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Preview

The Turkish Competition Authority grants an individual exemption for five years to a "frequent flyer cooperation agreement" between a national airline and a bank *(Turkish Airlines / Kuveyt Turk)*

ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), BLOCK EXEMPTION (REGULATION), FINANCIAL SERVICES, COOPERATION AGREEMENT, NON-COMPETITION CLAUSE, TURKEY, EXEMPTION (INDIVIDUAL), MFC CLAUSE, TRANSPORT (AIR)

Turkish Competition Authority, *Turkish Airlines / Kuveyt Turk*, Case 21-29/369-185, 3 June 2021 (Turkish)

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e-Competitions News Issue Preview

This case summary includes an analysis of the Turkish Competition Board's ("Board") *Turkish Airlines and Kuveyt Turk* exemption decision [*1*] in which the Board determined that the "THY Frequent Flyer Program Miles&Smiles Credit Card Cooperation Agreement" ("**Agreement**") cannot be issued a negative clearance certificate pursuant to Article 8 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") or benefit from block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"), but may be granted individual exemption for a period of five years within the scope of Article 5 of the Law No. 4054.

Background

Two types of credit cards offer free or discounted airline transportation to end consumers. First is the Frequent Flyer Programme ("**FFP**") credit card, which is issued under cooperation agreements between airline companies and banks, and allows members to win awards only under the FFP of the relevant airline.

The second type is the travel advantage credit cards banks issue individually rather than cooperating with airlines. These allow customers to earn more miles and other benefits via their travel expenses. Consumers can spend these miles in any airline they choose instead of being limited to one airline company.

In this case, the Miles&Smiles card, which is a product of Türk Hava Yolları A.O.'s ("**Turkish Airlines**") own loyalty programme and allows members to earn miles from their Turkish Airlines and other Star Alliance member airline flights as well as from purchases made from other Miles&Smiles partners, was issued under the Agreement between Turkish Airlines and Kuveyt Türk Katılım Bankası A.Ş. (Kuveyt Turk Participation Bank – "**Kuveyt Turk**"). [*2*] The card cannot be used as a means of payment; it cannot be substituted with other payment cards and therefore, is not in the same product market.

The Agreement aims for Turkish Airlines passengers to have access to a Kuveyt Turk credit card alternative and for Kuveyt Turk customers to receive additional advantages through their Miles&Smiles cards. The card collects miles when purchasing goods/services with the card from third parties. With these miles, members receive various benefits such as free flight tickets, flight upgrades, and spending their miles on certain purchases.

Regarding the the parties' relationship, the Board identified Turkish Airlines as the supplier in the upstream market while Kuveyt Turk markets to end consumers by using miles supplied by Turkish Airlines as input in the downstream market. Therefore, the Board found a vertical agreement between the parties.

The Board held that, although the relevant markets could be defined broadly as "airline transport" and "banking services", given the vertical nature and scope of the Agreement, a narrower definition may prove more beneficial in assessing the Agreement's effect on competition. This analysis led the Board to define the relevant markets as:

1. the purchase and sale of FFP miles market, i.e. the upstream market; and
2. credit cards offering travel benefits within free and/or discounted airline transportation market, i.e. the downstream market.

The Board also stated that the services offered by the parties in both the upstream and the downstream markets are homogeneous nation-wide and defined the relevant geographical market as "Turkey".

Reasons for Not Granting Negative Clearance

In its negative clearance evaluation, the Board identified certain provisions of the Agreement which are deemed restrictive on competition, namely the non-compete and most favoured customer ("**MFC**") obligations of Kuveyt Turk. Emphasis was also made on the provision restricting the number of Turkish Airlines' buyers. This provision prohibits any cooperation between Turkish Airlines and excluded banks aiming to offer flight miles to customers through credit cards.

In light of the anti-competitive effect of these provisions, the Board held that the Agreement falls within the scope of Article 4 of the Law No. 4054 and decided not to issue a negative clearance certificate due to such competition restraints.

Reasons for Not Granting Block Exemption

In order for any vertical agreement to benefit from block exemption under Turkish Competition Law, the supplier's share in the relevant market(s) must not exceed 30% pursuant to Article 2(2) of Communiqué No. 2002/2. [*3*]

It must be noted that the Communiqué No. 2002/2 was amended by the Communiqué No. 2021/4 on November 5, 2021, almost five months after the Board issued this decision. The market share threshold for block exemption for vertical agreements used to be 40% at the date of the decision.

The Board determined that Turkish Airlines' market share, as the upstream market supplier, exceeds 40% when calculated with respect to the number of active FFP cards. Therefore, it was held that the Agreement did not qualify for a block exemption under the Communiqué No. 2002/2.

Analysis of the Individual Exemption Conditions

Individual exemption under Turkish Competition Law is governed by Article 5 of the Law No. 4054. Four conditions exist under Article 5, all of which must be satisfied for an agreement, decision or concerted practice to benefit from individual exemption. These conditions are as follows:

(a) They must ensure new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services;

(b) Consumers must benefit from the above-mentioned;

(c) They must not eliminate competition in a significant part of the relevant market; and

(d) They must not restrict competition more than necessary to achieve the goals set out in (a) and (b) above.

