



Upholding Ne Bis in Idem: The TCA's Approach to Exclusivity Agreements in Nesine Decision

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Introduction

The Turkish Competition Authority (“*TCA*”) has recently announced its reasoned decision concerning abuse of dominance by D Elektronik Şans Oyunları ve Yayıncılık AŞ (“*Nesine*”), a sports betting company in Türkiye, through exclusivity agreements with the customers of its competitors².

The subject of the investigation was the exclusivity provisions in the contracts signed between Nesine and its advertisers/sponsors within the scope of advertising, promotion and sponsorship activities, allegedly preventing Nesine’s competitors from working with the said undertakings.

The decision is interesting as it involved important competition law mechanisms available in Turkish competition law including (i) commitments submitted by Nesine, (ii) interim measure imposed by the TCA on the exclusivity clause between Nesine and Maçkolik (a popular mobile application and website for consumers allowing live score tracking) until the end of the investigation, and (iii) the TCA’s instructions to Nesine to cease its certain exclusivity arrangements to restore the competition in the relevant market.

The decision is also carrying significance as it deals with abuse of dominance assessments stemming from exclusivity clauses and its relationship with *ne bis in idem* principle.

This article will begin by examining the TCA’s approach to defining the relevant product market, followed by an analysis of its assessment of abuse of dominance. It will then address

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² The TCA’s decision numbered 24-11/194-78 and dated 29.02.2024.

the commitments submitted by Nesine and the interim measure imposed by the TCA, before concluding with a review of the decision.

Relevant Product Market

The TCA has first evaluated whether the “games of chance” and “betting games” can be considered in the same relevant product market. The former is used for games in which the chances of earning a prize are completely dependent on “luck” of the participant while the latter depends also on the skills, experience and knowledge of the participant along with the “luck” factor. According to the TCA, betting games may be further broken down into two categories: parimutuel betting and fixed odds betting. The difference between the types is that estimation of potential final earnings is not possible in the former while being clear at the time of the betting activity in the latter.

The TCA has established in a previous case³ that games of chance and betting games are not considered to be in the same relevant product market as, among others, they are subject to different rules and regulations, and it was considered that the said separation of markets is also applicable in the case at hand.

After establishing that “games of chance” and “betting games” constitute two separate relevant product markets, the TCA went onto assessing whether physical channel and online channel for betting are two separate relevant product markets.

Physical betting shops require the participant to be present at the shop during to place a bet, while online betting shops offer more convenience to the participants by being accessible through any smart mobile device or computer with internet access. According to official figures, between the years 2019-2022, online betting’s market share rose to 87.74% from 78.12%, presumably due to covid-19 and its effects on digitalization. Due to the differences required to complete the betting process, the TCA concluded that online and physical channels are not in the same relevant product market.

All in all, the TCA has concluded that the relevant product market should be determined as “fixed odd betting games played through virtual shops” in assessing whether Nesine abused its dominant position.

³ The TCA’s decision numbered 14-26/548-236 and dated 07.08.2014.

Dominant Position Assessment of the TCA

The TCA firstly examined the amount of active users (the ones with betting slips) and how that translates into market share, where Nesine was determined to be the top earner. One important factor to consider was that in 2019, “live betting” was legalized in Turkiye causing all participants of the practice to search for a legitimate platform. Nesine was reported to have made this transition very efficiently through integrating the necessary systems into their operations, gaining large amounts of participants during the period which is said to have resulted in the current economic standing of the platform.

Secondly, the barriers for entry into the industry was examined. It was found that the entry into and activities in the betting games industry was strictly regulated by the Spor Toto Organization of Turkiye (“*STTB*”) with failure to comply with its regulations resulting in cancellation of license. The threat of business shutdown is also cited as a reason for new undertakings' hesitation about entering the industry, with the claim being supported by the fact that the last entry into the industry took place in 2010.

Thirdly, factors around network externality were examined. As the user network of a firm in this industry widens, it can provide external services⁴ and spend financial resources on advertisements and sponsorships. Nesine, due to its financial advantage over competing firms, was subject to far less financial restrictions in providing these services. Consequently, these advantages create a cycle where Nesine is able to gain and spend more while other firms are unable to compete.

The TCA has also found out that according to *Similarweb*⁵, Nesine was the 40th most visited website in Turkiye in 2023, while its closest competitor active in the same relevant product market, Bilyoner, was at 316th place followed by other competitors at 443rd, 640th, 1622nd and 2515th places. Although not as the sole determinator, this has factored in establishing that Nesine is in dominant position in the “fixed odd betting games played through virtual shops”.

⁴ Live broadcasting of matches for the betting game participants during the game.

⁵ Similarweb is a website aimed at measuring website traffic (e.g. number of visitors, duration of website visit)

Nesine's Exclusivity Agreements

Due to regulations on payments and earning rates⁶, the betting games industry is not open to competition in financial benefits. Consequently, firms resort to advertisements and sponsorship to further bring in participants, as the competition takes place on attracting more customers to the platform, rather than on pricing. Competitors compete on parameters such as brand visibility (advertisement, promotion and sponsorship agreements), bonus distribution, customer experience offered on betting sites (website speed, design, ease of use), customer relations, speed of solving customer problems, speed of withdrawals, bank commissions that can sometimes be arranged after agreements made with banks, live match broadcasts and the variety of matches broadcasted, and digital games subject to special permission. As a result, opportunities for ads and sponsorships that increase the visibility of the betting platform become crucial in this sector.

