahibinden`s activities, the Authority conducted an investigation against the entity in 2018, to determine whether it had abused its dominant position and violated Article 6 of the Law No. 4054 on Protection of Competition ("***Law No. 4054***") through excessive pricing. As a result of its evaluation, the Board found that Sahibinden had abused its dominant position in the (i) "online platform services market for real estate sales/rentals" and in the (ii) "online platform services market for vehicle sales" through excessive pricing, and imposed an administrative monetary fine of approximately TRY 10 million ("***Sahibinden Decision***").[3]

Sahibinden objected to this decision and requested its annulment from the Board; however, the Board rejected Sahibinden's objection and approved the Sahibinden Decision once again.[4] Thereupon, Sahibinden appealed both the initial fine and the subsequent re-affirming

[1] Ankara 6th Administrative Court decision dated December 18, 2019 and numbered E.2019/946, K.2019/2625.
[2] The administrative court decisions regarding Enerjisa`s four subsidiaries were handed down in separate judgments: Ankara 13th Administrative Court decisions dated July 16, 2020 and numbered E.2019/660, K.2020/1315 dated July 16, 2020 and numbered E.2019/1969-K.2020/1318; dated July 16, 2020 and numbered E.2019/1970-K.2020/1319; dated July 16, 2020 and numbered E.2019/1956-K.2020/1317.

[3] The Board's decision dated 01.10.2018 and numbered 18-36/584-285.
[4] The Board's decision dated 02.05.2019 and numbered 19-17/239-108.

decisions, before the administrative courts. Upon its examination of the case, the Ankara 6th Administrative Court ("***6th Administrative Court***") annulled both, on the basis that the Sahibinden Decision had lacked (i) concrete evidence for the existence of excessive pricing, (ii) an analysis on the market definition, and (iii) cost analysis for the determination of the excessive pricing.

In scope of its assessment on the excessive pricing, the 6th Administrative Court explained that there are three different tests for the determination of excessive pricing but referred to the "Economic Value Test" set forth under the "*United Brands*" decision of the Court of Justice of the European Union[5] as the most preferred test when analysing excessive pricing allegations. This Economic Value Test, the court explained, involves the (i) comparison of the total production costs and the price, (ii) comparison of the prices of same or similar products within the relevant market or (iii) comparison of the prices of same or similar products within the neighbouring markets.

The 6th Administrative Court stated that the Economic Value Test determines whether the profit is high or not, by comparing a product's cost and its price. Following this examination, a price comparison is made to determine whether the product's price is unfair on its own or in comparison to the competitors` products/services. However, the 6th Administrative Court indicated that in conducting the price/cost comparison there may be certain challenges regarding the benchmark and calculation of the costs, or the assessment of what a reasonable profit margin would be, which may prevent an objective and error-free price/cost comparison. The 6th Administrative Court also specified that if the difference between the price and cost determined in the first step of the Economic Value Test is excessive, then the second step of the test should be used, where the comparison can be made either between the entity`s own prices or those prices employed by its competitors in the same or different geographic markets.

Moreover, the 6th Administrative Court explained that in order for an excessive pricing to be considered as abuse, the mere fact that an entity is in a dominant position in the market would not be sufficient. In addition to dominance, (i) the market should have high and permanent entry barriers, or (ii) the market should be a monopoly or near monopoly, as a result of current or historical exclusive rights or privileges. Even in cases where these conditions exist, it is accepted that competition or other relevant authorities should seek to resolve and remove the relevant entry barriers before assessing these acts within the purview of competition law, and if this is not possible, only then would the competition authorities be able to interfere in pricing.

[5] The European Court of Justice Judgment of 14.02.1978, *United Brands*, Case 27/76, ECLI:EU:C:1978:22.

In line with the above, the 6th Administrative Court referred to the position of European Commission with regard to the issue and explained that interference in pricing should be reserved for very exceptional cases where there is no other way to protect the consumer, and the pricing should especially not be interfered with, in cases where the market is expected to recover on its own within a short time or in the medium term. Therefore, the 6th Administrative Court examined that, due to the "exceptional" nature of the abuse through excessive pricing, the infringement should be proven with concrete facts that do not leave room for any doubt; otherwise, the interference may lead to consequences that are incompatible with the market economy and competition law.

