

Exclusive Owner of the Turkish Football League Broadcast Rights Is Found to Violate Turkish Competition Law: Competition Board’s Digiturk Case

Authors: Gönenç Gürkaynak, Esq., Fırat Eğrilmez and Simay Demir, ELIG Gürkaynak Attorneys-at-Law

(1) Introduction

Turkish Competition Board (“**Board**”) imposed an administrative monetary fine of TL 7,068,133.04 to Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. (“**Digiturk**”) on the grounds that Digiturk has violated Article 4 of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) by way of preventing active and passive sales of its resellers¹. According to the Decision of the Board (“**Decision**” or “**Digiturk Decision**”) published on the Turkish Competition Authority’s (“**Authority**”) web-site on August 9, 2022, the investigation pertaining to the Decision has been launched based on the complaints of the commercial customers of Digiturk’s dealers.

Digiturk is the exclusive broadcast right owner for 2018 and 2019 seasons of Turkish Super League and First League, which are respectively the first and second football leagues in Turkey. In the Decision, the Board examined the allegations that Digiturk has implemented an exclusive distribution system for subscription based TV broadcasting services for Turkish Super League and First League and its actions have involved in resale price maintenance. Additionally, the allegations against Digiturk and its dealers include abuse of dominant position by way of excessive pricing and discrimination.

(2) Competition Board’s Assessment within the scope of Article 4 of the Law No. 4054

(a) Assessment regarding Exclusive Distribution

¹ Decision of the Board dated 13.01.2022 and numbered 22-03/48-19.

The Board initially noted that Turkish Super League and First League games may either be purchased by way of individual subscription, which enable household users to watch football games at home or commercial subscription that targets commercial and public enterprises broadcasting football games. In that context, the Board remarked that the investigation of the Authority focused on Digiturk's conducts pertaining to the commercial subscriptions.

The Board remarked that Digiturk's distribution system for commercial subscribers involved territorial exclusive distribution. In that context, the Board found that before each Turkish Super League and First League season, Digiturk initiates a tender for the exclusive rights to distribute Turkish Super League and First League broadcasting to commercial subscribers in each city of Turkey. Additionally, the Board found that Digiturk sells an exclusive right to distribute commercial subscriptions of Turkish Super League and First League broadcasting to the highest bidder within the given city or cities. According to the contracts entered into between Digiturk and Digiturk's dealers, dealers are only allowed to distribute commercial subscriptions within the cities and/or districts that are allocated to them. Additionally, the Board found that none of the Digiturk's dealers have conducted activities beyond the cities or districts that are allocated for them by Digiturk.

Upon this, the Authority inquired Digiturk the reason why its dealers refrained from operating in cities or districts that are not designated for them. In its response, Digiturk remarked that for 2019-2020 season Digiturk has designated 100 exclusive territories for distribution to the commercial channel. Digiturk further explained that these territories comprised of entire cities as well as smaller districts within cities in certain cases. Additionally, Digiturk remarked that its distribution system for commercial channel envisaged a tender based system, where the exclusive distributor for a given territory is designated based on the tender results and winning the tender required the bidder to offer highest bid for the exclusive dealership. Moreover, Digiturk noted that it sought additional conditions to be met for accepting a dealer to its distribution channel, such as strong financial credentials, strong commercial performance in case the potential dealer has operated as a dealer of Digiturk in the prior season, commercial reputation of the potential dealer and prior sales performance of the potential dealer, etc.

Against the foregoing, the Board remarked that the exclusive distribution system of Digiturk gave rise to negative outcomes for Digiturk's dealers. The Board underscored the fact that one of the complainants was forced to procure broadcasting services from the exclusive Digiturk dealer designated for the city that the complainant is located and was unable to procure such

services from an alternative dealer due to the exclusive distribution system, despite the fact that there was an ongoing legal dispute with the complainant and the dealer. Additionally, the Board remarked that the interviews made with Digiturk dealers within the scope of the investigation indicated that dealers were instructed by Digiturk not to operate outside their designated territories. Accordingly, the Board remarked that these findings confirmed that Digiturk has violated Article 4 of Law No. 4054 by way of preventing active and passive sales of its dealers in 2018-2019 and 2019-2020 seasons.

