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***A Decision on Abuse of Dominance: The Turkish Competition Board’s Assessment on the Conflict of Law on Intellectual and Artistic Works Law and the Competition Law in the light of Data Portability Restrictions***

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**I. Introduction**

The Turkish Competition Authority (“**Authority**”) has published its *Nadirkitap* decision<sup>1</sup> in which it evaluated the allegation as to whether Nadirkitap Bilişim ve Reklamcılık AŞ (“**Nadirkitap**”), a company providing mediation services in the online sale of the second-hand books through its website named www.nadirkitap.com, violated Article 4 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) by way of hindering the activities of the competitors by way of not providing the data sets of its seller members who wish to market their products through rival intermediary service providers (“**Investigation**”). Upon its investigation, the Competition Board (“**Board**”) decided to impose an administrative monetary fine on Nadirkitap.

**II. Background Set out by the Board**

As for the background to the case, the Board firstly explained the business model of Nadirkitap. The Board stated that Nadirkitap provided services to numerous undertakings that sell second-hand books which it has a contractual relationship with up-to-date data through its website, in return for a membership fee and commission from their sales. The Board stated that Nadirkitap did not sell second-hand books under its own name and account, and only was an intermediary platform.

The Board provided insight on the supply chains of new edition books and second-hand books. As for the new edition books, the chain simply included a provider, distributor, and sellers which could be traditional sales points such as bookstores; as well as websites providing services through online channels, in addition to those who are active in both the traditional and online channels. Apart from this categorization, the Board also highlights that essentially there were platform service providers in the market who did not record sales to their own name and account, but rather mediated book sales such as Nadirkitap.

On the other hand, as for the second-hand books, the Board stated that the supply chain of a second-hand book which has been through the steps mentioned above as a former new edition book starts with its sale to a second-hand bookseller by the first owner. The Board highlights

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<sup>1</sup> Decision of the Board dated 07.04.2022 and numbered 22-16/273-122 (“**Decision**”).

that despite there being second-hand book stores and second-hand bookseller centers, recently second-hand booksellers have been shifting their activities into online channels and most of them opt to sell their products online through mediatory service providers, such as Nadirkitap.

### **III. Assessment and findings of the Board**

#### **(i) Assessment on the Relevant Market**

In line with its previous precedents, the Board emphasizes that for a violation within the meaning of article 6 of the Law No. 4054 on the Protection of Competition (“*Law No. 4054*”), the undertaking concerned shall enjoy dominance and the behaviors of the undertaking concerned subject to the investigation shall amount to abuse.<sup>2</sup> In order to evaluate the dominant position of Nadirkitap, the Board first conduct an analysis of the relevant product market.<sup>3</sup>

Considering that the behaviors subject to the complaint occurred within the scope of online sale of second-hand books, and a large part of Nadirkitap's activities consisted of second-hand book sales, the Board emphasized that the milestone of the relevant market definition was sale services of second-hand books through online platforms. In its evaluation, by taking both supply and demand side substitution into consideration, the Board evaluated the substitution relationship from four different perspectives:

- (i) Whether new edition book sales are substitutable with second-hand book sales,
- (ii) Whether second-hand book sales through traditional channels are substitutable with the second-hand book sales through online channels,
- (iii) Whether book sales through e-marketplace platforms are substitutable with the activities of the undertakings that are selling through online channels to their own name and account
- (iv) Whether e-marketplace platforms that sell books in addition to other various products are substitutable with the e-market platforms that only books.

While evaluating the substitutability relationship between new edition books and second-hand books, the Board first looks into the supply-side substitutability. The Board found that, while a bookstore owner wishing to sell new edition books should engage in a vertical relationship with the distributor and/or publisher of the book; the main channel through which the second-hand booksellers supply the books they sell are previous customers who have bought and read the new edition books. Therefore, the Board concluded that there is no supply-side substitution in between.

On the other side of the coin, as per the demand-side substitution, the Board states that this substitutability relationship might depend on the purpose of use and the category of the book.

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<sup>2</sup>These conditions are sought cumulatively for a behavior to amount abuse of dominance under Turkish competition laws. As per the precedents of the Board, where the absence of one of these fundamental factors may be demonstrated, the Authority may choose not to perform an analysis concerning the remaining factor. See. See *Doğan Grubu* (08.12.2010; 10-76/1569-604), *Domino's Pizza* (04.11.2010; 10-69/1458-557), *GE Jenbacher* (17.11.2011; 11-57/1471-528), *Eureka* (14.06.2012; 12-33/941-296).