The 6th Administrative Court stated that standard of proof is considered as the minimum standard which the Authority should meet before deciding on a case, and that the Board generally accepts the standard of proof to be "*healthy data, sufficient and convincing evidence, clear evidence showing the breach.*" However the Board's precedents do not contain any explanations as to the parameters on how to determine whether an evidence carries the abovementioned qualifications; whereas the Council of State, requires the standard of proof as "*clear and concrete evidence beyond any doubt*" when reviewing a case on Competition Board's decisions.

Against this background, the 6th Administrative Court decided that the Board`s Sahibinden Decision lacked solid basis and analysis, relied on mere observations and assumptions, reached conclusions based on doubt, and thus did not meet the standard of proof with respect to the following points:

- The 6th Administrative Court stated that although the Authority indicated that Sahibinden`s prices should be compared to its competitors' prices, its assessment had been, in fact, based on comparisons between different entities in markets that were not pertinent to the one where Sahibinden is active in. Furthermore, the Authority failed to conduct any comparative assessment for other geographical markets, and especially with respect to countries where global players are also active in.

- The 6th Administrative Court also drew attention to the allegation that the advantage garnered by Sahibinden as a result of its choice of trade name (which means "from the owner") in terms of consumer preferences, could not be deemed as an indication of its dominance without any tangible market data, but rather an outcome of the commercial foresight of the company.

- The 6th Administrative Court further scrutinized the lack of evidence regarding the "abuse of dominant position" arguments of the Authority and stated that the Authority had failed to adequately evaluate the case by pointing to the dominant position in the market, and to take into consideration the effect of Sahibinden's work model on its

prices and costs; and had rather just focused on the fact that the entity is active in more than one category of service and how this affected the visitor numbers.

- The 6th Administrative Court also explained that the Authority did not specifically calculate the margin between prices and costs; which meant that it did not conduct the required cost analysis to determine the existence of excessive pricing and only relied on observations. Regarding the prices, the 6th Administrative Court also noted that the Authority refrained from analysing the actual prices as opposed to the discounted prices and list prices, because it was a difficult comparison; as a result of which, the analysis failed to meet the standard of proof, as it was merely based on observations rather than concrete data.

- The 6th Administrative Court explained that it is not clear which tangible data or analysis were used for the assessment on the entry barriers in the market, which could potentially prevent the competitive pressure to a point the markets cannot recover themselves in short or mid-term. According to the 6th Administrative Court, the analysis on non-existence of "recovery in short or mid-term" is merely an observation and assumption. Additionally, the 6th Administrative Court stated that there was no solid market research on (i) the growth capacities of the global players in the market, (ii) their current recognition levels in the market, (iii) their growth process in the similar markets in different geographies, and that the evaluations were conducted without collecting any data and merely by observing the current positions of the players especially in short, mid and long term.

- The 6th Administrative Court also noted that the Board should have proven its allegation on the anti-competitive effects of the excessive pricing and whether this excessive pricing created any barriers of market entry. Accordingly, the 6th Administrative Court provided that theoretically, Sahibinden being considerably more expensive in its services, would be encouraging for new players to enter the market with very low or even free subscription methods and for the corporate customers to migrate to these platforms. The 6th Administrative Court also added in order to interfere with an entity's excessive pricing, the market would need to be closed to new entries, without enough players to create any pressure through their work models and commercial success on the allegedly dominant firm. However, basing the assessment on the commercial activities of a dominant undertaking subject to the success or performance of other undertakings, could not be a legal reasoning for abuse of dominance.

  Finally, the 6th Administrative Court stipulated that the Sahibinden Decision also lacked a full analysis of consumer benefit: Sahibinden has two types of user categories, personal and corporate, however the Board's analysis focused on only one

of them. Therefore, the 6th Administrative Court pointed out that since the personal users (*i.e.*, the consumers) do not pay any fee whereas corporate users pay a monthly fee, the Authority should have examined whether a decrease in the corporate users' subscription fee would lead to demanding fees from the personal users as well, and how the welfare of the consumers would be affected in the long run. Thus, it was found that the Sahibinden Decision lacked sufficient analysis as it focused on just one specific consumer group while examining the consumer welfare.