(b) Assessment regarding Resale Price Maintenance

In terms of resale price maintenance allegations, the Board initially examined the terms and conditions set out in the Commercial Authorized Seller Contract (“*Contract*”) entered into between Digiturk and its dealers in 2017-2018 season. The Board determined that the Contract involved a price guarantee clause that requires the dealer to comply with the resale prices determined by Digiturk and in case of non-compliance the dealer is required to incur the financial burden of the price difference. That being said, the Board remarked that it is not certain that the price guarantee clause have actually been implemented. Additionally, the Board found that none of the customers that were charged above the guaranteed price demanded the price difference from Digiturk and Digiturk did not request the price difference amount from its dealers that charged commercial customers above the guaranteed prices. Moreover, the Board found that the price guarantee clause was removed from the Contract after 2018-2019 season.

The Board further noted that whether the dealers has acted as an agency on behalf of Digiturk is an important question for determining whether Digiturk has involved in resale price maintenance. In that context, the Board remarked that while the price guarantee clause of the Contract implied that the dealers might have designated by Digiturk as mere agencies, concluded that this was not the case. The Board remarked that the dealers must be treated as resellers, considering that dealers could implement prices not complying with the price chart determined by Digiturk, also bore a significant commercial risk in relation to their resales activities.

In order to clarify whether Digiturk’s conducts amounted to resale price maintenance or not, the Board delved into the revenue sharing system that was utilized by Digiturk and its dealers. The revenue sharing system envisages a gradual scheme of revenue sharing. According to the system, in any event, a fixed amount (e.g. TL 1 million) of money would be paid by the dealer

to Digiturk for the exclusive distribution right. If the dealer could not generate revenue that is above the fixed amount, it will incur the loss for the respective game season.

That being said, if the dealers' revenue exceeds the fixed amount, two revenue sharing options would come into play. If the revenue of the dealer reaches to a certain threshold (e.g. TL 1.2 million) but not exceeds it, the difference of such amount and the fixed amount (e.g. TL 1 million) would be given to the dealer as profit. In case that the revenue of dealer exceeds the threshold (e.g. TL 1.2 million), surplus revenue achieved beyond the threshold is distributed between Digiturk and the dealer by a certain rate and the rate changes depending on whether the dealer holds an exclusive right in a major city (i.e. İstanbul, Ankara, İzmir and Bursa) or another territory that is not a major city.

Furthermore, the Board examined the customer categorization of Digiturk. According to the categorization, Digiturk divides the commercial customers depending on the cities that they are located in (e.g. major cities, touristic regions, large Anatolian cities and small Anatolian cities) as well as the location of the customer within the city (i.e. urban or rural). Additionally, commercial customers are also categorized depending on the business type (i.e. businesses serving alcoholic beverages, cafes that do not serve alcoholic beverages, coffee houses, restaurants that do not serve alcoholic beverages, public businesses and hotel lobbies). Lastly, Digiturk categorizes commercial customers based on their physical sizes (i.e. above or below 200 square meters) and the number of screens they utilize for game displays. To that end, the Board found that there were 192 different customer categories and four or more pricing periods within a season. Accordingly, the Board found that the pricing determined by Digiturk for each commercial customer within different pricing periods varied significantly.

In terms of 2018-2019 season, the Board found that Digiturk utilized a pricing system called "IRIS" that is run by Digiturk ("**IRIS System**"). According to the system, if a dealer were to make discount for one of its customer, it should make an exception record and enter the discounted price to the system. If it is approved by Digiturk through the system, then the dealer could apply the discounted price. If the dealer applies the discounted price without Digiturk's approval, Digiturk demands the price difference from the dealer. The same applies if the dealer were to implement a price above the price determined by Digiturk for that particular commercial customer, meaning that approval of Digiturk is still necessary and in case of non-compliance the price difference is incurred by the dealer.

Furthermore, the Board found that while the investigation was still ongoing, within 2019-2020 football season Digiturk changed IRIS pricing system that was utilized in 2018-2019

season. In the new system, the exception record method is abolished and Digiturk could not access the information on the prices implemented by the dealers. Additionally, Digiturk introduced a maximum price increase rate for commercial customer prices based on recommended prices. The Board remarked that this new system is theoretically more liberal than the previous one, allowing more freedom for the dealers in terms of pricing.

The Board's violation assessment focused on Digiturk's conducts in 2018-2019 football season and revolved around the IRIS system. In that context, the Board underscored that the dealers could implement a discount up to certain rate without the knowledge or approval of Digiturk. The discount rate varied depending on whether the dealer operated in a major city or not and dealers in non-major cities had the discretion to apply a discount up to 30%.

