

Individual Exemption by the Turkish Competition Authority to the Cooperation between One of the Largest Retailers and Mobile App

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The products and services surrounding mobile phones (e.g. mobile apps, browsers, search engines) have already proved to be a separate marketing tool for undertakings. This has triggered and created new challenges for competition law enforcement. Indeed, the competition authorities have had to deal with defining new relevant product markets and evaluating their market dynamics. In line with this approach, the Turkish Competition Authority's ("TCA") newly published individual exemption decision may shed light on the evolution of the relevant product market definitions for mobile apps and the services they provide. The concerned decision is also important to illustrate the potential approach to be pursued by the TCA with regard to the cooperation agreements between mobile application providers and retailers.

Background

The TCA recently evaluated whether a cooperation agreement between the following undertakings:

- Migros Ticaret A.Ş ("Migros"), the largest FMCG retailer in Turkey,
- Boyner Holding A.Ş ("Boyner"), a group that is active in luxury and fashion brand retail stores and owns renowned local brands,
- BNR Teklonoji A.Ş ("BNR"), a subsidiary of Boyner that is active in mobile shopping platforms and owns the mobile application called HOPİ being the subject of the cooperation agreement

falls under the scope of Article 4 of the Turkish Competition Law that prohibits the anti-competitive agreements and whether the agreement may benefit from either block or individual exemption.[fn]TCA's decision dated 03.05.2018 and numbered 18-13/238-111.[/fn]

The main findings of the TCA, which will further be explained below, is as follows:

- HOPİ mainly offers personalized shopping experience for its customers in many industries such as apparel, technology, travel, car rental. Thus, HOPİ provides an opportunity to the member companies to gain indirect and limited access to the HOPİ's customer portfolio database and to promote and sell their products whereas the customers have the chance to be informed about the campaigns depending on their lifestyle and preferences.
- The relevant product market is defined as "personalized marketing applications for smart phones".
- Since the concerned agreement includes restrictive provisions such as data sharing, exclusivity and most favored customer ("MFN") clauses, a negative clearance on the agreement could not be granted.
- Since HOPİ's market share in "personalized marketing applications for smart phones" on the turnover-basis exceed the threshold set out under the Block Exemption Communiqué on Vertical Agreements ("Communiqué No. 2002/2") (i.e. above 40%).

Finally, the TCA decided upon granting an individual exemption to the concerned agreement.

Aim of the Cooperation Agreement

The aforementioned agreement between Migros, Boyner and BNR concerns a cooperation which also includes provisions embodying the share of data, the exclusivity and the MFN. The agreement mainly aims to facilitate the customers, - who downloaded the HOPİ application in their mobile phones -, to have the chance to gain Paracık (coins) and spend these coins in shopping at any of the HOPİ member companies including Migros. Additionally, this agreement enables the parties to realise joint promotions, campaigns and advertisements and to share the personal data of the customers in compliance with the relevant legislation.

In this context, Migros will select the customer groups and inform HOPİ about the campaigns addressing to those customer groups, through the interface to be established between Migros and HOPİ or HOPİ will share the group and campaign suggestions. The campaigns approved by the parties will be announced to the attention of the relevant HOPİ customer groups.

Relevant Product Market: Broad vs Narrow

The TCA has taken into consideration the developments in the European Union competition law (such as Google/DoubleClick, Microsoft/Yahoo, Telefonica UK/Vodafone UK/Everything Everywhere/JV decisions of the European Commission) as well as the academic discussions in regard to the multi-sided & two-sided markets (including the evaluations of Damien Geradin and David S. Evans) and found that the mobile phones and the services that they have to offer constitute a separate market. Accordingly, the TCA has defined the relevant product market as "personalised marketing applications for smart phones" instead of using a broader definition a broad market, i.e. "mobile marketing services market".

In this regard, the TCA has first highlighted the fact that the market, in which HOPİ operates, demonstrates the characteristics of a two-sided market. This is because (i) there exist two distinct groups of customers with different demands, (ii) the customer groups' demands and their benefits from the platform are connected or coordinated with each other, and (iii) an intermediary is necessary to internalize the benefits between those customer groups. Further, the TCA has referred to the different types of two-sided markets as well.

Secondly, the TCA has evaluated that HOPİ is a platform which can be used only by downloading the concerned application to smartphones and which provides a code to enable the customers to benefit from the discounts. Afterwards, the TCA has emphasized that as the consumers could benefit from the campaigns and promotion only through smartphones and tablets, the marketing activities of the undertakings through desktop and laptop computers do not place competitive pressure on HOPİ.

Another topic discussed by the TCA is whether a distinction could be made between online advertising activities (via digital tools such as social media, e-mail) and physical advertising activities (via non-digital tools such as news, magazines). In this regard, it appears that the TCA has attached a particular importance to the evaluations in the European Commission's previous decisions where the distinction between online or physical advertising activities, search or non-search online advertising activities, and static online or mobile advertising activities can be made.

Within this scope, the TCA has pointed out:

- the claim of the applicant regarding the "mobile marketing services" market definition relies on the view that undertakings such as Google, Facebook and Twitter are substitutable to HOPİ; nonetheless, those do not create actually or potentially competitive pressure on HOPİ.
- the broad or narrow definition of the relevant product market will significantly change HOPİ's market share in the defined relevant product market which is of importance for the evaluation of block or individual exemption.
- the broad definition of the relevant product market would not ensure proper evaluation of the market dynamics.
- therefore, the relevant product market is defined as "personalized marketing applications for smart phones" rather than a broad market, i.e. "mobile marketing services market".

