

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority evaluates a request from an insurance information company for an individual exemption or negative clearance for the payment method application which enables payment with the first six and last four digits of the card number (*SBM*)

ANTICOMPETITIVE PRACTICES, BLOCK EXEMPTION (REGULATION), RELEVANT MARKET, VERTICAL RESTRICTIONS, FINANCIAL SERVICES, INSURANCE, TURKEY, EXEMPTION (INDIVIDUAL), EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT

Turkish Competition Authority, *SBM*, Case 20-55/769-341, 24 December 2020 (Turkish)

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e-Competitions News Issue Preview

This case summary includes an analysis of the Turkish Competition Board's ("Board") *SBM* decision [7] in which the Board evaluated Sigorta Bilgi ve Gözetim Merkezi's (Insurance Information and Monitoring Center) ("**SBM**") request for individual exemption or negative clearance for the payment method application which enables payment with the first six and last four digits of the card number to be used for the payments in the insurance sector along with the card holder's Turkish identification number. The Board also evaluated *SBM*'s so-called payment gateway services in respect of on-us and not-on-us transactions within the scope of Article 4 and Article 5 of the Law No. 4054 on the Protection of Competition ("Law No. 4054") and ultimately granted individual exemption for three years to *SBM*'s payment application concerning not-on-us transactions. On the other hand, the Board did not grant individual exemption to the application concerning payment gateway services.

Background

SBM was established as an institution possessing legal entity within the Association of Turkish Insurance and Reassurance Companies pursuant to Article 31/B of the Insurance Law No. 5684 in order to collect information which will constitute the basis for the risk assessment including the insurance malpractices with respect to the insured persons and the persons who benefit from the insurance contract even by indirect means and to ensure sharing of these information with the pension companies which are engaged in insurance, reinsurance and insurance activities and the persons that are determined by the Ministry of Treasury and Finance of the Republic of Turkey (the “**Ministry**”). The foregoing companies are required to be a member of SBM and they are under the obligation to provide all kinds of information requested from SBM. In return, SBM is under the obligation to submit any information it collects to the Ministry in the determined form and duration.

SBM’s individual exemption / negative clearance application concerns the payment application enabling agencies and insurance companies to make collections without requesting full card information but by means of the Turkish identification number and only the first six and last four digits of the card number. The Board evaluated this application in terms of two separate technical flows: on-us and not-on-us transactions.

SBM is active in two main payment services: (i) payment gateway services which enable that the consumers’ credit card information is securely transmitted from the workplace to the relevant bank during internet-based payments and (ii) card data storage services which include keeping the data readily available by third party service providers under various security standards for the consecutive payments.

The Board stated that the application in question has been developed by SBM in order to ensure the security of the insured customers’ card information especially for recurring payments. It is noteworthy that agencies and insurance companies are not obliged to use this payment system developed by SBM which concerns payment on a single interface rather than separately integrating with different banks. Moreover, it is determined that SBM does not aim for profit while developing this payment method.

In its assessment on the relevant product market, the Board stated that the relevant product market can be considered as the “payment services market”. The Board further stated that it is also possible to make different market definitions due to the effects on many sub-markets related to activities such as card data storage, acquisition of merchant members and virtual POS services. However, the Board stated that the payment gateway service will be provided by SBM increases the possibility that the effects of the secure payment workflow will arise on different activities and players in the payment service market. In addition, the Board considered that the effects of the application will also arise on the competition conditions regarding different payment services developed for the sector. The Board decided that the uncertainties on how the market will shape due to the fact that the service in question is directly related to the developing technology makes it difficult to define the relevant market precisely. Therefore, as the Guidelines on the Definition of Relevant Market provides that the market definition can be left open in cases where the transaction in question does not give rise to competition law concerns regardless of the market definition, the Board ultimately did not make a specific relevant product market definition.

The Board’s assessment within the scope of Article 4 of the Law No. 4054

Not-on-us transactions envisage that full card information is shared between the issuing and receiving banks by means of a barter system. In this respect, card information is not communicated to workplaces by card holders and/or banks and this transaction leads to cooperation as the card information is shared between competing

banks. The insurance companies can integrate to this infrastructure directly by themselves or by means of third party service providers. The Board considered that this transaction creates a vertical relationship where the issuing bank is a service provider and the receiving bank is a purchaser.

On the other hand, the Board evaluated that on-us transactions also lead to cooperation by means of sharing full card information and also, the insurance companies are involved in these transactions by means of SBM which will provide getaway payment services. In its assessment, the Board stated that the first application has the nature of a vertical cooperation agreement between competitors as it is a system based on the issuing bank's transmit of open bank information to the receiving bank along with the authorization response. The Board was in the opinion that as a result of this vertical cooperation, the demand for other services provided in the insurance sector for the card data protection including card data storage, digital wallet and anti-fraud services can decrease. More specifically, this payment method can eliminate the need for card data storage services entirely as it enables payment by means of only some digits of the card. The Board stated that this situation may hinder the development of value-added innovative services such as payment with QR codes or digital wallets that come to the forefront in the competition between banks. Moreover, as an insurance company which does not intent to be a part of this system will continue to request full card information from the consumers, this may decrease the preferability of these companies and obstruct their capability of competing in the market.

