

Cinema Sector Still Tangled Up In Revenue Sharing Models: The Turkish Competition Board Decided Not To Initiate a Full-fledged Investigation

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(1) Introduction

The reasoned decision¹ of the Turkish Competition Board (the “*Board*”) concerning the preliminary investigation initiated by the Turkish Competition Authority (the “*Authority*”) against four movie producers and their professional union has been published on the official web-site of the Authority on March 8, 2019 (the “*Reasoned Decision*”).

The preliminary investigation was initiated on July 26, 2018 further to a complaint filed with the Authority by a third party on July 20, 2018 with a confidentiality request alleging that leading local movie producers, namely (i) Beşiktaş Kültür Merkezi A.Ş., (ii) Tam Aile Filmleri Fabrikası Stüdyo Film ve Organizasyon Sanayi Ticaret A.Ş., (iii) Nulook Prodüksiyon ve Film Yapım A.Ş. and (iv) Çamaşırhane Film Yapım A.Ş. violated Articles 4 and 6 of Law No. 4054 on the Protection of Competition (“*Law No. 4054*”) by way of intervening to the prices, discounts and similar sales conditions in the movie exhibition market via their professional union, namely Televizyon ve Sinema Filmi Yapımcıları Meslek Birliği.

To put the subject matter of the Reasoned Decision into context, it might be beneficial to highlight that the ongoing disputes between the local movie producers and the movie exhibitors reached to its peak in December 2018 and drew the attention of the public as a result of the comprehensive press coverage. There is even room to argue that the publicity of the disagreements might have accelerated the process regarding the finalization and promulgation of Law No. 7163 (“*Law No. 7163*”)² on the Amendment of Law No. 5224 on Evaluation, Classification and Support of Motion Picture Films (“*Law No. 5224*”) which aims to streamline certain fundamental issues that cause certain disagreements between the players operating at different levels of the sector.

To that end, although the cinema sector was previously scrutinized by the Authority in a comprehensive manner by way of various decisions³ of the Board as well as the Sector

¹ The Board’s decision dated November, 2018 and numbered 18-42/667-328

² Law No. 7163 has been published on the Official Gazette on January 30, 2019. All provisions of Law No. 7163 have entered into force on the date of its publication of the Official Gazette with the exception of certain provisions that will enter into force on July 1, 2019.

³ e.g. Mars-4, January 18, 2018, 18-03/35-22; Mars-Cinecom-Avşar, June 23, 2016, 16-21/371-173; Mars-3, November 20, 2015, 15-41/682-243; Mars-2, September 12, 2014, 14-32/654-289; Movie Distributors, September 27, 2013, 13-55/760-319; Mars-1, January 26, 2012, 12-03/93-32, Özen Film-2, January 19, 2012, 12-02/73-19; UIP, June 17, 2010, 10-44/765-248; Fida Film-4, September 16, 2009, 09-42/1062-271; Fida Film-3, June 18, 2009, 09-29/632-148; Özen Film, May 6, 2009, 09-21/446-111; Warner Bros.-2, March 8, 2007, 07-

Inquiry Report concerning Cinema Sector⁴ (the “*Sector Inquiry Report*”), the approaches to be adopted by the Board in light of the amendments to Law No. 5224 are highly anticipated. That being said, the decision at hand was rendered prior to the promulgation of Law No. 7163 and the Reasoned Decision does not delve into any details on this front despite briefly referring to certain ongoing legislative amendments at that time. Nevertheless, the Reasoned Decision recaps the Board’s current understanding of the dynamics and competitive landscape of the sector while also giving subtle hints for the potential competition law concerns that might still come into play even after the legislative amendments within the scope of Law No. 7163.

(2) A closer look to the revenue sharing models: the Board’s assessments regarding the dynamics and competitive landscape of the cinema sector

Before taking a position in terms of the relevant market definition and delving into the details of the case at hand, the Reasoned Decision opts to first echo certain key elements regarding the dynamics of the cinema sector by way of explicitly referring to the findings and conclusions set forth within the Sector Inquiry Report.

