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Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition authority rejects an individual exemption application between two online retailers which agreed to not bid for the keywords relevant to the rival's brand (*Modanisa / Sefamerve*)

ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), INTELLECTUAL PROPERTY, ADVERTISING , TURKEY, EXEMPTION (INDIVIDUAL), EFFECT ON COMPETITION

Turkish Competition Authority, *Modanisa / Sefamerve*, No. 21-57/789-389, Decision, 25 November 2021

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The Turkish Competition Authority Evaluates a Request from Modanisa for an Individual Exemption or Negative Clearance for the Settlement Agreement Regarding Restricting on Branded Keyword Bidding*

This case summary includes an analysis of the Turkish Competition Board's ("Board") Modanisa/Sefamerve decision [1] ("Decision") in which the Board determined that the settlement agreement ("Settlement Agreement"), executed between Modanisa Elektronik Mağazacılık ve Ticaret A.Ş. ("Modanisa") and EST Marjinal Medikal Tanıtım ve İletişim San. ve Tic. Ltd. Şti. ("Sefamerve") (together, the "Parties") would not be issued a negative clearance certificate and would not be granted an individual exemption.

GENERAL INFORMATION

The Parties of the Settlement Agreement are mainly active in the sale of ready-to-wear clothing for women. Even though both Modanisa and Sefamerve mainly carry out their activities through online channels, Modanisa has a limited number of physical stores through which it conducts sales. The Settlement Agreement includes provisions restricting the Parties from using certain keywords through online advertisements. In this sense, according to the Settlement Agreement, concerning the broad match and phrase match categories of online advertising on mobile applications and/or desktop platforms, on all internet mediums including search engines and social media platforms in Turkey and globally; Modanisa undertakes to list "*sefamerve*", "*sefa merve*" and "*sefa*" as negative keywords and, in a similar vein, Sefamerve accepts to determine "*Modanisa*" and "*nisa*" as negative keywords, and both Parties agree not to target each other's names and officially registered brands. These restrictions and

obligations also apply to the Parties' advertisement texts and metatag keywords. All in all, the Board assessed the restrictions and obligations within the Settlement Agreement under three categories, namely; negative matching obligation, non-targeting obligation, and restrictions related to metatag.

Having considered the nature of the restrictions and obligations within the Settlement Agreement, the Board provided a detailed explanation concerning (i) broad matching, (ii) phrase matching, and (iii) exact matching – certain types of keyword matching– that are commonly used for online search-based advertising in practice. It is explained in the Decision that “**broad match**” means that the results following a user's search query would mainly focus on the meaning of the query rather than the exact keyword(s). Therefore, an advertisement might be displayed to a user if it is detected that the user's query is sufficiently related to the keywords which were bid on by the advertiser. However, if an advertiser preferred “**phrase match**”, the advertisement would only appear if the user's search query includes exact keywords which were determined by the advertiser, even before and/or after other keyword(s) in the search query. Finally, if the advertiser bids on the keyword(s) by determining an “**exact match**”, the advertisement related to the relevant keyword(s) would only appear in the results following the user's search query, which should include the exact keyword(s) only, without any additional keyword in the search query. The Board also indicated that “negative keyword” does not constitute a matching category, but a tool enabling the advertisers to determine certain negative keyword(s), serving a function in not displaying the advertisement if included within the user's search query.

REASONS FOR NOT GRANTING NEGATIVE CLEARANCE

In its negative clearance evaluation, the Board stated that it is necessary to assess whether the restrictions and obligations arising from the Settlement Agreement would restrict competition within the meaning of Article 4 of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”). Furthermore, the Board evaluated the provisions of the Settlement Agreement considering Law No. 6769 on Industrial Property (“**Law No. 6769**”) due to the Parties' arguments that the relevant obligations and restrictions aim to protect the Parties' rights originating from registered trademark protection.