<sup>3</sup>It should be noted that, as the conditions are cumulative for the abuse of dominance violation, the Board has previous cases where the conduct itself was proven to be non-abusive, and therefore the Board opts not to analyze the relevant product market. See. *Toypa* (14.11.2019; 19-40/664-285), *Mercedes-Benz* (27.08.2018; 18-29/498-239), *Bilsing* (14.12.2017; 17-41/642-281).

Therefore, the Board took a deeper dive into the motives of the consumers that prefer second-hand and categorized them into two groups as follows: (i) those who prefer second-hand products solely for their more affordable prices compared to the new products and (ii) who act based on motives other than price (ecological reasons, appearance of the book, nostalgic feeling, originality, social interaction etc.).

At that point, the Board found that customers who act based on price-related concerns do not comprise the larger part of the market indicating that except for certain categories second-hand book prices were relatively higher than the new edition book prices. In light of this assessment and the information collected from the undertakings in the market and other publicly available sources, the Board ultimately concluded that second-hand books and new edition books are not in the same relevant market highlighting that it is difficult for new edition books to create competitive pressure over second hand books.

Secondly, the Board evaluated the substitutability relationship between the traditional and online channels. In parallel with its precedents<sup>4</sup>, the Board stated that if the sales made through online platforms are able to compete with the traditional channel sales, they shall be accepted in the same relevant market; on the other hand in the case of a product that is brand new or only eligible for online sales, or selling the product online provides significant advantages, the e-commerce of the product in question shall be defined as a separate market.

Based on the information collected from the sector and in light of the decisions of other competition authorities around the world, the Board concluded that online platforms are not substitutes for the traditional channels due to their characteristic features such as accessibility, saving of time, ease of use, wide product portfolio and diversity, ability to minimize transactional costs while making comparisons, allowing to access more than one seller (*in case the online channel in question is a multi-sided platform*), ease of payment, customization and so forth.

The Board moved on to its assessment on its third perspective; the substitution relationship between the multi-sided platforms and websites that sell on their name and account. The Board continued the general approach that the platforms in its previous decisions were generally defined as a separate market and, following the path of its previous decisions, ultimately concluded that online channels sell on their own name and account cannot substitute multi-sided platforms.

Lastly, upon the allegations that there was no other intermediary service provider platform that specializes in the sale of second-hand books except for Nadirkitap asserted by the complainant, the Board evaluated the substitution relationship between platforms that are specialized in second-hand books sales and platforms that sell various products. Emphasizing that for both multi-product selling platforms and specialized platforms, the consumers can benefit from product variety, product and seller comparison, various comments, and time-saving advantages, the Board stated that the service offered by platforms that also sell books as well as other various products is can be considered as a substitute for services offered by platforms that are specialized in book selling only.

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<sup>4</sup> See. *Yemeksepeti* (09.06.2016; 16-20/347-156), *Booking* (05.01.2017; 17-01/12-4), *Sahibinden* (01.10.2018; 18-36/584-285),

In light of the foregoing, the Board ultimately concluded that the relevant market should be defined as “*platform services mediating second-hand book sales*” within the scope of the case and continues its assessment on the dominant position of Nadirkitap.

**(ii) Assessment on the Dominant Position of Nadirkitap**

In terms of dominance evaluation, the Decision is noteworthy as it highlights that while evaluating the dominant position in multi-sided markets, the Board’s approach might differ from traditional channels. In this respect, the Board took parameters such as market shares, number of contracted second-hand booksellers/ sellers, network effects, other barriers to entry, and buyer power into consideration while evaluating the dominant position of Nadirkitap.

To begin with, in parallel with its assessments of traditional markets, the Board found that despite its market share decreasing relatively as a result of the growth of Netartı, a new player entered into the market in 2020, and the complainant at the same time, and other players, Nadirkitap still has a very high market share in the sales of second-hand books made through the platforms.

Moreover, for a better understanding of the indirect network effects in the double-sided platforms, which could briefly be defined as the increase in the number of users on one side of the platform making the platform more attractive for users on the other side of it, the Board also examined the number of booksellers Nadirkitap and its competitors have a contractual relationship with. As a result, the Board found that Nadirkitap works with considerably higher numbers of sellers compared to its closest competitor thereby being preferred by more customers, and therefore this advantage results in an increase in the number of second-hand book-seller to opt to work with Nadirkitap each day. In this respect, the Board highlighted the loop of indirect network effects, which eventually paved the way for Nadirkitap to gain even more market power.