To that end, the Board evaluated that Digiturk developed this system in order to prevent the dealers from superficially decreasing the trade volume of the territories that they operate in. The Board explained that granting full discretion to the dealers to make discounts would enable dealers to superficially lower the tender price for the next season, given that the tender price for the next season is determined based on the trade volume of that territory in the preceding season. In that sense, the Board noted that Digiturk's conducts in 2018-2019 football season served as an instrument to prevent undervaluation for the upcoming seasons' tender prices rather than a tool that aim resale price maintenance. Additionally, the Board remarked that it did not find any evidence indicating that Digiturk suggested any resale price level to the dealers or employ measures to deter them for non-compliance. To that end, the Board concluded that Digiturk's conducts that were dealt within the scope of resale price maintenance did not violate Article 4 of the Law No. 4054.

(c) Individual Exemption Analysis

In the Decision, the Board proceeded with an individual exemption analysis on the grounds that none of Digiturk's dealers have operated outside their designated territories despite the fact that the agreement between Digiturk and its dealers did not set out any explicit clause preventing active and passive sales outside exclusive territories. In that sense, the Board initially evaluated if the vertical relationship between Digiturk and its dealers fell within the scope of Block Exemption Communiqué on Vertical Agreements 2002/2 ("*Communiqué No. 2002/2*"). Considering that Digiturk's market share has exceeded the 40% threshold in the relevant product market, the Board delved into the individual exemption analysis pursuant to Article 5 of Law No. 4054.

In terms of the new developments or improvements or economic or technical improvement in in the provision of services condition, the Board remarked that the new distribution system that came into play from 2018-2019 football season onwards (“*New System*”) would help Digiturk prevent illegal broadcasting, given that an exclusive distribution system would incentivize the dealers to tackle businesses broadcasting illegally. Additionally, the Board noted that territorial exclusivity might help Digiturk identify technical problems more easily and improve the glitch prevention. Moreover, the Board indicated that the New System envisaged a more objective customer categorization enabling Digiturk to cut costs related to after-sales services. Lastly, the Board noted that the customer categorization that the New System entails would enable the exclusive dealers to operate in a more optimal manner. To that end, the Board concluded that the first condition set out in Article 5 of the Law No. 4054 is met.

That being said, the Board remarked that the said developments or improvements in the provision of services would not pass on to the consumers. In that context, the Board explained that the New System deprives the customers of the opportunity to purchase services from alternative suppliers, creating a monopoly territory for each dealer that is designated as the exclusive distributor. Therefore, the Board decided that the second condition set out in the Article 5 of the Law No. 4054 is not met.

In terms of the third condition, namely, the agreement must not significantly eliminate the competition in a significant part of the market; the Board pointed out that the competition between the dealers only takes place during the tender process, given that after the conclusion of the tender, best bidding dealer would have the exclusive distribution right in the designated territory. To that end, the Board remarked that the primary risk that exclusive distribution entails is restriction of intra-brand competition. Additionally, the Board remarked that restriction of intra-brand competition may pose a competition law concern in cases where inter-brand competition is weak, as in the case at hand, while restriction of inter-brand competition is generally considered more detrimental compared to restriction of intra-brand competition. To that end, the Board indicated that Digiturk’s distribution system would impede the effective competition between dealers, reduce the consumer choices and increase the possibility of higher consumer prices by way of restricting intra-brand competition. Therefore, the Board decided that the third condition set out in the Article 5 of the Law No. 4054 is also not met.

In terms of the fourth condition, which requires that the competition not to be restricted more than necessary to achieve the goals set out under the first and the second conditions, the Board evaluated actual and potential effects of the efficiency gains expected from the New System. In that sense, the Board underscored that Digiturk has purchased exclusive rights for live broadcasting of Turkish Super League and First League for five years starting from 2017-2018 season. Considering that Digiturk is the sole supplier in the market, the Board noted that there is no inter-brand competition in the market. The Board also remarked that in the absence of inter-brand competition, the primary competitive parameter in the market is the intra-brand competition. To that end, the Board deemed that the competition in the market is restricted more than necessary, given that the exclusive distribution system of Digiturk would totally eliminate the intra-brand competition. In that context, the Board explained that dealers of Digiturk, who would have monopoly power in their designated territories, would have the discretion to set consumer prices and their ability to make price discrimination would increase. Additionally, the Board remarked that the New System would decrease dealers' motivation to take efficiency enhancing actions such as technical improvements and innovation. To that end, the Board decided that the fourth condition set out in the Article 5 of the Law No. 4054 is also not met.

