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New or Old-Fashioned Approach for the Market Definition: Turkish Competition Authority's TveK/D&R Decision

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On August 27, 2018, the Turkish Competition Authority (“TCA”) announced that it had unanimously cleared the acquisition of one of the largest retailers of various products such as books, periodicals, music, electronics, accessories, video games and toys (“D&R”) by another retailer & wholesaler of the relevant products (“TveK”).[1] Furthermore, the group of companies to which TveK belongs has operations in the supply and distribution of those products as well.

This is a particularly important and highly anticipated decision for the antitrust practitioners on the following questions:

- whether the TCA will define a distinct market for online retail sales and for stores in shopping malls, and
- whether the TCA will also evaluate the micro geographical markets in depth.

Relevant Product Markets Defined by the TCA

To determine the anti-competitive concerns that may stem from the inspected transaction, the TCA, like other competition authorities, basically evaluates the interchangeability or substitutability of the products by the consumers due to the products' characteristics, prices and intended use. Additionally, the interchangeability may also be assessed from the supply side perspective. Therefore, any inaccurately defined markets, in either broader or narrower sense, would lead to fallacies and the transaction would be subject to unreasonable objections raised on competition grounds. On the other hand, acknowledging the difficulties caused by the digitalization of most markets, credit should be given to the competition authorities in this regard. Indeed, the TCA's TveK/D&R Decision reveals, to some extent, its approach and solution to the above-mentioned difficulties.

In the TveK/D&R Decision, the parties of the transaction are operating in retail sales of a very wide range of products including but not limited to the books, news, periodicals, toys and electronics. Accordingly, the TCA determined, on the basis of its

previous precedents, the overlapping markets as follows[2]:

- horizontally overlapping relevant product markets: “*market for the retail sale of books*”, “*market for the retail sale of periodicals*”, “*market for the retail sale of stationery products*”, “*market for the retail sale of games, toys and hobby products*”, “*market for the retail sale of retail sale market of consumer electronics*”, and “*market for the wholesale of books*”
- vertically overlapping relevant product markets: “*market for the distribution of periodicals and products other than the publications*” and “*market for the publishing of periodical and non-periodical*”

Moreover, after having affirmed that both parties are active in the online sales of the concerned products and the trend towards online shopping, the TCA plausibly stressed that the relationship between traditional and online sales channels, and the importance of having a store in a shopping mall must be evaluated as well.

Online Sale vs. In-Store Sale

As for the relationship between traditional and online sales channels, the TCA referred to several decisions of the European Commission[3] and the national competition authorities of the EU members such as the *Competition and Markets Authority*[4] and *Autorité de la concurrence*[5], along with the general reports published by the audit companies. In this context, despite the lack of a comprehensive analysis for the necessity to distinguish the online market from the traditional market in most of the TCA’s previous case law, it suggests that the TCA has considered the factors including extra services provided (*e.g.* informing about all discounts and campaigns, concluding more than one transaction, cancelling the orders without any payment, comparing the prices and enabling the customers to reach the cheapest one), accessibility, saving of time, and ease of use.[6]

With regard to the supply side, as highlighted by the TCA, the in-store sales and online sales could not be deemed substitutable because of the differences between investment amounts required, number of employees, working pattern, etc. To the contrary, the outcome of the TCA’s analysis from the demand side perspective introduced that the mentioned sale channels, at least for the defined relevant product markets, are substitutable owing to the lack of a significant difference for the consumers/customers. In this context, the TCA in this decision put special emphasis upon the competitive relation between those channels in an asymmetric manner. In other words, if it is determined that the online sale channel does create a competitive pressure on the traditional sale channel, the two channels are accepted within the same market regardless of whether the traditional sale channel has such a pressure on the online sale channel.

The TCA then assessed the market size[7], the portions of both traditional and online sale channels for books within the estimated book sales, the growth rates of both channels on a turnover basis[8], the price differences between those channels (*i.e.* sale prices has been approx. 35% cheaper in online than one in traditional channel),

and the consumers' reasons for choosing online shopping (*i.e.* mainly based on the prices). It should be noted that all of the above evaluations are based on the analysis of book sales and the TCA did not conduct any assessment in terms of other products concerned.

However, the competitors' and publishers' responses to the TCA's information requests appear not to be in harmony. Some of those claimed that those channels could be defined as separate markets, but online sale channel has an effect on the traditional sale channel, whereas others argued that the concerned channels are complementary rather than alternative and thus should be defined as a single market.

Eventually, the TCA concluded that it would conduct further analysis in accordance with a single market approach for book sales, *i.e.* "market for the retail sale of books". Nonetheless, the approach pursued by the TCA seems sceptical for some.

In this regard, it is also noteworthy that the TCA has benefited from the information provided by the different stakeholders as well as the information submitted within the scope of another recent clearance decision[9].

Stores in Shopping Malls vs. Stores on Streets

Similar to the longstanding critics that are valid in Turkey even nowadays with regard to the importance of the venue of a store[10], the TCA has, to some extent, brought certainty to those discussions in the market for the retail sale of books.

Contrary to its MARS/AFM Decision^[11], where it was determined that movie theaters at malls or multiplex movie theaters price their services considerably higher than the independent movie theaters and this has led to the conclusion that these two sub-segments should be defined as separate product markets, the TCA resolved not to make any distinction between the bookstores in shopping malls and the bookstores on streets.

This determination of the TCA is mainly based on the following facts:

- Although it is undeniable that being placed in a shopping mall brings certain commercial advantages, the location of the store plays a crucial role regardless of being placed in a shopping mall. This can be particularly derived from the evaluations made on a turnover basis which shows that some of the stores on certain streets had achieved significantly higher turnovers.
- There has not been any significant difference between the average prices of book sales, the size of the stores in shopping malls and on streets or the quality.

