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Meal Card Companies under the TCA's Scrutiny: From Full-Functionality to Collusion

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Introduction

In April 2019, the Turkish Competition Authority (“**TCA**”) released its reasoned decision,[1] as a result of its full-fledged investigation concerning the practices of the companies that operate in the “*meal card services*” sector.[2] The TCA found, contrary to its findings in its annulled decision (dated 01.07.2010 and numbered 10-47/862-299), that Sodexo Avantaj ve Ödüllendirme Hizmetleri A.Ş. (“**Sodexo**”), Edenred Kurumsal Çözümler A.Ş. (“**Edenred**”), and the joint venture established by those undertakings (namely, Network Servisleri A.Ş. (“**Network**”)) have breached Article 4 of the Law No 4054 on the Protection of Competition (“**Competition Law**”) (*i.e.* the article which prohibits anti-competitive agreements and concerted practices) and it has thus imposed a TRY 7.7 million fine (approx. EUR 1.2 million).[3]

This decision is of particular importance, since the “*meal voucher/card services*” sector has been under the radar of the TCA for a long time and the characteristics of a joint venture company has been thoroughly evaluated. Also, the issuing of an opinion letter to the Ministry of Treasury and Finance by the TCA in relation to undertakings’ financial recordings is noteworthy.

Background of the Case

Back in 2010, the initiation of a preliminary investigation was triggered by the applications made by a restaurant, two chambers, the Savings Deposit Insurance Fund of Turkey, and an undertaking which operates in “*meal voucher/card services*” sector. The main two allegations were as follows:

- Sodexo and Edenred have allocated tenders and customers among themselves, jointly determined sale conditions, and complicated the activities of competitors.
- meal voucher/card market players have collectively acted in order to receive high commission rates ranging between 7% and 10% from restaurants.

As a result of its preliminary investigation, the TCA did not find any communication or information exchange between Sodexo and Edenred which indicated the existence of a

coordination of the maturity, discount, and commission rates. Furthermore, the TCA determined that even though there was a high customer mobility between the players in the “meal voucher/card services” sector, the client mobility between Edenred and Sodexo was relatively limited. Despite such determination, the TCA decided not to initiate a full-fledged investigation regarding the allegations.

Multinet Kurumsal Hizmetler A.Ş. (“**Multinet**”) (*i.e.* another player in “meal card services” sector) appealed the TCA’s decision (dated 01.07.2010 and numbered 10-47/862-299) before the Council of State. The Council of State overruled the TCA’s decision by putting emphasis upon the abovementioned finding of the TCA as regards the customer mobility and market shares of two undertakings, Sodexo and Edenred.[4] Additionally, the Council of State ruled that doubts whether Sodexo and Edenred engaged in anti-competitive practices specifically against customers with a tender procedure and limitedly against other customers remained. Thus, the Council of State concluded that the TCA should have further investigated to reach sufficiently satisfying information or documents. Afterwards, the TCA initiated a full-fledged investigation against Sodexo, Edenred, Network, Multinet, Winwin Hizmet Yönetimi Sanayi ve Ticaret A.Ş. and Set Kurumsal Hizmetler A.Ş. on May 2017.

Eventually, it should be pointed out that the meal voucher/card services sector has been under the scrutiny of the TCA which previously examined the meal voucher/card services sector in its seven decisions,[5] excluding merger control filings. Indeed, the TCA also referred to those cases in its evaluations in the latest reasoned decision. In this respect, the TCA’s Meal Voucher/Card Investigation Decision[6] in 2006 is of particular importance since this was the first case where the TCA imposed fines on Sodexo and Edenred (previously Accor Servisleri International A.Ş.) due to the anti-competitive agreement on the customer allocation and maturity fixing.

On the other hand, in its latest reasoned decision in 2018, the TCA could not find any information or document indicating that the investigated undertakings have allocated tenders and customers among themselves or that they have jointly determined the sale conditions or complicated competitors’ activities. Nevertheless, as will be explained below, the TCA resolved that Network (*i.e.* a joint venture established by Sodexo and Edenred) does not meet the full functionality criterion, rather facilitated collusion among those two undertakings.

Evaluation of Network’s Activities: Revealing of A Non-Full-Function Joint Venture and Collusive Behavior

The Network Decision[7] in 2001 entails the first evaluation and determination of the TCA as regards the establishment of a joint venture (namely Network), upon the merger notification submitted by Sodexo and Edenred. According to the notification, the contemplated joint venture would provide and manage the infrastructure services for smart cards of the meal voucher/card firms.

In this Network Decision, the TCA made the following determinations:

As regards the coordination risks:

1. the advantages such as promotions, discounts and long maturity terms offered by the

- parties to the customers affect the competition among the shareholders;
2. however, the joint venture has no function to facilitate mentioned offers of the shareholders;
 3. the main function of the joint venture is to provide the infrastructure system ensuring safe and efficient realization of transactions of the already engaged customers;
 4. activities of the joint venture and the shareholders are different;
 5. the information to be obtained by Network from Sodexo and Edenred are planned to be transmitted via separate channels, thus such separation is an assuring mechanism for prevention of possible cooperation between the parties;
 6. the services to be offered by the joint venture do not restrict competition between the shareholders.