(II) Enerjisa Judgments

In 2018, the Board initiated an investigation concerning Enerjisa Enerji A.Ş ("***Enerjisa***") and its subsidiaries, all of which were active in the electricity sector in Turkey, on whether they had violated Article 6 of the Law No. 4054 by way of abusing their dominant position through various practices in different relevant product markets.

As a result of its assessments, out of the seven companies investigated, the Board imposed administrative monetary fines amounting to a total of TRY 143 million on four of them: (i) three were retail electricity sales companies (namely Enerjisa Istanbul Anadolu Yakası Elektrik Perakende Satış A.Ş. ("***Ayesaş"***), Enerjisa Başkent Elektrik Perakende Satış A.Ş. ("***Başkent***") and Enerjisa Toroslar Elektrik Perakende Satış A.Ş. ("***Toroslar***"), (together, the "***Retail Electricity Sales Companies***" or the "***RESCs***") and (ii) one was an electricity distribution company (namely, Istanbul Anadolu Yakası Elektrik Dağıtım A.Ş. ("***Ayedaş***")) ("***Enerjisa Decision***").[6]

These four subsidiaries all applied for the annulment of the Enerjisa Decision before the administrative courts. Ankara 13th Administrative Court rendered four separate decisions, one of which annulled the fine imposed on the distributor Ayedaş ("***Ayedaş Judgment***")[7] and the other three upholding the fine imposed on the RESCs and rejecting the appeal ("***RESCs Judgments***").[8]

(1) General Background of the Board Decision

The Board firstly highlighted the regulatory framework of electricity activities in Turkey. To that end, the Board particularly noted that the distribution of electricity and its retail sales had been severed into two separate activities with a regulation in 2013 and were carried out by separate legal entities since then.

[6] The Board's decision dated 08.08.2018 and numbered 18-27/461-224.
[7] Ankara 13th Administrative Court decision dated July 16, 2020 and numbered E.2019/660, K.2020/1315.
[8] Ankara 13th Administrative Court decision dated July 16, 2020 and numbered E.2019/1969-K.2020/1318; dated July 16, 2020 and numbered E.2019/1970-K.2020/1319; dated July 16, 2020 and numbered E.2019/1956-K.2020/1317.

Accordingly, the Board conducted different assessments for the RESCs and the electricity distribution companies, such as Ayedaş:

- For the retail sale of electricity services, the Board analysed the market in terms of (i) *ineligible consumers* (those consumers whose total annual consumption remain below the consumer eligibility threshold and therefore precluded from choosing their own providers), and (ii) *eligible consumers* (those consumers whose consumptions are above the said threshold and thus, able to choose their own providers). To that end, in its assessment concerning the RESCs, the Board held that, the relevant companies which used to hold a legal monopoly for the sale of electricity within their territories, still had exclusivity for the ineligible consumers and used this advantage to hinder the eligible consumers' switching options to competitors, thereby foreclosing the market to competitors. According to the Board, these RESCs (i) manipulated the customers, who used to be ineligible but who had subsequently passed the thresholds and become "eligible" to purchase electricity from their competitors, by preventing them from changing suppliers via certain practices and (ii) engaged in leveraging practices by way of making certain offers that could not be matched by the competitors.

- As for the electricity distribution activities, the Board defined the market as the "electricity distribution service" in view of the fact that the market is closed to competition and is subject to monopolistic regulations. To that end, the Board indicated that the electricity distribution company Ayedaş had shared competitively sensitive information (*i.e.,* debt notices) with Ayesaş, the Enerjisa RESC operating in the same territory, thereby providing it a significant cost advantage compared to the other retailers active in the territory and leveraging its monopoly position within the electricity distribution market.

(2) Ankara 13th Administrative Court's Judgments

In terms of the RESCs Judgments, the Ankara 13th Administrative Court (***"13th Administrative Court")*** assessed the actual, potential, and collective effects of unilateral abusive conducts by the undertakings holding dominant position and rejected all of the arguments set forth by the RESCs while upholding the fine imposed on the relevant undertakings.

As for the Ayedaş Judgment, the 13th Administrative Court pointed out at the outset that, it is possible for an electricity distribution company to provide invoice/payment/debt notice delivery services to an electricity retail sales company within the same economic entity. However, the important point to be scrutinized here should be whether the electricity distribution company's conduct would constitute a competition-restrictive behavior.