Finally, the Board decided that Digiturk's distribution systems for 2018-2019 and 2019-2020 seasons, which *de facto* restricted active and passive sales do not comply with Article 5 of Law No. 4054, therefore cannot benefit from the individual exemption.

(3) Competition Board's Assessment within the scope of Article 6 of the Law No. 4054

(a) Relevant Product Market Definition and Dominant Position Analysis

In terms of the relevant product market, the Board emphasized that Digiturk has purchased exclusive rights for live broadcasting of Turkish Super League and First League for five years starting from 2017-2018 season at a tender initiated by Turkish Football Federation ("**TFF**"). The Board remarked that Digiturk's activities involved broadcasting of several football, basketball and tennis leagues other than Turkish Super League and First League by means of the exclusive broadcasting rights that it holds, including but not limited to UEFA Champions League, Serie A, La Liga, Euroleague and Women's Tennis Association Tour. That being said, the Board decided to define the relevant product market as "the market for pay-TV broadcasting for Turkish Super League and First League games" on the grounds that the number of audience that visit commercial/social venues to follow live contests in the leagues other than Turkish Super League and First League is marginal. Additionally, the Board

concluded that the relevant geographical market should be defined as Turkey, given that Digiturk was the Turkey-wide exclusive broadcasting entity.

In terms of the dominant position analysis, the Board concluded that Digiturk was in dominant position in the relevant market given that it holds the exclusive rights for live broadcasting of Turkish Super League and First League for five years starting from 2017-2018 football season.

(b) Assessment regarding Excessive Pricing

As for the allegation of excessive pricing, the Board examined whether the pricing behaviour of Digiturk and its exclusive dealers amounted to double marginalization, which required both Digiturk and its dealers to maintain maximized monopolist profits. To that end, the Board examined Digiturk statements of income between for its financial year of 2017 and 2018 and found that Digiturk incurred significant loss in both years. Additionally, the Board considered the fact that Digiturk has rarely priced above the envisaged fee as a testament that Digiturk's pricing was not excessive. Moreover, the Board found that dealers of Digiturk have implemented prices exceeding the price recommendation in few instances.

In terms of 2019-2020 football season, the Board noted that the maximum price increase rate introduced by Digiturk based on recommended prices would prevent any potential excessive pricing practice. Against the foregoing, the Board concluded that the allegation of excessive pricing was unfounded.

(c) Assessment regarding Discrimination

In terms of the allegation that Digiturk dealers discriminated among customers that are under equal conditions, the Board examined whether the pricing conditions under the same category of customers varied. The Board found that generally the prices charged to customers under the same category varied from 10% to 20% and were justified by the differences in payment methods, commercial credibility and the commencement dates of the contract. Additionally, the Board specifically examined whether the complaint regarding discrimination had merit. To that end, the Board found that the difference in prices set for the complainant and other commercial customers that are under equal conditions stemmed from an error that was made by Digiturk in customer categorization, which caused the complainant to be classified under the wrong customer category. Against the foregoing, the Board concluded that the allegation of discrimination was unfounded.

(4) Conclusion

Digiturk Decision of the Board is a prime example, where the Board specifically takes market and business characteristics into account in terms of its assessment regarding resale price maintenance. Unlike recent examples, where resale price maintenance was considered as a violation of Article 4 of the Law No. 4054 by its object², the Board adopted a more lenient approach based on the commercial rationale underlying Digiturk's conduct.

All in all, Digiturk Decision provides valuable insight on how the Board deals with vertical restrictions implemented in markets, where monopolistic exclusive rights prevail in both upstream and downstream, such as the market for pay-TV broadcasting for Turkish Super League and First League games.

Article Contact: Gönenç Gürkaynak, Esq.

E-mail: gonenc.gurkaynak@elig.com

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² Henkel (19.09.2018; 18-33/556-274), Sony (28.11.2018; 18-44/703-345), Turkcell-3 (10.01.2019; 19-03/23-10) and Maysan Mando (20.06.2019; 19-22/353-159) decisions of the Board.