As regards the full functionality criterion:

1. the joint venture would provide its services not only to its shareholders but also to other undertakings;
2. when the shareholders maintain their presence in the downstream or upstream markets of the joint venture, one of the aspects to be examined while assessing the full functionality of a joint venture is the relationship between the concerned parties and the joint venture;
3. the abovementioned relationship is particularly deemed problematic in cases where large amounts of sale and purchase are realized between the joint venture and the parties of a joint venture. On the other hand, during the initial start-up period of a joint venture, it is possible to mainly rely its existence in the market on the sale or purchase transactions realized with its shareholders for a certain period and this shall not affect its full functionality. Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control stipulate that the period when a joint venture company can rely its existence in the market on the sale or purchase transactions realized with its shareholders shall not exceed three years.[8]

To summarise, the TCA concluded that the contemplated joint venture does not create a coordination risk, the joint venture and its parties are active in different relevant markets, and since the parties have no turnover in the relevant product market in which the joint venture would operate, the establishment of Network is not subject to the TCA's approval.

Nevertheless, the TCA has determined in its latest decision in 2018 that Network have not provided its services to any other undertaking other than Sodexo and Edenred ever since its establishment. Therefore, it has stressed that Network did not meet the full functionality criterion as of 2005 (three years after the establishment of its establishment). Furthermore, unlike the TCA's finding in its Network Decision in 2001, the TCA has disclosed that the separation explained in the Network Decision with regard to the transmission of the information provided by the parties to Network has not been implemented from 2002 to 2006. Accordingly, the TCA has decided to re-evaluate Network's joint venture status by also taking the changed market conditions into consideration and thus it has emphasized that Network has not operated as an independent undertaking as of three years since its establishment and Network does not meet the requirement of full functionality.

In its latest decision, the TCA has further assessed those activities as a cooperation agreement under Article 4 of Competition Law and it has underlined that the fundamental costs of the meal voucher/card firms are as (i) infrastructure costs stemming from the establishment of smart card systems and (ii) personnel costs due to the operation of smart card systems. The activities of Sodexo and Edenred are considered to be sharing the infrastructure costs of smart card systems via Network. Cost harmonization between competitors is deemed as problematic since, similarity between competitor firms' costs is a facilitating factor for cooperation.

In addition to the cost harmonization, Network is also determined to be leading to a cooperation between the parties in terms of the relations with their member work places. The member work places to be provided with POS systems via Network are determined together by Sodexo and Edenred. In other words, the provision of the device is performed according to a list of member workplaces which are approved by both parties. While determining the lists, Sodexo and Edenred prioritized the member workplaces which both firms are already engaged with and required approval of each other with respect to the work places to be further added to the lists in order to be provided with the POS systems.

In the light of these findings, the TCA determined that Network is considered as a competition restrictive agreement, since it leads to cost harmonization and coordination among Sodexo and Edenred.

TCA further conducted an analysis whether Network can be granted with individual exemption in accordance with Article 5 of Competition Law (*i.e.* article stipulating individual exemption conditions which are similar to the ones stipulated under TFEU 101(3)) and determined that Network created efficiencies and contributed to consumer welfare to a certain degree. However, it is further pointed out that Network eliminated competition in a significant part of the relevant market by facilitating coordination between Sodexo and Edenred mainly by harmonizing their costs to a considerable extent. It is also determined that Network is limiting competition more than what is compulsory for achieving its goals with its establishment since it is determined that the smart card infrastructure can be implemented by Sodexo and Edenred independently, without need of a joint venture.

Determination of the Fine

In determining the amount of the fines to be imposed on Network, Sodexo, and Edenred due to their collusive behaviors, the TCA has realized the inconsistency that the turnovers generated by Sodexo and Edenred were well below the competing undertakings' turnovers even though Sodexo and Edenred were the undertakings with higher market shares calculated on the basis of annual transaction volumes. Then the TCA requested clarification from the undertakings concerned.

In accordance with the responses to the TCA's clarification request, it has been determined that Sodexo and Edenred started using different accounting treatment since 2005 whereas other undertakings active in the "*meal card services*" sector have not made any changes in this respect and this has caused that the turnovers generated by Sodexo and Edenred were well below the competing undertakings'

turnovers.

Eventually, the TCA has emphasized the importance of the use of a similar accounting method in undertakings' net sales in order to accurately identify the undertakings' relative size and to determine the amount of fine to be imposed. Therefore, the TCA issued an opinion letter to the Ministry of Treasury and Finance with respect to the undertakings operating in the "*meal card services*" sector so that it would be possible for the TCA to make adequate assessment and to prevent any inequality that may occur between those undertakings.