The Board also evaluated the fact that this infrastructure enabling the payment with the first six and last four digits of the card is not open to payment institutions significantly restricts the competition on the member business acquisition market in the insurance industry and therefore eliminates them from the market. The Board stated that this situation has potential negative impacts on the competition.

All in all, the Board stated that the payment application subject to individual exemption/negative clearance has potential restrictive effects on competition and decided that this application appears to be within the scope of Article 4 of the Law No. 4054. In this respect, the Board stated that negative clearance cannot be granted to this application. Therefore, the Board further assessed the conditions for individual exemption within the scope of Article 5 of the Law No 4054.

The Board's assessment within the scope of the Block Exemption Communiqué

The Board set forth that the application allowing the sharing of open card information between competitor banks along with the payment approval or rejection decision, used for the purpose of not-on-us transactions leads to cooperation between competitor banks. The Board stated that these banks are competitors in both member business acquisition market and the card issuing market. In this respect, the Board decided that this application cannot benefit from the group exemption set forth under Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("Communiqué No. 2002/2") as it cannot be evaluated within the scope of the exception set forth under Article 2/5.

Moreover, the Board assessed the vertical relationship between banks and SBM and stated that SBM receives integration services from banks and all banks active at the retail level are service providers and the total market share of these banks in banking activities is above 40%. Therefore, the Board decided that the application cannot benefit from the block exemption within the scope of the Communiqué No. 2002/2 either.

The Board's assessment within the scope of Individual Exemption (Article 5 of the Law No. 4054)

Subsequently, the Board evaluated the conditions for individual exemption set forth under Article 5 of Law No. 4054 which are (i) ensuring new developments or improvements or economic or technical improvement in the production or distribution of goods and in the provision of services, (ii) the customer's benefit from the aforementioned condition, (iii) not eliminating competition in a significant part of the relevant market and (iv) not restricting competition more than necessary to achieve the goals set out in the first two conditions.

As for the first condition, the Board decided that not-on-us transactions fulfill this condition since with this application; unauthorized spending with the cards of insurance sector customers will be prevented. The Board also stated that the application will reduce the risk of vulnerability in the sector and will create less transaction/investment cost for insurance companies. However, it is decided that on-us transactions do not fulfill this condition as they are based on SBM's getaway payment services which set forth the integration of the insurance companies with the banks by means of SBM.

As for the second condition, the Board stated that this condition has been fulfilled for not-on-us transactions as the risk of theft and non-consensual use of card information will be minimized and the transaction costs and processes in the payment transactions will be reduced. On the other hand, the Board stated that it has not been fulfilled for on-us transactions as this application may lead to the fact that the entire sector will be based on a single service provider which is risky for the consumers. It is also noteworthy that SBM does not hold certain certificates which are essential for the service standards. The Board stated that this may be problematic for the effective functioning in the market.

As for the third condition, the Board stated that this condition has been fulfilled for not-on-us transactions. The Board found that the payment infrastructure to be established is a new service model offered to the market, and the competitors currently do not provide a similar service that has the same qualifications. As not-on-us transactions concern solely the transactions in the insurance industry, the Board stated that the application will not affect the need and demand for card data storage and other security services in online payments in sectors other than insurance sector. Also, the insurance companies are not forced to be a part of the implemented system. Indeed, they are contractually free to choose other payment solutions and integrations. In brief, the Board concluded that the application does not restrict competition between banks and insurance companies. In the current situation, the virtual POS services in the insurance industry are quite limited and there is no evidence indicating that banks systematically reject the demands of payment institutions. However, it is noted that in order to prevent the potential exclusionary effects, it is essential to monitor the development on the market.

On the other hand, the Board stated that second workflow based on SBM's getaway payment services do not fulfill this condition as these may significantly restrict competition and eliminate other undertakings from the market. The Board stated that as a result of the proposed application, virtual POS services and payment getaway services currently rendered by payment institutions making significant investments may be eliminated and therefore, payment institutions can be deprived of reaching to the market.

As for the final condition, the Board decided that not-on-us transactions fulfill this condition as insurance companies are not obliged to be a part of the proposed application. They are indeed able to freely determine their payment solutions and integrations. However, the Board stated that on-us transactions do not fulfill this condition

as SBM's involvement in the system is not indispensable for the functioning of payment gateway services. Therefore, the implementation of this system may lead to restriction of competition in the market.

In brief, considering the payment service with regard to not-on-us transactions, the Board decided that all of the four conditions have been fulfilled. As for the condition related to not eliminating competition in a significant part of the relevant market, in order to monitor the application's effects of the competition between banks and payment institutions on the member business acquisition market, the Board decided that the duration for individual exemption shall be restricted to three years starting from the notification of the reasoned decision. On the other hand, the Board decided that the payment service based SBM's gateway payment services cannot benefit from individual exemption as it does not fulfill any of the previously stated conditions.

Conclusion

The SBM decision is significant as it includes the Board's approach with regard to the payment applications in the insurance industry. The decision sheds light on the factors that the Board takes into consideration while granting individual exemption to such applications. In this respect, this decision will likely serve as a solid example for future applications to be implemented in the insurance industry involving online payment methods.

[1] The Board's SBM decision dated 24.12.2020 and numbered 20-55/769-341.