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Turkish Competition Board's decision assessing discriminatory practice allegations and refusal to deal

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> Introduction

> Facts

> Decision

> Comment

Introduction

This article provides an analysis of the Turkish Competition Board's decision⁽¹⁾ that examines the allegations made by Kare Yangın Otomasyon Sis San ve Tic Ltd Şti (Kare) against Mavili Elektronik Tic ve San AŞ (Mavili) and its authorised service provider, Filiz Güvenlik Sistemleri Proje San ve Tic AŞ (Filiz). The board's assessment aimed to determine whether Mavili and Filiz abused the dominant position within the meaning of article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054) by engaging in discriminatory practices through applying dissimilar conditions to equivalent buyers.

Facts

Mavili is the manufacturer of fire detection systems and sells and installs relevant system products through its authorised service providers and dealers. Filiz operates as one of Mavili's authorised service providers. Kare, the applicant (ie, the complainant), is a company undertaking the maintenance of fire detection systems at Türkan Özilhan State Hospital as a result of a tender.

Kare applied to Mavili for the performance of the services subject to the tender and, in response, Mavili directed Kare's request to its authorised service provider, Filiz. However, Kare alleged that the offer price for Filiz's services was significantly high compared to that of other undertakings. The decision indicates that when Filiz was asked by Kare for the reasoning behind the prices that were well above the fair market price, Filiz explained that the pricing was determined by Mavili.

Concerning the judicial background, Kare's allegations were initially brought to the attention of the Turkish Competition Authority through an application dated 8 July 2020. However, the board assessed that the application was insufficient to initiate preliminary investigation due to the lack of concrete evidence indicating the existence of the alleged infringement (the board's initial decision).⁽²⁾ In response, Kare challenged the initial decision before Ankara 5th Administrative Court, which upheld the board's initial decision, emphasising the board's authority to dismiss applications failing to establish its claims in a serious and sufficient manner without launching a preliminary investigation.⁽³⁾ Subsequently, Kare appealed to Ankara Regional Administrative Court 8th Administrative Chamber, which annulled the decision of Ankara 5th Administrative Court, considering that the price disparity offered to Kare compared to other undertakings and the similarity of the services provided by these undertakings sufficiently established evidence of the alleged practice.⁽⁴⁾

Based on this, the board initiated a preliminary investigation to assess Kare's allegations and concluded in its decision that Mavili did not hold a dominant position in relevant markets and thus, did not violate article 6 of Law No. 4054.

Decision

The decision states that fire detection and warning system devices are purchased for long-term use and therefore require products and services such as:

- repair;
- maintenance;
- spare parts; and/or
- consumables throughout their lifetime.

The board explains that markets encompassing products and services related to the primary product are considered "secondary" markets, as they become relevant after some time following the initial product purchase. On the other hand, the board assessed that where this type of after-sale product or service is required, the market concerning the first product purchased is called the "primary" market.

As for the dynamics of the markets, the board assessed in terms of the primary market that there are more than thirty competitors and found that the market is highly competitive. As for the secondary market, the board took the following factors into consideration to define whether there is a need for brand-specific market definition:

- substitutability of the service in production and use;
- consumer demand; and
- whether there are any obstacles to the production by other undertakings.

In this respect, the board indicates that the market could be defined brand-specific if there is an advanced technology of the products and a low degree of substitutability of the service provided for the products due to the need for obtaining training and certificates for each product, which are typically provided by the manufacturer.

As for brand-specific market definition, the board stated that since the competence of a technical service in a specific brand will be limited for competitor brand products, the substitutability between the authorised technical service providers of different brands will be low for the consumer. Against this background, the board underlines that to operate for maintenance and repair of fire detection and warning systems, an undertaking must obtain a certificate of competence from Turkish Standards Institution.

Within its decision, the board emphasised that one of the conditions for obtaining the qualification certificate is training and authorisation of the technicians for the after-sales services by the manufacturer. However, while some manufacturers offer high-cost trainings that require travelling abroad, obtaining a certificate of competence does not require a high-cost training in relevant market. Therefore, the board determines that high-cost training stipulation does not exist for relevant case to adopt a brand-specific market definition. Furthermore, the board considers the scarcity of individuals holding competence to grant certification for relevant brand as a motivation for defining brand-specific relevant market. However, given that Mavili has 77 authorised service providers operating across Turkey, the board considered that the scarcity stipulation was not met either.

Moreover, the board states that in cases where there is an absence of intensive competition in primary markets, consumers are more likely to be affected by the functioning of the secondary market. In this respect, the board within its decision also considers the number of players active in the primary market. Based on this, the board found that:

- there are more than 30 players in the primary market;
- there is fierce competition in the market; and
- therefore, the brand dependency is low for consumers who want to receive such services.

Furthermore, the board stated that another important factor to adopt a brand-specific definition is whether the consumer has sufficient information about the conditions of the secondary market, especially the price data regarding services and spare parts while purchasing products in the primary market. However, it was emphasised that the consumers generally have price information about the services in the secondary market as consumers receive information on this front during the negotiations with the undertakings operating in the primary market.

