

Turkish Competition Board Prohibited Exclusive Use of Ad Spaces by Online Betting Platform

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Introduction

In July 2022, the Turkish Competition Board (“**Board**”) initiated an investigation against D Elektronik Şans Oyunları ve Yayıncılık A.Ş. (“**Nesine**”), a company operating in online betting market, to determine whether the exclusive Advertisement Sales Services Agreement (“**Agreement**”) between Nesine and Maçkolik İnternet Hizmetleri A.Ş. (“**Maçkolik**”), a platform providing live scores of sports events and statistical information through its broad database, would result in abuse of Nesine’s dominant position in the context of Article 6 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) and fall into the category of vertical agreements prohibited by Article 4 of Law No. 4054.

The said Agreement, which has been in force since 2019, is related to the rental of ad spaces on Maçkolik’s website and mobile app, prevents Maçkolik from renting its ad spaces to the competitors of Nesine. In addition to this exclusivity requirement, the Agreement also imposes ad click quotas on Maçkolik, failure of which is subject to penalties.

With a view to do away with the potential competition law concerns, Nesine submitted two rounds of certain commitments to the Board. The content and the details of the commitments were not disclosed in the reasoned decision, although it is understood that the Board did not find the commitments sufficient and rejected them.

Although the investigation is on-going and the final determination of the Board is pending, the Board decided to implement an interim measure¹ (“**Nesine Interim Measure Decision**”) to suspend the provisions of the Agreement related to the exclusivity requirement and the ad click quotas after finding the commitments submitted by Nesine insufficient to do away with the competitive concerns arising from these provisions.

¹ Turkish Competition Board’s *Nesine Interim Measure* decision dated 15.06.2023 and numbered 23-27/520-176.

This article evaluates the Board's Nesine Interim Measure Decision by explaining the Board's recent approach towards: (i) the interim measures mechanism stipulated under Article 9(4) of the Law No. 4054 and (ii) the commitment procedure governed by Article 43(3) of the Law No. 4054 and the Communiqué No. 2021/2 on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices And Decisions Restricting Competition, and Abuse of Dominant Position ("*Communiqué No. 2021/2*").

Interim Measure Mechanism in Turkish Competition Law

If there is a possibility of occurrence of serious and irreparable damages until the final decision is taken within the scope of an investigation, Article 9(4) of the Law No. 4054 allows the Board to implement interim measures to maintain the situation prior to the infringement, without exceeding the scope of the final decision. In other words, the Law No. 4054 establishes a three-tiered test for the implementation of interim measures.

Firstly, there must be a risk of realization of serious and irreparable damages prior to the final decision since interim measures directly impact the competition in the market and have the risk of distorting competition unnecessarily. Thus, in each case, the Board must establish the presence of the nature of the risks as well as the likelihood of the realization of these before the final decision. Secondly, an interim measure must aim to restore and preserve the situation in the market prior to the infringement and should not punish the anti-competitive conduct itself. In other words, it must be proportionate to remove the concerns arising from the potential violation until the decision is rendered. Finally, the scope of an interim measure should not exceed the scope of the Board's final decision, as for any interim measure in the scope of both civil and administrative law.

Nesine Interim Measure Decision

According to the Nesine Interim Measure Decision, both Nesine and Maçkolik are the leading undertakings in the markets that they are operating in. In the online betting services market, Nesine is the leading undertaking in terms of clicks, doubling the clicks of its closest competitor.² Maçkolik is also the most popular digital platform in the sports category in Turkey in terms of internet traffic.³

² Nesine Interim Measure Decision, para 39.

³ Nesine Interim Measure Decision, paras 30-31.

Nesine receives a substantial part of the clicks received from its advertisements from Maçkolik where the said traffic is more than the total clicks of Misli, a competitor of Nesine which is the third most click receiving undertaking in the online betting market in Turkey.⁴ Therefore, the Agreement which was first signed for 2019-2021 and renewed for 2022-2024 is said to have a direct impact on the competition in the online betting market.

The Board also evaluated the existing and prospective projects foreseen within the context of the Agreement such as inclusion of a “bets header” on the Maçkolik’s platforms and specification of the matches streamed on Nesine TV, which deepened the competitive concerns. Having identified the importance of advertisement spaces of Maçkolik for the undertakings operating in the online betting services market, the Board collected information from the competitors of Nesine, which stated that advertisement on Maçkolik’s platforms is crucial and all the undertakings desires to advertise on Maçkolik’s platform. However, the Agreement providing exclusivity to Nesine prevents such an engagement of its competitors with Maçkolik.