The Board concluded that the Agreement meets all of these conditions. The analyses mainly focused on conditions (c) and (d), Kuveyt Turk's negligible presence in the market served as the main reference point to conclude that these conditions are met for the Agreement.

The findings for condition (a) revealed that the Agreement allows the parties to access a higher volume of customers as well as a new customer base that they otherwise could not have reached. The Board emphasised the ways in which the Parties' businesses were improved since entering into the Agreement, such as:

1. Turkish Airlines being able to better organise its flights and passenger capacity while generating income;
2. Kuveyt Turk's less costly outreach to Turkish Airlines' customers;
3. Turkish Airlines being able to access Kuveyt Turk's interest-sensitive customers, [*4*]
4. a brand new consumer group for the company; and the cooperation's significant contribution to the parties' corporate identities and brand values.

For condition (b), the Board stressed that the Agreement creates significant product differentiation in the credit card market, resulting in increased consumer preferences. It stated that added benefits for Turkish Airlines customers include instalment shopping and loan opportunities under the Agreement. Moreover, Kuveyt Turk's interest-sensitive customers are able to access exclusive offers through the cooperation.

Condition (c) firstly required the Board to scrutinise the Parties' position and market power within the relevant markets. The Board highlighted that Turkish Airlines' high market share in air passenger transportation contributed to the anticompetitive impact of the Agreement. The Board observed that this outlook in the upstream market stems from Turkish Airlines' special position in the sector as well as the number of customers of the banks with which it has agreements. The Board also noted that the downstream market is dynamic and continuously growing as many banks are able to offer travel advantages to their customers without agreements with airline companies as a result of these programmes.

Subsequently, the foreclosure effect within the non-compete and the MFC clauses were evaluated. Although it was stated in the decision that cooperation could be made in a way that would not be an alternative to the agreement, no evaluation was made on whether this would be applicable or not. The Board assessed that these provisions will not result in foreclosure of the market to rival airline companies, [*5*] mainly because of Kuveyt Turk's trivial presence within the credit card market and right to cooperate with other airline companies as to services other than the ones alternative to those under the Agreement.

Thirdly, the foreclosure risk of the buyer restriction imposed on Turkish Airlines was assessed, and the Board concluded that it did not foresee foreclosure due to three reasons: (i) airline customers are not particularly inclined to use FFP cards for payments, (ii) customers can receive a credit card offering travel advantages without an agreement with Turkish Airlines, and (iii) banks may be reluctant to have these agreements due to budgeting issues.

When evaluated within the scope of condition (d) to determine whether the provisions were necessary and proportional to achieve conditions (a) and (b), the Board stated that they were all essential to protect Turkish Airlines' brand image and to ensure uniformity and high quality standards. The Board noted that limiting the number of Turkish Airlines' buyers may also (i) ensure revenue optimisation for Turkish Airlines, (ii) protect brand image, and (iii) solve the freeloading problem which may arise out of Kuveyt Turk's expenses for the promotion, advertisement, marketing and communication of the Miles&Smiles card.

Based on these findings, the Board granted individual exemption to the Agreement. Although Kuveyt Turk is not a significant player in the relevant market, the Board considered it appropriate to periodically evaluate the Agreement's effect due to Turkish Airlines' dominant position in the upstream market. Hence, it was concluded that the individual exemption period must be limited to five years.

Conclusion

The *Turkish Airlines and Kuveyt Turk* decision is similar to the Board's previous decisions regarding Turkish Airlines' FFP cooperation agreements with QNB and Garanti Bank. It is seen that the evaluations are majorly parallel to each other; however, while the individual exemption for QNB was similarly granted with a five-year time limit, the time limit for Garanti Bank's individual exemption was two years. In this case, we also see that Kuveyt Turk's relatively inconsequential presence constitutes an important basis for the Board's analysis. Yet, the assessment of the condition not to eliminate competition in a significant part of the relevant market was rather peripheral than usual compared to previous decisions in which one party is in a dominant position, and the Board adopted a wait-and-see strategy by establishing a time limit for the individual exemption.

[*1*] The Turkish Competition Board's Turkish Airlines and Kuveyt Turk decision dated 03.06.2021 and numbered 21-29/369-185 (Available at: *https://www.rekabet.gov.tr/Karar?kararId=046fc52d-a9ec-4895-a1e7- eab2171b0010*).

[*2*] Turkish Airlines had entered into a similar agreement with QNB Finansbank A.Ş. ("**QNB**") and Türkiye Garanti Bankası A.Ş. ("**Garanti Bank**"), which were both evaluated by the Board on the basis of negative clearance, block exemption and individual exemption in the Board's decision numbered 20-11/122-71 and dated 20.02.2020 and decision numbered 17-28/465-204 and dated 07.09.2017 respectively.

[*3*] The 30% threshold is also required for the buyer in cases where the supplier provides goods or services to a single buyer.

[*4*] Interest-sensitive customers are those who choose participation banks over debit banks due to the interest-free financing options they offer.

[*5*] It must be noted that the Board did not prefer to evaluate the cumulative foreclosure effect these two provisions may have together and the provisions were rather assessed independently of each other.