

Google Fined - This Time by the Turkish Competition Watchdog

Kluwer Competition Law Blog
November 5, 2018

Bahadır Balki (ACTECON)

Please refer to this post as: Bahadır Balki, 'Google Fined - This Time by the Turkish Competition Watchdog', Kluwer Competition Law Blog, November 5, 2018, <http://competitionlawblog.kluwercompetitionlaw.com/2018/11/05/google-fined-this-time-by-the-turkish-competition-watchdog/>

The tech giant Google^[1] has been under the Turkish Competition Authority's ("TCA") scrutiny due to its practices in the market for licensable mobile operating systems and under the judicial review since July 2015. In September 2018, the TCA has finally released its short decision and imposed a fine of TRY 93 million (approximately USD 15 million based on today's exchange rate) for abusing its dominant position through its agreements with the mobile device manufacturers in breach of the Turkish Competition Law No. 4054.^[2]

BACKGROUND OF THE DECISION

Following a complaint lodged by Russian Yandex Ltd. ("Yandex") with the allegation that Google has violated the Turkish Competition Law by forcing the original equipment manufacturers through its agreements to pre-install certain Google apps in their mobile devices, the TCA investigated the concerned practices of Google and concluded its preliminary investigation in December 2015.

The TCA found that Google, as a condition to grant licenses to the device manufacturers for its operating systems, requires them, among others, to exclusively pre-install certain Google apps and to place these apps on the home-screen of the devices. In this regard, the TCA evaluated in its preliminary investigation, among others,

- whether this practice constitutes tying, which is prohibited under certain circumstances,
- if so, whether such tying restricts competition.

Accordingly, the TCA resolved, by majority of votes, not to carry out a full-fledged investigation against Google^[3]. Instead, the TCA sent an opinion letter to Google as per Article 9/3 of the Turkish Competition Law, in which it instructed Google to remove the provisions in its agreements with original equipment manufacturers that force them to exclusively pre-install certain apps within the Google Mobile Services. It is noteworthy that the result of the TCA's preliminary investigation revealed Google's high market power in Turkey. In addition, that the TCA acknowledged:

- exclusive pre-installing of Google apps may restrict the competition and
- Google's practice of tying does not prevent consumers to download other apps and services, and this reduces the transaction costs in favor of consumers, thus, Google did not drive its competitors out of the market and did not violate the Turkish Competition Law.

Similarly, main point in the dissenting votes was Google's high market power, distribution advantages of such exclusivity & tying practices for Google against other apps and service providers, foreclosure effect, and restriction of new entries due to such exclusivity & tying practices. However, two members of the TCA opined in favor of initiating a full-fledged investigating against the concerned practices.

Afterwards, Yandex appealed to the Administrative Court for the annulment of the decision. In March 2017, the Court annulled the TCA's decision on the ground that the TCA should have initiated a full-fledged investigation to reveal whether Google's practices have been against the Turkish Competition Law. Shortly after the Court's annulment, the TCA initiated a full-fledged investigation against Google.

In the meanwhile, the European Commission in July 2018 fined Google an astounding EUR 4.34 billion for similar practices. Since then, the focus has been on the outcome of the TCA's full-fledged investigation. In September, the TCA announced that

- Google holds the dominant position in the market for licensable mobile operating systems and
- its agreements constitute an abusive behavior within the meaning of Article 6 of the Turkish Competition Law.

Therefore, the TCA fined Google TRY 93m in accordance with Article 16 of Competition Law and Regulation on Fines. Although the short decision lacks clear information as to the calculation of the fine, it is further understood from the reference to Article 5/3(b) of the Regulation on Fines that Google's violation lasted longer than five year and accordingly, the fine increased by one-fold.

GOOGLE IS TO TAKE STEPS TO ESTABLISH THE EFFICIENT COMPETITION IN THE MARKET AGAIN

In addition to the administrative fine imposed against Google, the TCA sent an opinion to Google to include a provision in its *Mobile Application Distribution Agreements* which explicitly sets forth that the device manufacturers are not prohibited to pre-install apps of Google's competitors. The TCA has considered this as a precaution to prevent possible competition concerns in the future and as a guarantee to bring precision for the device manufacturers.

Eventually, the TCA unanimously decided that Google should take the following steps in order to end the concerned violation and to ensure the efficient competition in the market again:

- with a view to ensure the device manufacturers' free choice between Google and its competitors, and to exclusively install other search widgets on the home screen, any provisions in Google's agreements that may directly or indirectly oblige the device manufacturer to install *Google search widget or bar* exclusively on the home screen should be removed.
- any provisions in Google's agreements setting *Google Search* as a default search engine in various locations or in the current operating system designs should be removed.
- any provisions in Google's agreements that may directly or indirectly indicate an obligation to set *Google Webview* as the default and exclusive component for in-app searches should be removed.
- any promotions or incentives through financial or other means that may result in the creation of the aforesaid restrictions should be avoided.
- any provisions in Google's agreements preventing the device manufacturers to pre-install the services of Google's competitors to the devices and to use those competitors' services in any of the search locations in the Android system should be abandoned.

Accordingly, within six months following the receipt of the TCA's reasoned decision, Google must inform the TCA that it has taken necessary actions to ensure that its agreements are in compliance with all of the above-mentioned instructions.

CONCLUSION

Google has been subject to several investigations stemming from competition concerns in the same relevant product/service market within recent years. In this regard, tremendously high amounts of fines have been imposed by the European Commission for strengthening dominant position by its illegal practices. Also, a settlement was reached between Google and Russian antimonopoly watchdog, according to which Google agreed to pay USD 7.8 million and committed to take certain steps similar to the ones it has to take in Turkey.

Although the reasoned decision of the TCA is yet to be published, the short decision provides clues as to the TCA's concerns and the essential facts of the case. Similar with what happened following the European Commission's decision, the TCA's decision is expected to be criticized as it at least raises concerns about the broadening interpretation of abusive practices (especially for the firms active in tech markets) or policy change in the implementation of Article 6 of the Turkish Competition Law. It also arouses the curiosity how the TCA addresses what Google had been doing wrong for the welfare.

As a separate but important note, the TCA's decision shows once again that the TCA is still following the European Commission's footsteps to a significant extent in evaluating anti-competitiveness of a behavior, especially in complex matters.

[1] Google LLC, Google International LLC, and Google Reklamcılık ve Pazarlama Ltd. Şti.

[2] The TCA's decision dated 19.09.2018 and numbered 18-33/555-273.

[3] The TCA's 28.12.2015 dated and 15-46/766-281 numbered decision.