To that end, the Reasoned Decision briefly summarizes the scope of the activities of the (i) producers, (ii) distributors and (iii) exhibitors to illustrate their roles and interactions within the scope of the supply chain as well as the manner in which they generate their revenues. In a similar vein, to also put the violation allegations into context, the Reasoned Decision emphasizes that the revenue to be generated by a movie producer in terms of the screening of a movie is generally determined in accordance with the principles of a 50-50% revenue sharing model. In this respect, the Reasoned Decision further elaborates that a movie producer first needs to come to an agreement with a movie distributor that will in return determine the appropriate movie theatres and deals with the exhibitors operating these movie theatres. Consequently, the exhibitors report the revenues they generated through the sale of tickets for the screening of the relevant movie; the distributor collects the share of the movie producer in accordance with the pre-determined revenue sharing model and transmits it after deducting its own distribution commission.

Accordingly, the Reasoned Decision accentuates that the revenue to be generated by a movie producer from the screening of its movie does not correspond to a fixed monetary amount that it unilaterally determines beforehand. On the contrary, such revenue of the producer is directly based on its fixed share of the revenues to be realized by the exhibitors as a result of the ticket prices that they will determine. To that end, the Reasoned Decision underlines that the pricing decisions of the exhibitors (e.g. discounts and promotions) directly affect the essential revenues to be generated by the movie producers. The reasoned decision indicates

19/192-63, Fida Film-2, July 4, 2007, 07-56/637-219; Fida Film-1, February 2, 2007, 07-16/146-47, Warner Bros.-1, January 18, 2005, 05-06/48-20.

⁴ The Authority’s Cinema Services Sector Inquiry Report dated February 16, 2016

that although the exhibitors could compensate the decrease in their own revenues (arising due to their own ticket pricing decisions) by way of theatre-curtain advertisements and sales at the snack bars of the movie theatres, the producers cannot introduce a similar solution during the screening of the movie to offset the decline in their revenues. Accordingly, the Reasoned Decision acknowledges that a movie producer might self-righteously deem that it is legitimate to require the exhibitors to consult with it in advance before applying any discounts or promotions in terms of their ticket prices for a specific movie.

By way of also referring certain reports prepared by the antitrust authorities⁵, the Reasoned Decision indicates that the globally utilized revenue sharing model indeed hands over the reins to the exhibitors to some extent in terms of the revenues to be generated by the movie producers and thus, occasionally results in certain disputes. Having said that, the Reasoned Decision emphasizes that although one of the main reasons for these disputes is the nature of the revenue sharing model itself, another one is that the sharing process (such as the reporting and similar necessary procedures on this front) is managed by the exhibitors to a great extent. In this respect, the Reasoned Decision states that allowing an efficient and transparent inspection by the movie producers in terms of the revenue sharing process might come into play to avoid potential disputes. To that end, the Reasoned Decision explicitly spells out that the Authority is aware that certain meetings are being organized by the Ministry of Culture and Tourism of Republic of Turkey to discuss this ongoing disagreement within the sector as well as similar potential solutions.

All in all, in terms of the relevant market definition for the matter at hand, the Board preferred to leave the relevant product market and relevant geographic market definitions open by way of referring to paragraph 20 of the Guidelines on the Definition of Relevant Market and stating that a conclusive definition on this front would not change the result of the analysis for the matter at hand. Nevertheless, the Reasoned Decision still refers to the precedents of the Board concerning the sector⁶ and set forth that the relevant product market for this case at hand could be considered as “the market for motion-picture exhibition services”. Similarly, the Reasoned Decision briefly refers to the decisional practice of the Board and indicates that although the movie producers are active throughout Turkey, narrower regional relevant geographic markets have been defined in terms the activities conducted by the movie exhibitors.

⁵ The Report titled “Developments in the Cinema Distribution and Exhibition Industry” published by the Australian Competition and Consumer Commission in 1998, The Report titled “A report on the supply of films for exhibition in cinemas in the UK” published by the Monopolies and Mergers Commission in 1994.

⁶ Warner Bros.-1, January 18, 2005, 05-06/48-20; Özen Film, May 6, 2009, 09-21/446-111; Fida Film-3, June 18, 2009, 09-29/632-148; UIP, June 17, 2010, 10-44/765-248; Özen Film-2, January 19, 2012, 12-02/73-19; Mars-1, January 26, 2012, 12-03/93-32, Mars-2, September 12, 2014, 14-32/654-289; Mars-3, November 20, 2015, 15-41/682-243

(3) The Board’s analysis in terms of the violation allegations raised by the complainant

(3.1.) The nature of the evaluated actions by the movie producers and their professional union: Is there a meeting of minds between the producers and exhibitors?