Indeed, the players in the same market also asserted that stores in shopping malls and stores on streets are directly competing with each other. This is because one is not superior to other in terms of benefits and costs, and because the criteria such as customer potential, rental conditions, competitors in the near locations and operational infrastructure are taken into consideration in deciding the place of a store.

Broad Market vs Micro Markets: A Narrow Approach as in the Recent Merger Cases about Movie Theatres and FMCG Retailers?

The TCA defines the relevant geographical market as the zones in which the undertakings are active in the field of supply and demand of the goods and services, that are easily differentiated from neighboring zones due to the sufficient homogeneity of the competition conditions and the significantly different competition conditions between the neighbouring zones. Therefore, depending on the case, it may adopt an approach in the narrowest (*i.e.* micro markets) or broadest (*i.e.* Turkey) term. Particularly for mergers in the retail and movie theatre sectors, the TCA has stressed that the definition of the relevant geographical market needs special attention.

For example; in its above-mentioned MARS/AFM decision, the TCA had pointed out that a detailed evaluation of the relevant geographical market is a necessity in order to analyze the effects of this transaction over the end-user prices. Within this frame, it has also noted that the 20-minute drive-time isochrone (the area that covers a diameter that is within the 20-minute drive-time) may also be considered as the relevant geographical market. Then it had been referred to the thirty-eight micro markets which requires in-depth analysis.

In this regard, another example would be the TCA's MIGROS/TESCO decision issued last year in relation to an acquisition realised by one of the largest FMCG retailers in Turkey.^[12] Indeed, the TCA's evaluations in this decision has explicitly strengthened the narrower market definition supporters' hand and it has implicitly revealed the future approach favoured by the TCA at least in retail sectors. In the mentioned case, the TCA especially highlighted that problems associated with the urbanization such as traffic, transportation, and parking have an impact on the consumers' preferences in their decisions. Eventually, the TCA conducted its analysis in each of the defined districts.^[13]

Similar to the above-mentioned cases, the TCA also defined 47 districts as micro markets by explaining that the parties' activities are mainly focused on the traditional retail, that the consumers would consider the distance for shopping purposes, and that this would be valid even if the traditional and online channels are defined as a single market. Nonetheless, the reason for potential critics against this part of the determination would be that the evaluation of the effect of the notified transition in the competition at a regional level has not been conducted in a sufficiently satisfactory manner. Indeed, the TCA mainly referred to the entry barrier that may arise in finding a proper location. Finally, it is also noteworthy that the parties informed the TCA about the stores to be potentially closed or opened in future and that this is not a commitment. However, the TCA only stressed the following issues without any further analysis:

- The number of overlapping markets will be reduced if the above-mentioned circumstances occur.

- The parties' activities will be overlapped mostly in shopping malls.
- Shopping malls generally rent one or two stores for such operations and this may create entry barriers in case there is not any street to attract consumer traffic similar to the one that exists in shopping malls.

To sum up, the TCA's decision on the notified acquisition is likely to be considered as a landmark decision as it considers online retail sales in the same market as the in-store sales. Further, the TCA has reinforced its micro geographic market assessments.

[1] TCA's decision dated 29 May 2018, numbered 18-16/293-146.

[2] TCA's decisions dated 22 April 2010, numbered 10-33/529-188; dated 06 April 2012, numbered 12-17/465-136; dated 27 December 2012, numbered 12-68/1682-618; dated 06 November 2013, numbered 13-62/865-371; dated 07 November 2016, numbered 16-37/628-279.

[3] Case No. COMP/M.2978 LAGARDERE/NATEXIS/VUP on January 07, 2004; Case No COMP/M.4611 EGMONT/BONNIER (BOOKS) on October 15, 2007; Final Report on E-Commerce Inquiry Sector on May 10, 2017.

[4] Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd on May 12, 2006; Anticipated acquisition by Amazon.com Inc of the Book Depository International Limited ME/5085/11 on October 26, 2011.

[5] Decision 16-DCC-111 on the acquisition of Darty by the Fnac group on July 18, 2016.

[6] TCA's decisions dated 12 May 2011, numbered 11-30/591-187; dated 03 January 2013, numbered 13-01/7-7; dated 10 November 2015, numbered 15-40/662-231; dated 09 June 2016, numbered 16-20/347-156; dated 05 January 2017, numbered 17-01/12-4; dated 04 May 2017, numbered 17-15/175-87.

[7] Based on the turnovers for different book categories such as educational publications except textbooks, cultural publications (including fiction publications for adults, other than fiction publications for adults, publications for belief, publications for children, and publications for adolescents) and others (academic, imported, etc.).

Based on the channels such as bookstore chains, independent bookstore and point of sales, chain stores, exhibitions, distribution/wholesale, and online.

[8] The concerned analysis was not conducted on the basis of the above-mentioned different book categories.

[9] TCA's decision dated 03 May 2018, numbered 18-13/248-113.

[10] Particularly due to the pros related to the nature of a shopping mall such as ability to satisfy different needs of consumers, lack of impact of any unfavourable weather condition, and lack of problems faced in parking.

[11] TCA's decision dated 17 November 2011, numbered 11-57/1473-539.

[12] TCA's decision dated 09 February 2017, numbered 17-06/56-22.

[13] To the contrary of the approaches adopted by the European Commission and some national competition authorities of the EU members, according to which the 20-minute drive-time has been taken into consideration.

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