The TCA has found out that Nesine had agreements, many of which include exclusivity clauses, with major stakeholders in Turkiye such as largest sports clubs, basketball tournaments, media companies and websites or applications that are of significance for Nesine's and its competitors' customers (such as live score trackers). In addition, Nesine's non-exclusive agreements are shorter in duration and contain lower contract prices compared to those with exclusive agreements. It has also been found out that that Nesine pays less advertising and sponsorship fees for these undertakings. On the other hand, it has been found out that Nesine's competitors carry out advertising, promotion and sponsorship activities with much fewer initiatives and much less budget compared to Nesine.

The TCA has also identified a trend where Nesine's sponsorship spendings have been increasing significantly over the years, surpassing the ones of Bilyoner (Nesine's largest competitor) in 2020, and doubling in 2022 compared to 2021.

In light of above, it has been assessed by the TCA that Nesine's exclusivity agreements with sports clubs, applications and for sports clubs' field advertisements, which are the most effective advertising and sponsorship areas for reaching the target audience for consumers, have actual and potential restrictive effects on competition. Therefore, it has been concluded that Nesine's exclusive practices through exclusive agreements violated the Law No. 4054.

⁶ The rates are decided by one entity and do not differ in-between firms with extremely few exceptions on rare occasions for limited timeframes.

Violation through Exclusivity Clauses and *Ne bis in Idem*

The TCA has remarked that exclusivity agreements can be considered within the scope of Article 4 of the Law No. 4054 prohibiting anti-competitive agreements, while the same practices can also be assessed in terms of abuse of dominant position through “exclusionary practices” under Article 6 of the Law No. 4054. Indeed, in instances where the TCA has initiated investigations against practices surrounding anti-competitive exclusivity arrangements, it generally evaluated the said practices within the scope of both Article 4 and Article 6⁷.

On the other hand, the possibility of repeated punishment arises if the same anti-competitive behavior violates both Articles 4 and 6 of the Law No. 4054, which is against *ne bis in idem* principle, prohibiting, in essence, repeated punishment for the same action⁸.

Considering above, the TCA has this time evaluated the alleged practices within the scope of only Article 6, and emphasized that regardless of whether Article 4 or Article 6 is applied, the same assessments will be made due to the exclusionary nature of the exclusivity clauses.

Interim Measures Regarding the Contract with Maçkolik

During the investigation process, the Board issued a decision⁹ containing interim measures surrounding Nesine’s agreement with Maçkolik as the agreement was observed to be posing serious threat of irreparably damaging the competitive landscape. The agreement was broadly about Maçkolik exclusively offering advertising services to Nesine during sports match broadcasts for a three-year period.

One aspect that specifically caused concern was that if Nesine’s ads did not receive a certain number of clicks, Maçkolik would pay penalty fees to Nesine. However, this clause resulted in Maçkolik displaying even more ads of Nesine, which made it even more challenging for competing firms to have a chance of putting forward ads on Maçkolik.

⁷ The TCA’s decisions numbered 00-26/292-162 and dated 10.09.2007; numbered 07-70/864-327 and dated 17.07.2000; numbered 10-14/175-66 and dated 08.02.2010; numbered 11-34/742-230 and dated 06.06.2011; numbered 15-28/345 and dated 07.07.2015; numbered 17-08/99-42 and dated 23.02.2017; numbered 21-04/53-22 and dated 21.01.2021.

⁸ The TCA’s decision numbered 21-13/173-74 and dated 11.03.2021.

⁹ The TCA’s decision numbered 23-27/520-176 and dated 15.06.2023.

According to the interim measure, Nesine and Maçkolik had to stop implementing the aforesaid clauses preventing, directly or indirectly, Nesine's competitors to advertise on Maçkolik until the final decision of the TCA.

Commitments Submitted by Nesine

Within the scope of the ongoing investigation, Nesine submitted two sets of commitments with a way to do away with the concerns surrounding its exclusivity arrangements. Both sets of commitments have been rejected by the TCA after consulting with the counterparts of the said exclusivity arrangements on the ground that the commitments were not suitable for resolving the concerns and are not effectively applicable.

Final Decision

The TCA decided that Nesine abused its dominant position in "fixed odd betting games played through virtual shops" through exclusivity clauses with major stakeholders such as, among others, major sports clubs and tournaments, preventing its competitors' opportunities to advertisement and sponsorship opportunities, which are the main decisive parameters of the competition in the market, and imposed an administrative monetary fine (approx. TL 78 million (approx. USD 2.3 million with today's exchange rate) on Nesine.

In addition to the administrative monetary fine, the TCA instructed that Nesine (i) remove the provisions in its agreements with sports clubs regarding advertisement and sponsorship (apart from the agreements regarding jerseys) that may cause direct or indirect exclusivity, (ii) not enter into new agreements with sports clubs (apart from the agreements regarding jerseys) that include provisions that may cause direct or indirect exclusivity on the same matters, (iii) remove the provisions in its agreements with sports clubs regarding field (e.g. football pitch or basketball court) advertisements that may cause direct or indirect exclusivity, (iv) not enter into new agreements with sports clubs that include provisions that may cause direct or indirect exclusivity on field advertisements, and (v) not enter into procurement or advertisement agreements with Maçkolik that include provisions that may cause direct or indirect exclusivity.

Conclusion

The Nesine decision provides an important precedent in Turkish competition law by clarifying the TCA's approach to assessing exclusivity agreements within the context of abuse of dominance. The decision focused on Nesine's extensive use of exclusivity clauses with major stakeholders in the sports betting industry, concluding that these practices had restrictive effects on competition in the market for fixed odd betting games played through virtual shops.

The TCA's assessment was based on detailed considerations of Nesine's dominant position, the market dynamics, and the role of exclusivity agreements in limiting competitors' access to advertising and sponsorship opportunities. The TCA applied only Article 6 of the Law No. 4054 to avoid the risk of overlapping with Article 4, reflecting the importance of adhering to *ne bis in idem* principle in competition law enforcement.

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(First published by Mondaq on October 7, 2024)