The complainant asserted that the local movie producers violated Articles 4 and 6 of Law No. 4054 by way of intervening to the prices, discounts and similar sales conditions in the movie exhibition market via their professional union.

Within this context, the Reasoned Decision explains that the relevant actions concern the attempts of the movie producers to keep the ticket prices of the movie exhibitors at a certain rate, in an effort to maintain their own revenues within the scope of the applicable revenue sharing model at a certain level. The Reasoned Decision further elaborates that such attempts by the producers could materialize upon the approval of the movie exhibitors and therefore they would constitute price-fixing agreements that would need to be evaluated within the scope of Article 4 of Law No. 4054.

Accordingly, the Reasoned Decision sets forth that the analysis of the matter at hand concerns whether the requests of the movie producers conveyed via their professional union in an attempt to fix the ticket prices of the movie exhibitors in the downstream market and to require their permission in advance before applying any discounts regarding the ticket prices would constitute a violation of Article 4 of Law No. 4054 in terms of directly or indirectly fixing purchase or selling prices or any other trading conditions of goods and services.

With regard to the alleged violation of Article 6 of Law No. 4054, the Reasoned Decision clarifies that further to the information and findings obtained during the preliminary investigation, the alleged actions could not be evaluated within the scope of Article 6 of Law No. 4054 (i.e. abuse of dominance). In this respect, by way of referring to the precedents of the Board and the Sector Inquiry Report, the Reasoned Decision emphasizes that due to the market power of Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş. (“*MARS*”) in the movie exhibition market, it is considered that the producers do not have sufficient bargaining power that would allow them to intervene with the activities of the movie exhibitors. To that end, also taking into account the nature of the alleged actions, the Reasoned Decision opts not to analyse the competitive landscape of the market for movie production.⁷

(3.2.) The nature of the “vertical” relationship between the movie producers and exhibitors: No benefit from the protective cloak of the block exemption

The Reasoned Decision emphasizes that the subject of the matter at hand concerns the assignment or licensing of certain intellectual property rights (the “*IPRs*”) to the movie exhibitors for a limited period of time in terms of the screening of the motion-pictures rather than purchase, sale or resale of a certain product or service. The Reasoned Decision

⁷ The Reasoned Decision, para. 33-34.

underlines that the primary object of such agreements between the exhibitors and producers or distributors is the screening of the motion picture and thus, they resemble a mere licensing of certain IPRs (where the purchase or sale of certain goods or services does not come into play under any circumstances).

Accordingly, the Reasoned Decision concludes that such vertical agreements do not fall within the scope of Block Exemption Communiqué No. 2002/2 on Vertical Agreements (the “*Communiqué No. 2002/2*”), by way of referring to the definition of “vertical agreements” within the scope of Communiqué No. 2002/2 as well as the relevant sections⁸ of the Guidelines on Vertical Agreements (the “*Vertical Guidelines*”) providing further guidance in terms of the vertical agreements containing provisions on IPRs.⁹

Nevertheless, the Reasoned Decision underlines that the mere fact that such agreements cannot be evaluated within the scope of Communiqué No. 2002/2 would not change the fact that the undertakings could still restrict competition by way of these agreements. In this respect, the Reasoned Decision further elaborates that in case the producers, distributors and exhibitors were to agree on and jointly determine the final ticket prices that will be charged to the end customers by the exhibitors, such actions would constitute a violation of Article 4 of Law No. 4054. To that end, the Reasoned Decision refers to *United States v. Paramount Pictures*¹⁰ case of the U.S. Supreme Court and reiterates that the relationship in terms of the IPRs would not warrant an intervention to the final ticket prices which would eventually restrict the competition among the movie exhibitors.