Against the foregoing, the Board stated that as a result of being a multi-sided platform, the indirect network effects play a significant role in the new entries to the market and has a high potential of creating barriers to entry in the relevant market within the scope of the case. Further, the Decision also indicates that Nadirkitap may also cause further barriers to entry as the undertaking has a striking “first entry” advantage, as well as certain other advantages including access to key inputs and critical information, idle capacity, vertically integrated structure, strong distribution network, wide product portfolio, high brand awareness, financial and economic power. In addition, product inventory information that Nadirkitap’s competitor did not possess yet has crucial importance for a player in the market to have a notable presence was evaluated as a reinforcing force on Nadirkitap’s market power in the relevant market.

Lastly, regarding the dominant position of Nadirkitap, the Board evaluates the buyer power for the users on both sides of the platform. The Board concluded that on the consumer side of the market which comprises individual customers, it was not possible to argue the existence of any buyer power. Whereas on the other side of the platform, the second-hand booksellers who realize sales through Nadirkitap also did not have any bargaining power against Nadirkitap, therefore, the Board concluded that they do not create competitive pressure on Nadirkitap as well.

All in all, based on its evaluations the Board ultimately concluded in the market for platform services mediating second-hand book sales that has barriers to entry, and that both the competitors of Nadirkitap and the seller on its platform did not have the power to have competitive pressure, that Nadirkitap holds dominant position.

**(iii) Assessment on the Abuse of Dominance by way of restricting access to data and data portability**

At first, as background information, the Board drew a theoretical framework with the information on competition law and Law No. 5846 on Intellectual and Artistic Works (“*Copyright Law*”) on the data, data portability, and its increasing importance on the online marketplaces. The Board highlights that within the scope of competition law, restricting data portability might create transition costs for the data owner therefore, data owners may choose to stay on the platform they first signed into due to transition costs if they find it burdensome to provide their data again to another platform, despite being a better and cheaper alternative. In this sense, the Board made it clear that the restriction of data portability by an undertaking in a dominant position may create entry barriers for competitors by creating artificial transition costs, in other words, it may lead to constitute an exclusionary abuse.

Before delving into its substantial analysis on whether the alleged behaviors of Nadirkitap amount to abuse, the Board stated that the importance of data in terms of digital markets is increasing, and accordingly, the prevention of data portability has become one of the competition problems. The Decision further touched upon that in order to address the concerns about the use of data, the issues of how to apply the existing competition law tools and whether these tools should be supported by other policy tools have led to intense discussions and the Board concluded that many competition authorities recommended data portability in order to establish a healthy competition in the market.

In this context, the Board first evaluated the data accessibility under Copyright Law and competition law as Nadirkitap claimed copyright of the data in question and insisted that such data that belongs to the books in its system were entered by its partners in its defenses.

The Board highlighted that databases are protected under the framework of Law No. 5846 on Intellectual and Artistic Works and EU Directive No. 96/9 on the Protection of Databases (“*Directive*”) in certain conditions. Speaking of which, databases with authentic quality are like compilation works according to Article 6 of Copyright Law under Turkish law. As a result, an authentic database owner will be able to benefit from all Copyright Law provisions regarding the protection of the work.

The Board stated that it is clear that the data set that Nadirkitap has with the information such as the name, author, and publication year of the books does not contain any element of creativity. For this reason, the Decision evaluated that Nadirkitap cannot benefit from copyright protection. On the other hand, databases that do not contain any intellectual creativity, in other words, non-original databases (*sui generis* databases) cannot benefit from copyright protection but may be subject to legal protection within the framework of the Copyright Law if they meet certain conditions.

The Board considered that the investments of Nadirkitap such as having warehouses in its establishment for data entry and employing personnel, are not so substantial for them to benefit from database protection, and the labor investment of second-hand booksellers in the

process is much higher than Nadirkitap itself. Additionally, the book inventory data which is the subject of this decision can be considered as raw data. In light of this, the Board concluded that Nadirkitap cannot benefit from the sui generis right protection either. However, the Board added that even if Nadirkitap cannot benefit from the sui generis right protection, this would not justify Nadirkitap's abuse of its dominant position.

In terms of the conflict of laws, the Decision includes an elegant consideration of the Board from a competition law standpoint. The Decision states that while intellectual property rights grant exclusive rights to its holder, competition law aims to keep the market open for competition. In this aspect, it can be said that there is a contradiction/tension between the two fields of law. However, this tension arises from the difference in the methods to be used to achieve the intended purpose of which is the same. Thus, the Decision concludes that there is no conflict between intellectual property law and competition law as they share the same end goal. Therefore, intellectual property rights ownership will not preclude being subject to competition law rules.

