COMPETITION & ANTITRUST - TURKEY

Competition Board grants exemption to agreement between broadband providers

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The Competition Board recently published its reasoned decision on the application filed by Vodafone Net İletişim Hizmetleri AŞ regarding an agreement signed with Superonline İletişim Hizmetleri AŞ. The agreement concerns Vodafone and Superonline granting each other access to their respective infrastructure for wholesale fibre-optic broadband services and providing support services to each other's customers where appropriate.

Parties

Vodafone is a part of the international mobile communications company Vodafone Group and provides landline, broadband internet access services and infrastructure management. Vodafone has been active in the Turkish market since 2006.

Superonline was founded in 2004 as part of the Turkcell Group and provides internet access services via the cable network (ie, internet access, landline services, infrastructure management, satellite telecoms, cable broadcasting and virtual mobile network management services).

Agreement

Under the agreement between Vodafone and Superonline:

- each party will, on payment of the sum decided, provide access to their fibre-optic broadband services on a wholesale level where possible;
- customers of both parties will be able to access the fibre-optic broadband services of both parties; and
- the parties will provide support services to each other's customers.

As the agreement concerns the electronic communications sector, the Competition Board consulted the Information and Communication Technologies Authority, which raised the following points:

- Although certain clauses could be revised, the agreement should be considered within the scope of consumer benefits and potential competition issues.
- It would be beneficial to assess whether in specific circumstances, and in the event of specific technical issues, consumers would be able to contact the appropriate party.
- The agreement's five-year duration should be considered within scope of:
  - potential global, regional and national economic developments;
  - technological advances and possible changes to and developments in the relevant product market;
  - consumer rights; and

- whether the agreement has the potential to result in the unjust treatment of consumers.

Relevant product and geographical markets

The Competition Board began its assessment of the agreement between Vodafone and Superonline by defining the relevant product market. Having considered the agreement's terms and conditions and jurisprudence and the Information and Communication Technologies Authority's opinions, it defined the market as 'wholesale fixed broadband internet services'. However, as the agreement concerns wholesale level access to fibre-optic broadband infrastructure and, as such, a relevant product market definition would allow a closer examination of said market structure, the other relevant market was defined as 'wholesale fixed fibre-optic broadband internet access services'.

In addition, the Competition Board noted that because the agreement primarily concerns services provided to end-users, the market could also be defined as 'retail fixed broadband internet access services'. The geographic market was defined as Turkey in consideration of the fact that the competitive landscape is the same throughout the country.

Assessment of agreement

The Competition Board argued that Superonline and Vodafone are competitors in the wholesale and retail fixed broadband services market. Both parties have their own fibre-optic broadband infrastructure and provide fixed broadband internet to end-users. According to the board's assessment, the agreement is expected to have a horizontal effect on the market. Conversely, as the parties' main field of activity is retail electronic communication services and the agreement between them mainly focuses on infrastructure (which is a vital element of the parties' retail services), the agreement will also have vertical effects on the wholesale and retail markets.

As a result, the board found that the agreement fell within the scope of Article 4 of Law 4054 on the Protection of Competition and should be examined in the context of Article 5 of the law, which governs the exemption regime. According to the board, the agreement between Vodafone and Superonline was a horizontal and vertical cooperation agreement, and this cooperation would lead to the parties having access to each other's strategic information in the wholesale market, which could influence management decisions and lead to a restriction of competition within the given markets.

Further, the board noted that the agreement between Vodafone and Superonline should also be assessed with regard to the risk of coordination effects in the market, as it could have negative effects for infrastructure management and the internet services provided to end-users.

The board also noted that even if vertical agreements such as that under review do not aim to restrict competition, they have the potential to create similar anti-competitive effects in the market as horizontal agreements, even if they do not include anti-competitive clauses. The board finished its initial substantive analysis by stating that the agreement fell within the scope of Article 4 of Law 4054.