(3.3.) The merits of the violation allegations and the findings of the Authority

Within the scope of the preliminary investigation, the Authority conducted on-site inspections at the premises of the relevant movie producers as well as their professional union and also requested certain information pertaining to the time period between 2016 and 2018 (e.g. samples of the agreements executed with movie distributors, performance reports presented by the exhibitors or distributors). Further to the Reasoned Decision it appears that the Board relied mainly on four findings collected during the on-site inspections. These four findings could be summarized as follows:

The professional union drew an official warning letter to the movie exhibitors underlining the shortcomings of the movie exhibitors in terms of their record keeping and reporting mechanisms regarding their box office returns emphasizing the inaccuracies, non-transparency and delays on this front which inevitably result with unjustified financial losses of the producers within the scope of the revenue sharing model. In a similar vein, the professional union also stated that within the warning letter that the promotional campaigns applied by the exhibitors in conjunction with the sale of the movie tickets without the

⁸ The Vertical Guidelines, para. 4.

⁹ The Reasoned Decision, para. 42-43.

¹⁰ *United States v. Paramount Pictures, Inc.* 334 U.S. 131 (1948)

permission of the producers result with significant unfair monetary losses to the detriment of the producers.

To that end, three movie exhibitors drew official response letters to the professional union stressing that the IPRs would not justify an intervention by the producers to their pricing strategies and they cannot operate without applying discounts/promotional campaigns. In this respect, the Reasoned Decision highlights that the exhibitors explained within their official response letters that they would not reconcile with the professional union on this front. Accordingly, the Reasoned Decision concludes that the exhibitors refused the request of the professional union to constitute an agreement which would result in the determination of the price of a service within the scope of Article 4 of Law No. 4054.

The first one of the other two findings concerns the copies of invoices collected by a producer from the movie theatres of different movie exhibitors (e.g. Cinemaximum, Avşar, Cinemarine, Cinetech, Cinema Pink and Cinetime) at various cities in Turkey in an effort to understand whether the exhibitors oblige that the movie tickets are purchased together with popcorn and if so, the amount of the overall discount that is reflected to the ticket price within the scope of such promotional campaign. In this respect, the Reasoned Decision indicates that further the review of the invoice copies, it appears that such mandatory promotional campaigns are not a common practice throughout Turkey, although certain exhibitors require the purchase of popcorn to be able to benefit from the discounted ticket prices.

The last finding refers to a meeting organized by the Ministry of Culture and Tourism of Republic of Turkey to consider potential solutions in terms of the ongoing problems within the sector, including but not limited to such promotional campaigns.

The Reasoned Decision also discloses that the professional union filed a petition before the Authority during the preliminary investigation in an effort to further emphasize that the disagreements between the producers and exhibitors boil down to the fact that the producers are not receiving their fair share within the scope of the revenue sharing model due to inaccurate record keeping, reporting and accounting of box office returns by the exhibitors coupled with their mandatory promotional campaigns.¹¹

(3.4.) The revenue sharing model does not justify an intervention to the final ticket prices: No-go decision by the Competition Board due to the absence of a meeting of minds between the investigated undertakings and the movie exhibitors

In light of the findings and further to the information obtained during the preliminary investigation, the Board concluded that the agreements requiring the exhibitors to seek prior approval of the producers to apply discounts or promotions in terms of the ticket prices would directly or indirectly involve fixing of the ticket prices at a certain level and thus constitute

¹¹ The Reasoned Decision, para. 51.

agreements with the object of restricting competition within the meaning of Article 4 of Law No. 4054.¹²

That being said, the Board emphasized that the preliminary investigation did not reveal any agreements between the producers and exhibitors that would restrict the competition on this front¹³. Accordingly, the Board unanimously decided not to initiate a full-fledged investigation against the investigated undertakings¹⁴, given that almost all¹⁵ of the movie exhibitors refused the request of the movie producers that would require them to seek prior approval before applying discount or promotions regarding ticket prices and thus there is not a concurrence of wills on this front.¹⁶

(4) Conclusion

All in all, the Reasoned Decision insinuatingly echoes the Board's settled practice¹⁷ in terms of determining the existence of anticompetitive agreements (i.e. seeking a meeting of minds on a particular issue with the intention of achieving an anticompetitive effect which leads the parties to feel bound by the relevant agreement). Although a recent precedent on the necessity of demonstrating the presence of both of these elements¹⁸ is still welcomed, the Reasoned Decision relatively falls short of the expectations to provide at least a preliminary guidance in terms of the Board's potential approach regarding the potential competition law concerns that might still come into play within the scope of revenue sharing model even after the legislative amendments.¹⁹

To put some additional color to the expectations on this front, paragraph 3 of Article 13 of Law No. 5224 which amended by Law No. 7163 reads as follows: "With the exception of pricing of discounted tickets that will be determined by way of the agreement to be executed between the exhibitor, producer and distributor, if any, the exhibitors cannot realize any

¹² The Reasoned Decision, para. 53.