The Board in its Decision indicated that, according to Article 7 of Law No. 6769, the trademark protection is obtained as of registration. Moreover, Article 7/3-d provides that it is prohibited to use the same mark or its similar versions in the form of a domain name, router code, keyword or a similar manner so as to create a commercial effect on the Internet, provided that the person using the mark does not hold the right to use or is not legitimately associated with the use of the mark. Based on this, the Board concludes that Article 7 of Law No. 6769 provides the brand owner with protection in case the concerned brand is used by the third-party(-ies) on the internet without permission. In this regard, to evaluate each provision within the Settlement Agreement, the balance should be observed between competition law sensitivities and trademark protection. Therefore, considering the restrictions and obligations within the Settlement Agreement, the Board identified three categories which are explained in the following lines:

1. **Narrow non-brand bidding restriction:** This covers non-targeting restrictions only for registered brands (i.e., '*modanisa*' and '*sefamerve*') of the Parties. That means, the Parties would not bid on a one-word keyword consisting of each other's brand only. Therefore, that one Party bids on a phrase consisting of at least two words (one of which is the other Party's registered brand) does not fall into the scope of narrow non-brand bidding restriction.
2. **Wide non-brand bidding restriction:** Through wide non-brand bidding restrictions, the Parties would not bid on search query consisting of at least two words, one of which is the other Party's registered brand. Even the

combinations of two words would be covered under this restriction.

- 3. Negative keyword matching obligation:** Similar to wide non-brand bidding restriction, this obligation requires the Parties to add each other's registered brand to their "list of negative keywords" so that when a query including one of their registered brands is searched, the ads of the other Party would not be displayed to the user.

Based on the foregoing categories, the Board concluded that the trademark protection would only be regarded for narrow non-brand bidding restrictions. However, as for wide non-brand bidding restrictions and negative keyword matching obligations, the Board held that such provisions would exceed the limit of trademark protection and lead to anti-competitive results in the relevant product markets. Therefore, in light of the anti-competitive effect of the concerned provisions, the Board held that the Settlement Agreement falls within the scope of Article 4 of Law No. 4054 and decided not to issue a negative clearance certificate due to such competition restraints.

REASONS FOR NOT GRANTING AN INDIVIDUAL EXEMPTION

The Board proceeded with an individual exemption assessment in terms of the Settlement Agreement under Article 5 of Law No. 4054 and noted that the Settlement Agreement would be a candidate for individual exemption only if the Settlement Agreement (a) would contribute to the improvement of the production or distribution of goods or the promotion of technical or economic progress and (b) would contribute to a consumer benefit, (c) would not consequently eliminate competition in a substantial part of the relevant market, and (d) would not restrict competition more than necessary to achieve the objectives outlined in (a) and (b). For an agreement to be exempted from the application of Article 4 of Law No. 4054, the conditions set forth above must be fulfilled cumulatively.

Based on the foregoing, the Board indicated that the Settlement Agreement should provide benefits not only for the Parties but also for the economy in general. Furthermore, the Board considered that the restrictive provision would decrease the consumer options and thereby harm consumer welfare in terms of price and quality. As for the restrictions and negative matching obligations regarding the keyword which are not registered as trademarks, the Board held that the Settlement Agreement would exceed the limit of trademark protection and restricts competition beyond what is necessary to attain the objectives outlined above.

Consequently, further to its substantial analysis in terms of competition law and trademark protections, the Board concluded that the Settlement Agreement would not be issued a negative clearance certificate as it falls within the scope of Article 4 of Law No. 4054 and would not be granted an individual exemption as it could not fulfil the conditions outlined in Article 5 of Law No. 4054. However, the Board held that the Settlement Agreement could benefit from the individual exemption regime if it is amended in a way that removes the non-targeting restrictions and the negative matching obligations for the keywords which are not registered as brands.

CONCLUSION

The Decision is of great significance as it harbours extensive explanation and analysis on the branded keyword bidding practices in terms of competition law and intellectual property law. The Decision also serves as an important precedent indicating that the agreements restricting companies from bidding on each other's brands could be exempted from Law No. 4054 if such agreements only contain narrow non-brand bidding restrictions. The Decision also sets an example of how the Board threads a line between the intellectual property protections and competition law sensitives while assessing agreements regarding the use of negative keywords.

[1] The Board's *Modanisa/Sefamerve* decision, dated 25.11.2021 and numbered 21-57/789-389.