Concluding Remarks

This decision is of particular importance since as a result of the TCA's re-evaluation, it has been revealed that the joint venture whose establishment was examined back in 2001 has not fulfilled the criteria for being a stand-alone joint venture, and thus the joint venture and the parties of these joint venture have been fined due to facilitating the collusion and engaging in the collusion. Also, it explicitly suggests that any joint venture which will mainly rely for its existence in the market upon the sale or purchase transactions realized with its shareholders during the initial start-up period of a joint venture requires a regular assessment from the competition law perspective.

It is also noteworthy that the TCA has highlighted the importance of the use of similar accounting methods by undertakings active in the same market when conducting its analysis and the different accounting methods used in the same relevant market may raise concerns as to accuracy and equality.

[1] TCA's decision dated 15.11.2018 and numbered 18-43/694-339.

[2] In line with its previous decisions, the TCA has made the following evaluations on the relevant market:

1. meal card services sector bears the characteristics of a two-sided market: the relations of a meal voucher firm with the member work places (*g.* restaurants) and the relations of a meal voucher firm with its customers (*e.g.* employers offering meal vouchers to their employees).
2. the main function of meal card services is to meet the food needs of customers' employees.
3. the meal card services may be considered as more convenient for employers since employers offering meal cards to their employees may enjoy, among others, a tax benefit to a certain extent.

Further, the TCA stressed that since smart cards are generally used in the provision of these services, the product market is determined as "*the market for the provision of convenience food and food to customers via tools which represent money*".

[3] This calculation is based on the exchange rate for the release date of reasoned decision (15.04.2019, 1 EUR=6,55 TRY). Fines imposed on Sodexo, Edenred, and Network are respectively TRY 3,207,702.79 (approx. EUR 485,000), TRY 3,919,367.39

(approx. EUR 590,000), and TRY 624,038.41 (approx. EUR 95,000).

[4] Decision of the Council of State dated 28.12.2016 and numbered 2010/4565 E., 2016/4508 K.

[5] TCA's decisions dated 26.05.2006 and numbered 06-36/465-127, dated 28.09.2006 and numbered 06-67/905-262, dated 16.04.2014 and numbered 14-15/274-117, dated 19.01.2011 and numbered 11-04/50-17, dated 28.04.2011 and numbered 11-26/502-156, dated 31.05.2012 and numbered 12-29/855-255, dated 24.12.2015 and numbered 15-45/751-273.

[6] TCA's Meal Voucher/Card Investigation Decision dated 28.09.2006 and numbered 06-67/905-262.

[7] TCA's Network Decision dated 31.07.2001 and numbered 01-37/365-97.

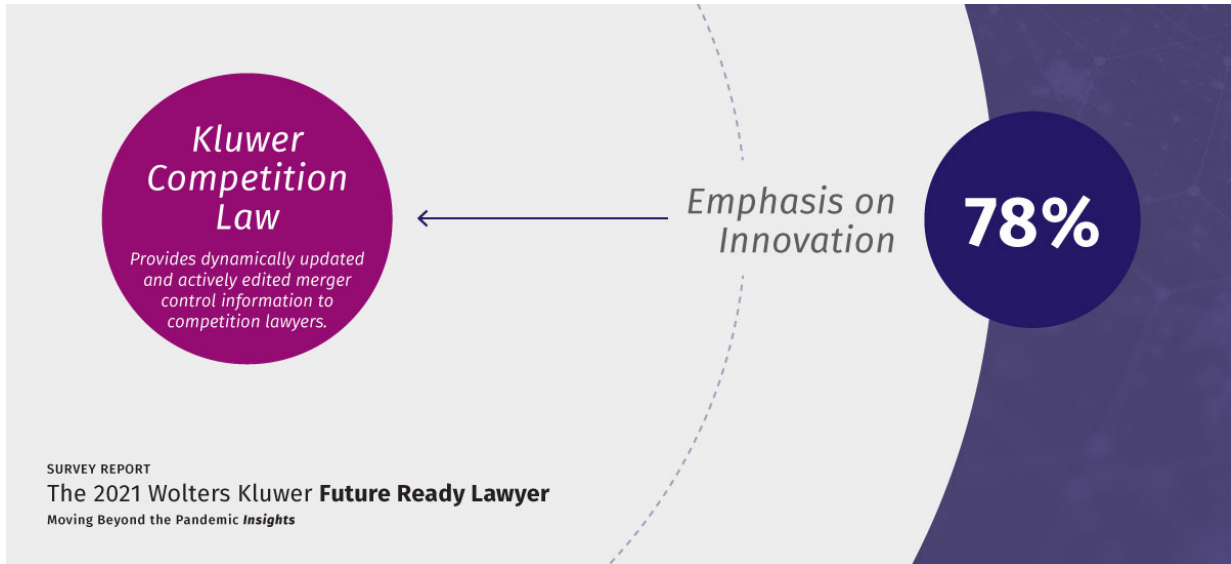
[8] Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control, para. 85.

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