¹³ The Reasoned Decision, para. 54.

¹⁴ The Board's no-go decision could be subject to appeal before the Ankara administrative courts within 60 days following the formal service of the Reasoned Decision. For the sake of completeness, this is a general rule that applies to all decisions of administrative institutions (such as the Board) and which is regulated under Article 6 of Administrative Procedural Law numbered 2577.

¹⁵ The exhibitors of 2,654 movie theatres out of 2,692 movie theatres in Turkey did not accept this request (The Reasoned Decision, para. 54).

¹⁶ For the sake of completeness, the Reasoned Decision sets forth that the opinion of the rapporteur was in line with the Board's reasoning and conclusion (The Reasoned Decision, para. 5).

¹⁷ e.g. Ak Beton, June 25, 2014, 14-22/441-199; Aksaray Central Bakeries, April 16, 2014, 14-15/287-120; Aksaray Driving Schools, February 12, 2014, 14-06/127-56; Bartın Driving Schools, August 13, 2013, 13-47/662-283; Bursa Çimento, October 16, 2012, 12-50/1445-492; Siemens Healthcare, May 29, 2012, 12-28/832-238.

¹⁸ Bellamy & Child; European Union Law of Competition; Edition 7; London, 2013, p 101 para. 2-035.

¹⁹ The decision at hand was rendered on November 8, 2018 prior to the publication of Law No. 7163 on the Official Gazette on January 30, 2019. Having said that the Reasoned Decision was published on the Authority's web-site nearly after one month following the publication of Law No. 7163 (i.e. March 8, 2019) and the Reasoned Decision does not delve into any details on this front despite briefly referring to certain ongoing legislative amendments at the time of the decision.

activities regarding the subscription deals, promotions, campaigns or ticket wholesales in terms of movie tickets.”.

Having said that, Law No. 5224 does not provide any insight in terms of the application of this provision and the last paragraph of Article 13 of Law No. 5224 provides that the Ministry of Culture and Tourism will determine the relevant principles and procedure regarding the application of this article in general (i.e. Article 13 of Law No. 5224) by way of promulgating a secondary legislation in the form of a regulation.²⁰

The wording of the relevant provision sets forth that the pricing of the discounted tickets for a movie by an exhibitor will be agreed upon mutually in advance by way of an agreement to be entered by the relevant exhibitor with the producer and/or distributor of such movie. That being said, the precise scope of such an agreement and the terms and conditions that will be mutually determined by the exhibitor and producer/exhibitor on this front are not yet clear.

Given that, the Reasoned Decision sets forth that the Board would deem the agreements directly or indirectly involving fixing of the ticket prices at a certain level as agreements with the object of restricting competition within the meaning of Article 4 of Law No. 4054, the prudent approach would be not to interpret this provision as giving room to manoeuvre to the movie producers and/or distributors for determining the final ticket prices of the exhibitors.

Taking into account the Board’s approach thus far in terms of the resale price maintenance allegations concerning final ticket prices, the prudent approach would be inferring that this newly introduced provision aims that the relevant counterparts mutually agree upon specific discount rates to be applied to the tickets and thus, refraining from any practices that might be interpreted as directly or indirectly interfering with the exhibitors’ final ticket prices. Needless to say, it would be prudent for the undertakings to comprehend and internalize the principles regarding the application of the mechanism introduced by this provision along with its practical consequences, once the secondary legislation on this front is promulgated. □

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²⁰ In terms of timing, this provision will enter into force on July 1, 2019 and the Provisional Article 4 of Law No. 5224 provides that the secondary legislation will be promulgated within the six months starting from the entry into force of this provisional article (i.e. January 30, 2019).