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The Turkish Competition Board decides not to open an investigation against a company active in online sales of flowers, edible flowers and gifts following allegations of predatory pricing (*Çiçek Sepeti*)

ANTICOMPETITIVE PRACTICES, ABUSE OF DOMINANCE, DOMINANCE, AGRICULTURE / FOOD PRODUCTS , LOW PRICES, TURKEY, EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT

Turkish Competition Board, *Çiçek Sepeti*, n° 18-07/111-58, 8 March 2018

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This case summary includes an analysis of the Turkish Competition Board's ("**Competition Board**" or "**Board**") *Çiçek Sepeti* decision (08.03.2018; 18-07/111-58). The Board reviewed the allegations put forward by *Çiçek Satış A.Ş.* ("**Çiçek Satış**") against *Çiçek Sepeti İnternet Hizmetleri A.Ş.* ("**Çiçek Sepeti**") indicating that *Çiçek Sepeti* abused its dominant position by way of hindering its competitors' activities. The Board decided that evaluations within the case would not amount to a violation of article 6 of Law No. 4054 on Protection of Competition ("**Law No. 4054**"). Accordingly, the Competition Board did not find it necessary to initiate a full-fledged investigation against *Çiçek Sepeti*.

Background

Çiçek Sepeti is a firm that is active in the online sales of flowers, edible flowers (bonnyfood) and gifts (bonnygift) through its several websites, whereas *Çiçek Satış* is also an online platform that provides same day flower delivery service throughout Turkey.

In its complaint, *Çiçek Satış* basically noted that *Çiçek Sepeti* (i) sold its products below the market value and restricted consumers' free choice through its aggressive sales methods, (ii) marketed its products by high-budget advertisements in search engines and news websites, (iii) hindered its competitors' activities via its sales policies, (iv) initiated lawsuits against its competitors on divergent issues in an effort to put them in a disadvantageous condition and thus (iv) abused its dominant position. Accordingly, the Board initiated a preliminary investigation to analyze these allegations and focused on the (i) potential below-cost sales of *Çiçek Sepeti* within the scope of predatory pricing, (ii) high-budget advertisement and promotion expenses of *Çiçek Sepeti* and (iii) legal actions taken by *Çiçek Sepeti* against its competitors.

Relevant Product and Geographic Markets

In its relevant product market assessment, the Board first analyzed the product groups which Çiçek Sepeti offers and determined that Çiçek Sepeti provides flowers, bonnyfood (chocolate and cake) and gifts (all kinds of products ranging from clothing to home textile) online. The Board then went on analyzing as to whether these three product groups fall in the same product market. Due to the lack of demand side and supply side substitutability, the relevant product groups were evaluated under separate markets. Since the allegations on Çiçek Sepeti's activities concern the online flower sales, the Board focused on the flower sales and accordingly assessed whether traditional flower sales (i.e. traditional flower stores, supermarkets etc.) and online flower sales are substitutable to each other. The Competition Board concluded that these sales services are not substitutable since (i) online flower sales market provides its users an advantage of sending flowers from remote locations while this was not possible for traditional flower sales market and (ii) the product range differs between traditional sales and online sales. Along these lines, the Competition Board also referred to one of its past decisions where it evaluated allegations against Çiçek Sepeti and defined the relevant product market as "online flower sales services". To this end, the relevant product market was determined as "online flower sales" market in the case at hand.

As for the relevant geographic market, the Board avoided defining a certain relevant geographic market since it considered that Çiçek Sepeti would still have significant market power even in the most favorable assumption for Çiçek Sepeti.

Market Position

The Board compared Çiçek Sepeti's market share with its competitors and found Çiçek Sepeti with the highest market share in the marketplace. The Competition Board also added that Çiçek Sepeti contributed to market growth and increased its turnover in the last five years. Thus its competitors were not found to have a competitive pressure over Çiçek Sepeti.

That said, the Board indicated that other factors also should be taken into account when determining the market position of Çiçek Sepeti and hence evaluated the entry conditions (costs to enter) to the online flower sales market. Among the costs for entry to the market, the decision makes reference to online advertisement costs.

With regards to buyer power, given the customers of Çiçek Sepeti are either individuals who do not have much of negotiation power or the high number of cooperative distributors, the Board found the alternative online flower sales platforms would unlikely to be chosen by Çiçek Sepeti's customers.

In light of the foregoing, the Competition Board determined that Çiçek Sepeti has a significant market power in the online flower sales market and concluded that Çiçek Sepeti may be assumed to be in dominant position. At this juncture, the practices of Çiçek Sepeti were examined whether they constituted abuse of dominance within the meaning of article 6 of Law No. 4054.

The Board's Assessment

(I) Evaluations on below-cost practices

The Guidelines on Abuse of Dominance ("**Guidelines**") highlights that the average avoidable cost is the main element to be used in order to identify an undertaking that sells at loss within the scope of predatory pricing, since the undertaking actually could avoid such loss. The Guidelines further specifies that such practices become

exclusionary when they lead to the market foreclosure. the Guidelines provides a list of factors that should be taken into consideration for an evaluation of market closure: (i) position of the dominant undertaking, (ii) conditions in the relevant product market, (iii) position of competitors, (iv) position of customers or providers, (v) scope and duration of the relevant practice, (vi) potential evidence on de facto market foreclosure, (vii) direct or indirect evidence on exclusionary strategy.

Along these lines, the Board examined the average avoidable cost items of Çiçek Sepeti (i.e. flower costs, advertisement and promotion expenses etc.). Accordingly, the Board pointed out that it is impossible to determine whether Çiçek Sepeti sold under cost based on the evidence collected within the scope of the case file. Based on the profitability chart of Çiçek Sepeti, although the profitability rate decreased in 2017, the Competition Board yet found that Çiçek Sepeti did not sell at a loss. That said, the Board also noticed that Çiçek Sepeti made a loss concerning solely promotion and advertisement products. The Board then decided that practices concerning such products did not lead to an anticompetitive foreclosure by taking into account the sales period and volume of these products.

(II) Evaluations on Çiçek Sepeti's very significant advertisement expenses

The Board found that advertising expenses of Çiçek Sepeti have increased in value over the past few years; however, the ratio of these costs within the total sales has decreased. The Board pointed out that this was because of the positive impact of decrease in price over demand as well as indicating that this did not lead to a decrease in consumer welfare. In this regard, the Board did not consider the significant advertisement and promotion expenses of Çiçek Sepeti as an exclusionary behavior.

(III) Evaluations on the lawsuits initiated by Çiçek Sepeti against its competitors

The Board also analyzed whether the lawsuits initiated by Çiçek Sepeti put its competitors in a disadvantageous position. Accordingly, by briefly citing the decisional practice of the European Commission, the Board indicated that such practices, namely "sham litigation", could qualify as an exclusionary conduct of dominant undertakings in theory. The Board concluded certain lawsuits initiated by Çiçek Sepeti did not fulfill the criteria that are adopted by the decisional practice for the finding of a violation.

All in all, the Board did not find any direct evidence that shows the object of Çiçek Sepeti on excluding its competitors. As a result of these main evaluations, the Competition Board concluded that there was no sufficient evidence proving that Çiçek Sepeti was in violation of article 6 of Law No. 4054 and therefore, it did not find it necessary to initiate a full-fledged investigation.

Comments

Çiçek Sepeti decision may prove to be of crucial importance as it indicates detailed evaluations on excluding competitors through predatory pricing and intense advertisement expenses in a multi-sided online sales market. The decision also deserves further attention as it is one of the rare decisions where the Board also briefly evaluates the abuse of dominance allegations by means of litigating against competitors.