Based on the foregoing, the Board decided to implement an interim measure suspending the exclusivity clause and also the click quotas, which could have the same effect. In its reasons, the Board considered that: Maçkolik has a great importance for undertakings providing online betting services; the traffic generated from Maçkolik to Nesine is substantial and likely to increase due to forthcoming project, which would increase the visibility of Nesine to the detriment of its competitors;⁵ it is possible to advertise multiple online betting service providers on platforms such as Maçkolik and there are examples to that globally.⁶

The Board also considered that until a final decision is reached, another sports season (2023-2024) would pass and the application the Agreement until then could result in exclusionary practices for 2024-2025 season. Therefore, it reached the conclusion that there is a possibility of occurrence of serious and irreparable damages until the final decision is taken within the scope of an investigation and decided to suspend the exclusivity and the click quota requirements until the final decision is reached.

⁴ Nesine Interim Measure Decision, para 40.

⁵ Nesine Interim Measure Decision, para 51.

⁶ Nesine Interim Measure Decision, paras 45-46.



Commitments Submitted by Nesine

According to the Nesine Interim Measure Decision, Nesine submitted certain commitments to the Board to annihilate the competitive concerns arising from the Agreement.⁷ During the evaluation of the commitments, competitors of Nesine were also invited to make comments on the proposed comments. However, although the nature of the commitments proposed by Nesine are not disclosed in the decision, the Board reached the conclusion that the commitments were insufficient to remove the concerns created by the Agreement.

The Board's Approach in Evaluating the Market

The Board evaluated the impact of the Agreement by considering certain factors shaping the competition in the online betting services market. In doing so, the Board evaluated how international platforms similar to Maçkolik operate, in particular whether they advertise multiple online betting service providers in their advertisement spaces. In this context, the Nesine Interim Measure Decision included excerpts from global players that advertise multiple online betting websites and considered that working with multiple brands in practice is possible.

The sports betting services in Turkey can only be provided by companies that are registered with the National Lottery Authority as per the national lottery legislation.⁸ However, none of the betting service providers included in the excerpts were registered in Turkey.

The crux of this matter lies how the Board will assess the relevant competition within the meaning of the Nesine investigation since it appears that to evaluate the competition in the Turkish geographical market, other undertakings which do not legally operate in Turkey were taken as a proxy for the analysis. As also stated in the Nesine Interim Measure Decision, there are still network externalities and market entry barriers deriving from legislation.⁹ Therefore, it would be interesting to see how this analysis will formulate in the final decision of the Board.

However, the usage of illegal betting services by consumers is widespread in Turkey according to the latest report of the Financial Crimes Investigation Board.¹⁰ Therefore, whether the Board would give any consideration to impact of these illegal activities in its decision would be

⁷ Nesine Interim Measure Decision, paras 6-12.

⁸ See, <https://www.mpi.gov.tr/legislation> last visited July 27, 2023.

⁹ Nesine Interim Measure Decision, para 28.

¹⁰ 20022 Activity of Report of Financial Crimes Investigation Board <https://ms.hmb.gov.tr/uploads/sites/12/2023/04/2022-Faaliyet-Raporu.pdf> last visited July 27, 2023

interesting to see. It must be noted that in Krea İçerik Hizmetleri ve Prodüksiyon AŞ decision (“**Krea Decision**”)¹¹, the Board investigated whether Krea abused its dominant position in the market of “*pay-TV broadcasting of Turkish Super League and 1st league matches*”. Despite the requests of the undertaking, the Board refused to define the relevant market as “*pay-TV broadcasting market*” which would have included OTT and IPTV services some of which are illegally broadcasting in Turkey.¹² It is not clear whether Nesine or Maçkolik had similar arguments in relation to the Nesine Interim Measure Decision but inclusion of the excerpts of the advertisements of the providers that do not have license in Turkey seems like in contradiction with the Board’s previous approach in Krea Decision.

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(First published by Mondaq on July 31, 2023)

¹¹ Turkish Competition Board’s *Krea Decision* decision dated 13.01.2022 and numbered 22-03/48-19.

¹² *Ibid*, paras 150-151.