Block or Individual Exemption?

The TCA has first evaluated that some of the provisions in the agreement as likely to be deemed as restrictive within the meaning of the competition rules and thus decided not to issue a negative clearance. Indeed, by the aforementioned agreement, HOPİ made itself bound not to include any company to its system whose activities and products are similar to those of Migros, for five years at most. Furthermore, the agreement sets forth an MFN clause according to which Migros will present an offer to HOPİ which is at least as good as those offered to HOPİ's competitors.

Additionally, the sharing of the customers' personal data provided under the agreement may create competitive advantages. In this regard, it should be noted that the substance of the data to be shared would have a direct effect on the success of campaigns. Accordingly, Migros will first use HOPİ's user database without any access to the customers' personal data and the target group will be selected by Migros through its access to the customers' HOPİ ID numbers, the member date and time of the customers, and the agreement version information. The TCA has determined that such sharing is a "must" to conduct joint campaigns. On the other hand, if Migros becomes a shareholder of HOPİ, segmentation information of the common customers in the database (updated after each six month) will be shared with HOPİ which has a significant economic value and may create competitive advantage to HOPİ.

Then, it has been decided that block exemption could not be granted for the concerned transaction because HOPİ's market share is above the 40% market share threshold on turnover basis. However, this determination of the TCA appears to be controversial as it includes market share analysis only on turnover basis and it depends on the information provided by Migros which is even not active in the relevant product market.

Finally, the TCA has concluded that the concerned agreement benefits from the individual exemption rule. According to the Turkish competition law, the conditions of individual exemption are as follows:

- ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
- benefiting the consumer from the above-mentioned,
- not eliminating competition in a significant part of the relevant market,
- not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

It should also be noted that the above two positive and two negative conditions must be met cumulatively in order for individual exemption to be granted for any competition restriction.

With regard to the first condition, the TCA has particularly observed whether the concerned information exchange would result in strengthening the parties' market positions and whether it would bring with any efficient gains. After having stated that the scope of the information exchange is a "must" for the functioning of the agreement, the TCA has reached a conclusion that (i) the competitive advantage gained by HOPİ will boost the efficiency and effectiveness of the HOPİ's personalized marketing activities, (ii) the information exchange will lead to the design of more efficient cross-campaigns, and (iii) it will also reduce operational costs and increase the quality of service offered.

As for the benefit of consumer condition, the decision shows that the TCA has focused more on the MFN clause formed in favour of HOPİ. This may avoid any cost to be incurred by the consumers regarding the

search of the best campaigns. Further, such systems may foster the personalized services to be rendered, better prices, and campaigns to be benefited by the consumers.

Subsequently, the TCA has highlighted the potential restrictive effect of the exclusivity on behalf of Migros during its evaluation of the third condition of the individual exemption, i.e. possibility of eliminating competition in respect of a substantial part of the products in question. In this regard, it should be noted that this has been deemed as an "exclusive supply obligation" of HOPI which requires an analysis regarding the market share of Migros in the FMCG retailing market. On the other hand, this exclusivity may become two-sided only in case of purchase of some of the HOPI's share by Migros. Thanks to the dynamics and developing nature of the target-specific mobile marketing services market, such exclusivity also does not create any concerns in terms of the third condition and it would not cause the foreclosure of the market for Migros' competitors.

In this context, the TCA has assessed the impact of the MFN clause as well. Accordingly, the main focus has been the lack of restriction on HOPI's right to provide services to other undertakings and significant part of Migros' activities will not be subject to the MFN clause. Additionally, such MFN clause would not result in a "price catalogue" or "price rigidity". As for the issue whether MFN clause lead to transparency and enables the coordination, the TCA has pointed out that (i) the campaign conditions are public available information, (ii) the scope of the MFN clause is limited and does not cover all campaigns, and (iii) it only relates to the periods of campaigns made by HOPI.

Finally, the TCA has been convinced that the concerned agreement is not limiting competition more than what is compulsory. Within this scope, the TCA has determined:

- the MFN clause stems from the requirement that the performance expected and the investment made should be proportionate in both medium and long run terms.
- the MFN clause may reduce the transaction costs which may occur due to the costly and time-consuming nature of the periodical negotiation processes for campaigns.
- the exclusivity will increase the shopping turn rate.
- the cumulative segment information of Migros card owners to be shared with HOPI in case Migros becomes one of the HOPI's shareholders has not been occurred yet and there is not any limit for HOPI's competitors to close similar cooperation agreements or to develop new business model which enables them to offer better services to the consumers.
- the duration of the agreement is two years and will be automatically renewed for another year unless the parties serve a notice of termination. However, in any case, the total period will not exceed five years.

In the light of the above, the TCA has reached the conclusion that all of the conditions required for an individual exemption exist in the concerned case.

Lessons Learned From...

While analyzing the cooperation between Migros and HOPI, the main issue revealed by the TCA relates to the difficulties that may be faced in defining the relevant markets due to the fast-growing technology markets. Despite the "so-called" positive result in the concerned case, particular attention should be attached to such cases because any evaluation of the TCA may constitute the basis for forthcoming decisions. In this case, the TCA has preferred to pursue a narrower approach and defined the relevant product market as "personalized marketing applications for smart phones" whereas the market share analysis and the evaluation regarding the restrictive clauses in the agreements may be questionable in other cases.

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