

Turkey: Turkish Competition Board

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The Turkish Competition Board fined Türk Telekomünikasyon A.Ş. and TNet A.Ş. (jointly and severally) for abusing their dominant position in the wholesale broadband internet access market and retail broadband internet access market by charging anti-competitive tariffs for access to the local networks

Following the investigation launched by the Turkish Competition Board ("the Board") on 7.5.2007, the Board, on November 19, 2008 adopted a fining decision against Türk Telekomünikasyon A.Ş. ("Türk Telekom")¹ and TNet A.Ş. ("TNet")² for abusing their dominant position through unfair pricing practices for the provision of local access to its fixed telecommunications network.

In its ultimate decision, the Board has resolved as follows;

1. The economic unit comprised by Türk Telekom and TNet enjoys a dominant position in the wholesale broadband internet access market and retail broadband internet access market,
2. The relevant economic unit abused its dominant position in the wholesale broadband Internet access market through price squeezing in the retail broadband internet access market and thus violated Article 6 of Law No. 4054 on Competition,
3. Türk Telekom shall refrain from applying any kind of conduct (framework of which will be set out in the reasoned decision) that might result in margin squeezing,
4. Due to the relevant economic units' market practices which violated Article 6 of Law No. 4054 on Competition, administrative monetary fine amounting to TRY 12,394,781.16 based on their total turnover generated in the relevant product market by the end of the fiscal year 2007 shall be imposed on Türk Telekom and TNet (jointly and severally).

While the reasoned decision is not available for the time being, there is a strong implication³ that the interim measure decision of the Board with regard to a campaign -which is called "Summer Storm"- carried out by Türk Telekom actually seems to be the herald for the merits of the Board's reasoned decision to be issued.

Against all historical reluctance of the Board in engaging cost and price analysis in antitrust cases, in order to figure out whether the whole sale prices of Türk Telekom applied to TNet are predatory or not, in the interim measure decision the Board appeared to have delved into the details of each cost item of the claimed "Summer Storm" campaign.

Subsequent to the evaluation of the each cost item, the Board has come to the conclusion that (i) each package of the Summer Storm campaign was being sold under cost price (ii) through the "Summer Storm" campaign, Türk Telekom structured its wholesale and retail prices in such a way that the margin between them did not allow competitors to compete on the market without making losses (iii) through this so-called "margin squeeze"⁴, Türk Telekom might insulate itself from the rigors of competition by making it impossible for alternative

broadband suppliers to enter the market on a commercially-viable basis and (iv) continuance of such campaigns might cause serious and irreparable damages on the competitors in the retail broadband internet access market.⁵

Although the interim measure decision provides useful clues with respect to the content of the ultimate decision and prima facie overview of the case strongly suggest that the case at hand is no different than its kinds issued by the European Commission⁶, the healthiest and most insightful evaluation of this significant decision remains to be made after the issuance of the reasoned decision.

On a different but quite important note, in its ultimate decision, the Board indicated that the administrative monetary fine amounting to TRY 12,394,781.16 was calculated over the economic units' (comprised by Türk Telekom. and TTNNet) total turnover generated in the relevant product market by the end of the fiscal year 2007 rather than the whole turnover (also including turnover generated from different markets which are completely separated from the relevant product market where the violation occurs) of the relevant economic unit. Given the fact that in antitrust cases the Board consistently employed the whole turnover of the undertakings that are evaluated in the breach of competition law as the sole calculation tool and refrained from just taking into consideration the turnover generated from the relevant product market, if no different position is taken in the reasoned decision, such an approach could be a breakthrough in the calculation of fines under Turkish competition law regime.

Footnotes

1. Incumbent telecommunication services operator and therefore the sole wholesale broadband internet access provider of Turkey.

2. Dominant undertaking in the retail broadband internet access market, which is under the sole control of Türk Telekom.

3. In the interim measure decision, it has been explicitly stated that the claims put forward by Tellcom are in parallel with the subject of the ongoing investigation launched against Türk Telekom and TTNNet. See Turkish Competition Board's Tellcom-Türk Telekom decision dated 11.7.2007 and numbered 07-59/676-235.

4. Margin squeeze refers to situations in which a vertically-integrated dominant undertaking uses its control over an input supplied to downstream rivals to prevent them from making a profit on a downstream market in which the dominant undertaking is also active. The dominant undertaking could in theory do this in a number of different ways:

- raise the input price to levels at which rivals could no longer sustain a profit downstream.
- engage in below-cost selling in the downstream market, while maintaining a profit overall through the sale of the upstream input.
- raise the price of the upstream input and lower the price of the downstream retail product to create a margin between them at which a rival could not be profitable.

5. It is also noteworthy that in the interim decision, the Board has conducted its cost and price analysis for a period of 24 and 48 months (which are the subscription lengths to the campaign in question). While the Board initially made an analysis on the basis of 24 months, by taking into consideration European Commission's Wanadoo decision dynamics, (see COMP/38.233), it has expanded the period to be taken into account closely to 48 months.

6. See the following European Commission cases COMP/C-1/37.451, 37.578, 37.579 - Deutsche Telekom (2003), COMP/38.233 Wanadoo (2003) and), COMP/38.784 Telefonica S.A..

*The content of this article is intended to provide a general guide to the subject matter.
Specialist advice should be sought about your specific circumstances.*