In light of the foregoing considerations, the board did not adopt a brand-specific definition for the secondary markets but defined relevant product markets as "fire detection and warning systems production" and "sales market and after-sales services of fire detection and warning systems market" in a broad manner.

Analysis within scope of article 6

The board emphasised within its decision that pursuant to article 6 of the of Law 4054:

The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.

Based on this, the board evaluated whether Mavili holds a dominant position in relevant markets. Regarding the type of the alleged violation, the board has emphasised that even though applicant's allegation is that Mavili preventing Kare from continuing its activities by way of discriminatory practices, the board decided to assess these allegations within the meaning of refusal to deal which is another form of abuse of dominant position.

In terms of dominant position analyses, the board remarked that there is no specific market share threshold above which an undertaking will automatically be considered dominant. Indeed, it is emphasised that an undertaking with a market share of below 40% is unlikely to be in a dominant position. Furthermore, the board assessed whether Mavili has the ability to operate independently from its competitors and customers. As such, the board remarked that even though Mavili is recognised as one of the leading players in fire detection and warning systems market, there is a close proximity of its market share to its competitors. Therefore, considering the abundance of players in the market and the close proximity of competitors' market shares, the board determined that the market conditions demonstrate a competitive market and, concluded that Mavili does not possess the market power to independently set product and service prices above competitive levels. As for the secondary market, the board stated that after-sales services are part of the competition in the primary market by taking into account the multi-player structure of the market and reiterated that consumers have information about the price of the services.

The board concluded that, considering the position of competitors and consumers in the markets for the production of fire and warning systems and after-sales services of these products in which Mavili operates, Mavili does not possess the ability to independently determine the competitive parameters in the secondary market and does not hold a dominant position.

Assessment of Mavili's activities

While the board did not find that Mavili held a dominant position in relevant product market, it examined Mavili's practices, noting that it is beneficial to assess whether the behavior that is subject to the complaint is indeed abusive. Through the findings obtained from on-site inspections, the board determined that Mavili clearly had the intention to refuse technical service support requested by Kare for Mavili branded products. The board also noted that Mavili made an excessively high-priced service offer, which is evaluated to be a way of indirectly declining Kare's service request. In addition, as a result of another finding, the board stated that Mavili's act of refusal to provide service could also be realised towards other private services together with the applicant.

The board stated that a refusal to supply may occur in the form of a direct refusal whereby the dominant undertaking rejects the request for supply without providing a justification or a "constructive refusal" in which includes unreasonable demands, supply restrictions and unjustified delays. Following these explanations, the board sought for the existence of the following three conditions cumulatively to find a violation in terms of refusal to supply:

- indispensability;
- anti-competitive effect; and

- consumer harm.

As for indispensability, the board investigated whether Kare was unable to continue its activities as a result of Mavili's actions. In other words, whether the software support that Mavili refused to provide was indispensable for Kare. The board stated that, while Mavili intends not to provide services to Kare, Kare can still provide maintenance and repair services for Mavili branded products as of 2022 and thus the software support that Mavili refused to provide to Kare is not indispensable for after-sales services. Moreover, it has been determined that Kare's main field of activity is not solely based on Mavili brand products, and that it can also provide after-sales services for other brands. Therefore, it was determined that the software support requested from Mavili does not bear indispensability condition.

In terms of the assessment of the consumer harm stipulation, the board stated that Mavili provided the service directly upon the customer's request. Therefore, it was stated that Mavili's actions did not lead to market foreclosure in the after-sales services market. Furthermore, the board considered that Mavili has a large number of authorised service providers located in different regions throughout Turkey with a wide distribution. Therefore, the market foreclosure, in other words, the anti-competitive effect is not realised and consumer preferences have not been restricted.

All in all, it has been concluded that Mavili does not hold a dominant position in relevant markets. Furthermore, even in a scenario where Mavili is considered to hold a dominant position, the service that the undertaking refused to provide is not indispensable for Kare to continue its activities. Accordingly, Mavili has not committed an act of abuse of dominant position. In addition, having established that Filiz acts in line with the directives of Mavili, it was concluded that it is not possible to impose a violation against Filiz.

Comment

The decision holds great importance as it includes comprehensive assessments on defining the markets for primary and secondary products and services, and evaluating the conditions under which these products and services can be defined in the same market. In addition, the board's decision in this case is of significance, as it explicitly illustrates the board's approach on whether the markets for secondary products and services can be defined on a brand-specific basis.

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Endnotes

- (1) The Board's decision dated 01.12.2022 and numbered 22-53/804-330.
- (2) The Board's decision dated 28.07.2020 and numbered 20-36/503-M.
- (3) Ankara 5th Administrative Court's decision dated 31.05.2021 and numbered 2020/1712 E., 2021/876 K.
- (4) Ankara Regional Administrative Court 8th Administrative Chamber decision dated 10.02.2022 and numbered 2021/1250 E. 2022/226 K.
- (5) Attorney at Law and Founding Partner of ELIG Gürkaynak Attorneys-at-Law, Istanbul, Türkiye.

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