Pursuant to the above line of reasoning, 13th Administrative Court stated that, in order to

establish whether there has been a violation which resulted in the foreclosure of the market to the competitors by way of creating an advantage to the retail company included in the same economic entity, the assessment should clarify (i) whether the distribution company (*i.e.*, Ayedaş) had, in fact, delivered debt notices on behalf of the retail sale company Ayesaş –both part of the same economic unity – and (ii) whether this service has been provided free of charge.

Furthermore, the 13th Administrative Court emphasized that the Board's assessment and therefore the administrative fine imposed to Ayedaş, relies on a single e-mail message extracted from the computer of an Ayedaş employee. In this regard, 13th Administrative Court put forward that the e-mail message in question does not even indicate whether the notices were actually delivered or what the purpose of the notices had been.

The 13th Administrative Court also emphasized the fact that, the Board found the e-mail message at hand sufficient to establish an abuse of dominance violation and refused to take into consideration Ayesaş's defenses indicating that (i) debt notices were actually being delivered to the consumers by a third party (namely, EEDAŞ, which was also another wholly owned subsidiary of Enerjisa), (ii) under a bilateral contract that actually required Ayesaş to pay for this notification service and (iii) any competitor of Ayesaş could also benefit from the same service with equal terms, if they wished to do so.

In light of the foregoing, the 13th Administrative Court found that the Board had failed to prove "beyond any doubt" that Ayedaş actually leveraged its legal monopoly in the distribution market by way of delivering debt notices to Ayesaş free of charge. It has further emphasized that rather than merely relying on a single e-mail correspondence, the Board should have extended the investigation in order to further assess the alleged conduct on part of Ayedaş. In line with this, it has indicated that the existence of a violation should have been established "beyond any doubt" by further examining the information, documents and evidence collected through this extension.

As a result, the 13th Administrative Court declared that the Board's Enerjisa Decision lacks adequate evidence to demonstrate Ayedaş's alleged anti-competitive conducts and therefore annulled the part of Board's decision pertaining to Ayedaş.

(III) Conclusion

The judgments provided above constitute highly valuable and relevant precedents about legal standards to be applied in abuse of dominance cases, regardless of the type of abuse. In both the *Sahibinden Judgment* and the *Ayedaş Judgment*, the Ankara Administrative Courts ruled that, in cases concerning (exclusionary or exploitative) abuse of dominant position, the existence of a violation must be established "beyond any doubt."

The reference to the standard of proof still varies in judgments of courts for example in 13th Chamber of the Council of State's *12 Banks* decision[9], it was referred to as "*beyond reasonable doubt*" or "*clear and precise evidence beyond any doubt*" by the Council of State[10].

However, in *Sahibinden* and *Ayedaş* judgments, the administrative courts set forth what is not enough to meet the standard of proof.

The 6th Administrative Court indicated that in abuse of dominance cases, the applicable legal standard requires the Board to conduct "*clear and precise assessments that are beyond any doubt,*" and criticized the Sahibinden Decision for relying on "*mere observations and assumptions*". In particular, the 6th Administrative Court underlined that "*forming an opinion based on doubt is not legally sufficient,*" and "*the requisite legal standard requires the allegation to be proven with concrete evidence, and justifications to establish that the doubt is valid.*" Similarly, the 13th Administrative Court found that the Board had failed to prove "beyond any doubt" that there has been a violation through relying on a single e-mail correspondence, whereas the Board should have extended the investigation in order to further assess whether the alleged conduct actually happened.

Both judgments focus on the necessity to determine a violation "beyond any doubt". While they do not provide a new set of standards or pre-determined requirements for the Board to apply, they require the Board to put forward some kind of evidence to illustrate the alleged violation "beyond any doubt". The judgements also give the Board the assignment to collect additional data, evidence and even conduct market research in order to gather clear evidence of the violation rather than merely relying on observation and statements.

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[9] The 13th Chamber of the CoS, *12 Banks* decision dated 21.05.2019 and numbered E.2016/3513; K.2019/1777.
[10] *See, e.g.*, 15th Chamber of the CoS, 13.11.2015; 2015/4441 E., 2015/7545 K. and 11.11.2015; 2015/2514 E., 2015/7361 K.