After resolving the so-seem-to-be conflict of laws, the Board continued evaluating the allegation on the restriction of competition where Nadirkitap does not provide their own book information on its website to the sellers, prevents the transfer of such information to other platforms, limits the transfer of the images to another platform by adding the "nadirkitap" logo on the photos of the display books.

First, from many complaint e-mail correspondences, the Board found that the sellers initially intended to work with rival platforms and wanted to transfer the data held by Nadirkitap to its competitors. However, in the e-mail correspondences, Nadirkitap did not allow the data included in its website relating to book inventories, which belonged to the sellers, claimed that any data obtained was obtained illegally, suspended the membership of those who transferred the mentioned data, and did not active the memberships until the data was removed, in other words, sales through the competitors are ceased. Second, the Board evaluated e-mail correspondences which was obtained during onsite inspection regarding the allegation and found that it was evident from the e-mail dated August 21, 2019 reads as "*how many times I bought from you before, why do not you give me the list of books I have created?*" the data used to be shared with the sellers beforehand. Subsequently, the Board concluded that Nadirkitap stopped sharing such data with the sellers after bulk data transfers to its competitors, showing the real motivation behind the new restriction of data sharing is to prevent such data from being transferred to the competing platforms.

Additionally, in the light of information obtained from competitors, it is understood that the restriction evaluated within the scope of the investigation regarding data portability is not a generally accepted practice in the market. The Board ultimately that Nadirkitap restricts data portability by limiting member seller's access to their data on nadirkitap.com and thus transferring them to competitor platforms.

On the other hand, to conclude whether such restriction of data portability has a restrictive effect on competition, the Board has evaluated whether the restriction on data portability has led to de facto exclusivity in the market. The Board mentions that the statement in one of the e-mails obtained, "*To be honest, Nadirkitap is our biggest market and a large part of our income comes from this site*" states that data portability is prevented and the membership on nadirkitap.com is not activated until the data is transferred to competitor sites is removed which may lead to do sales exclusively on nadirkitap.com.

Following, for a better understanding of the restrictive effects of the alleged behaviors of Nadirkitap, the Board evaluated how critical is the data set in question for an undertaking's activity in the market, and the burden of the cost of rebuilding such data sets on the undertakings. In its detailed calculation as per the information obtained through various players active in the market, the Board ultimately concluded that the manual entry of the mentioned books one by one by the second-hand booksellers requires a considerable effort, and therefore a substantial cost for the sellers that generally operate as individual businesses.

The Board states that in light of the information collected from the various second-hand booksellers, such restrictive behavior of Nadirkitap on data portability prevents the seller from working with Nadirkitap's competitors. The Board concluded that, in brief, Nadirkitap obstructed sales activities of the seller on competing platforms; and with such behavior, transition costs were artificially created in the market which in return limited the sellers from switching to other competitors. All in all, the Board found that a significant ratio of the sellers work with Nadirkitap, and ultimately concluded that the restrictive behaviors of Nadirkitap certainly play an important role in that ratio, thereby deciding that the data portability restrictions imposed by Nadirkitap do restrict the competition in the market.

#### **IV. Conclusion**

As a result of the Investigation, the Board evaluated that Nadirkitap abused its dominant position within the framework of Article 6 of the Law No. 4054 through preventing access to and portability of the book data which the members of the seller upload to [www.nadirkitap.com](http://www.nadirkitap.com) without reasonable grounds. In this regard, the Board imposed administrative fines of TRY 346,765.63 based on its annual gross revenues in 2021, by its discretion on Nadirkitap according to the third paragraph of Article 16 of the Law No. 4054 and Article 5(1)(b), 5(2) and 5(3)(a) of the Regulation on Fines to Apply in cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position. That said, the Board decided that Nadirkitap Bilişim ve Reklamcılık A.Ş. shall provide the book inventory in a correct, clear, secure and complete way in a convenient form, free of charge, to the seller members in case they make such request in order to ensure the termination of the violation in question and establishment of effective competition in the market.

The Decision is noteworthy due to several reasons. First, the Decision includes a detailed relevant product market assessment and evaluates the market from several perspectives based on comprehensive market research on multi-sided platforms. Second, the Decision sheds light on the Board's approach towards a possible conflict between Copyright Law and Competition Law rules accompanied by its detailed evaluation, which was parallel with various competition authorities around the world.

Finally, the Decision unrolls the critical importance of data in digital, especially multi-sided, markets and provides valuable evaluations on the anticompetitive effects of restrictions on the data portability in these markets.

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