Block exemption assessment

After establishing that the agreement fell within the scope of Article 4 of Law 4054, the board assessed whether it also fell within the scope of the Block Exemption Communique on Vertical Agreements (2002/2) . The communique exempts vertical agreements from Article 4 of Law 4054 as long as they are not concluded between competitors. As an exception, the communique states that if a supplier is both the producer and distributor of the goods under review (whereas the purchaser is only the distributor of said goods), a vertical agreement between competitors may be assessed under the communique .

As regards the agreement between Vodafone and Superonline, the board noted that the parties were competitors and service providers and that the agreement therefore did not fall under the scope of the communique.

Individual exemption assessment

Article 4 of Law 4054 is not applied where an agreement:

- improves the production or distribution of goods or promotes technical or economic progress;
- benefits consumers;
- does not eliminate competition for a substantial part of the goods or services in question; and
- does not restrict competition beyond what is strictly necessary to achieve the aforementioned positive effects.

In order for an agreement to be exempt under Article 5, the two positive and negative conditions outlined above must be cumulatively fulfilled. In this context, the Competition Board assessed the agreement between Vodafone and Superonline according to each of the above conditions.

In order to fulfil the first condition, an agreement must result in objective and concrete gains that are applicable to the general economy (eg, lower distribution costs, product variety and enhance pre-sale services).

In its assessment of the agreement between Vodafone and Superonline under the first condition the board stated that it would result in reduced costs, as the establishment of a new network infrastructure requires significant investment and could be regarded as a sunk cost. In addition, the networks in question include high-level economies of scale and also require permits from the Ministry of Communications. According to the board, the agreement between Vodafone and Superonline could eliminate the need for investment in infrastructure in certain areas and create additional cost reductions.

As for the parties' competitors, the board noted that Türk Telekomünikasyon AŞ has significant market power through its network at wholesale and retail levels. In 2017 Türk Telekom's fibre-optic broadband infrastructure was 254,474 km, whereas the combined network infrastructure of alternate suppliers was 68,193 km. The copper phone line network belongs entirely to Türk Telekom. The board found that Superonline is the second largest fibre-optic broadband network owner. As a result, if Superonline would share its network with Vodafone, this would enhance competition between these companies.

The board also noted that the agreement between Vodafone and Superonline would enhance Superonline's capacity utilisation ratio, as its infrastructure reaches 2.7 million households (which is 60% of its current capacity). By cooperating with Vodafone, the additional 40% of its capacity would be used. As a result, the penetration of high-speed fibre-optic broadband would increase nationwide.

After assessing the above and additional elements, the Competition Board concluded that the agreement between Vodafone and Superonline fulfilled the first exemption condition in Article 5 of Law 4054.

In its assessment of the second criterion, the Competition Board noted that consumers must also benefit from the gains mentioned above. In the case at hand, the board initially acknowledged that fibre-optic broadband infrastructure provides a relatively improved access speed compared with the copper-phone-line infrastructure. Further, fibre-optic broadband infrastructure is less influenced by elements such as distance, weather conditions or heat, whereas copper phone line infrastructure is affected by these elements in addition to electromagnetic factors. Therefore, fibre-optic broadband provides a better quality of service to consumers even at long distances compared to copper phone line services.

The Competition Board also noted that both the Ministry of Development and the Ministry of Communications had previously indicated that the improvement of fibre-optic broadband services was central to Turkey's long-term development plans. The board noted that in the scope of the agreement between Vodafone and Superonline, the parties would have access to each other's infrastructure and therefore would be expected to provide consumers with faster and better quality internet access.

Further, if Superonline and Vodafone granted each other access to their respective infrastructure, consumers would have the opportunity to purchase the services of different providers. Therefore, the agreement between the two parties would increase consumer choice.

The board also noted that the agreement between Superonline and Vodafone had produced additional benefits for consumers (eg, support services that were planned to be mutually provided by Superonline and Vodafone). The board stated that, as the parties had agreed to provide support services to each other's customers with the same care that they would their own, this would greatly benefit consumers.

The board also stated that the agreement would result in cost benefits for consumers and acknowledged the possibility of lower prices at the retail end.

According to the board's assessment, the agreement between Superonline and Vodafone fulfilled the second condition under Article 5 of Law 4054.

The Competition Board's also examined the agreement between Superonline and Vodafone under the third exemption condition above and noted that its assessment would focus on the effect that the agreement would have on the market and the parties' market power.

The board initially noted that copper-phone-line-based internet constitutes 72.5% of the fixed broadband services provided to subscribers in Turkey, whereas fibre-optic broadband constitutes 19.6%, albeit with an increase in recent years. In 2017 Türk Telekom owned 79% of Turkey's fibre-optic broadband infrastructure. Further, as copper phone line networks are being transformed into fibre-optic networks and Türk Telekom has the largest copper phone line infrastructure, the board noted that this provides Türk Telekom with significant advantage to strengthen its position in the scope of fibre-optic broadband services. The board also examined Superonline and Vodafone's market share in the previous three years and noted that it had decreased, while Türk Telekom's had increased in the same period. Therefore, the board concluded that the parties' market shares, both individually and collectively, did not equate to significant market power.

The board also assessed Superonline and Vodafone's market share on the basis of the number of houses to which they supplied internet access. It noted that Türk Telekom had a relatively higher market share in this context compared with Superonline and Vodafone. However, the board also highlighted that the number of homes to which Superonline's services were available compared with the size of its infrastructure was higher than Türk Telekom's considering the latter's market share and the number of homes to which its services are available.

When a revenue-based assessment was made, the board noted that although the market share of Türk Telekom's TTNet brand was decreasing, Vodafone's market share was relatively low compared with Türk Telekom and Superonline, which is Türk Telekom's closest competitor.

The board concluded that both Superonline and Vodafone's market share did not indicate significant market power and that Türk Telekom had held significant market power for many years.

The board also assessed the economic and structural entry barriers to the market and noted that the establishment of a brand new broadband network would require a number of permits from the Ministry of Communications, municipalities and property owners, while also bearing in mind additional elements such as cultural spaces or natural assets. Further, the board noted that the infrastructural and sunken costs are high and therefore this element creates asymmetrical conditions for new market entrants.

It also acknowledged the difficulty for alternative suppliers to establish a Turkey-wide broadband network in the short and medium term. As a result, the board recognised that there were structural and legal entry barriers to the market. Moreover, it found that a vertically integrated competitor such as Türk Telekom would make it difficult for alternative suppliers to potentially limit the market power that it enjoys.

When examining retail-level entry barriers, the board noted that a permit from the Information and Communication Technologies Authority and the existence of vertically integrated competitors with broad product portfolios could be seen as potential entry barriers to the market (although not as relatively high as the entry barriers at the wholesale level).

As for its assessment of the overall market, the board considered how the parties would fair in competition with Türk Telekom and the overall internet services market in Turkey. It noted that an increase in customers for Superonline and Vodafone through each other's networks would also increase incentive for investment and help to develop the existing broadband infrastructure.

Moreover, the board acknowledged the parties' aim to create an alternative to Türk Telekom and that competition in the wholesale and retail fixed broadband markets would increase as a result.

Following a detailed assessment, therefore, the board concluded that the agreement between Vodafone and Superonline fulfilled the third criterion of individual exemption provided under Article 5 of Law 4054.

In its assessment of the agreement between Vodafone and Superonline under the last exemption criterion under Article 4 of Law 4054, the Competition Board noted the following:

- The agreement does not introduce an exclusivity clause for the parties.
- Cooperation under the agreement would remain between the parties to the agreement.
- The parties would continue to actively or passively market their products to gain additional customers, including each other's.
- Although the agreement between Vodafone and Superonline includes clauses that could have anti-competitive effects, the board found that the agreement would restrict the parties from interfering with each other's retail campaigns and the existence of competitors (eg, Türk Telekom) was an obstacle to the possibility of price increases.

Finally, the board noted that the agreement's duration was set at five years, but having considered the potential global, regional and national developments it could be granted only a three-year exemption.

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