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

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Please refer to the link for full-functionality and collusion

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Introduction

In April 2016, the Turkish Competition Authority (“TCA”) released its reasoned decision as a result of its full-functionality investigation concerning the practices of the companies that operate in the “meal voucher/card services” sector and the TCA found, contrary to its findings in its previous decision, dated 19.01.2006 and numbered 14-TA/1991, that Sodexo Business on Business Environment A.Ş. (“Sodexo”), and Edenred’s subsidiaries namely Network Multinet Kurumsal Hizmetler A.Ş. (“Network”) and Multinet Hizmetleri A.Ş. (“Multinet”) colluded in order to restrict competition in the sector.

This decision is of particular importance, since the “meal voucher/card services” sector has been under the scope of the TCA for a long time and the characteristics of a joint venture company have been thoroughly analyzed. Besides, the importance of this sector on its own, the Ministry of Treasury and Finance and the TCA in relation to financial systems is noteworthy.

Background of the Case

Back in 2006, the initiative of a preliminary investigation was triggered by the applications made by a restaurant, two chambers, the Housing Reimbursement Fund of Turkey, and an undertaking operating in the “meal voucher/card services” sector. The main allegations were related to

- the two undertakings having reached an agreement on the sale or purchase transaction realized with the shareholders for a limited period; thus, the joint venture would provide its services not only to its shareholders but also to other undertakings;
- the advantage such as promotions, discounts and long maturity terms offered by the parties to the customers were not applicable on other parties;
- the joint venture makes the lists of member workplaces for further use through separate channels, thus such separation is an assuring mechanism for prevention of possible conflict of interest; and
- 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 conflict of interest.

As regards the coordination risks:

- the joint venture is not under the influence of the parties;
- the joint venture can rely its existence in the market on the sale or purchase transactions realized with its shareholders for a limited period; thus, the joint venture would provide its services not only to its shareholders but also to other undertakings;
- the separation explained in the Network Decision with regard to the transmission of 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 conflict of interest.

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

1. The joint venture would provide its services not only to its shareholder but also to other undertakings.
2. The shareholders maintain their presence in the downstream or upstream markets of the joint venture, one of the aspects to be measured while assessing the full-functionality of a joint venture is the relationship between the concerned parties and the joint venture.

In its latest decision, the TCA has further assessed those activities as a cooperation agreement under Article 4 of its 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).

Nevertheless, the TCA has reiterated in its latest decision in 2016 that Network has not provided its services to any other undertaking other than its shareholders and therefore, Network does not meet the requirement of full-functionality of a joint venture.

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 their market power. Unlike the previous finding of the Council of State overruled the TCA’s decision (dated 01.07.2010 and numbered 10-47/862-299) before the Council of State. The Council of State examined the TCA’s decision for putting emphasis upon the abovementioned finding of the TCA as regards the customer mobility and market shares of two undertakings, Sodexo and Edenred respectively. Subsequently, the Council of State concluded that the TCA should have further investigated it sufficiently satisfying information or documents. Nevertheless, the TCA released a final investigation report regarding Sodexo, Edenred, Network, Multinet Hizmetleri A.Ş., and Multinet Kurumsal Hizmetler A.Ş. as May 2017.

The TCA has disclosed that the separation explained in the Network Decision with regard to the transmission of 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 conflict of interest.

Furthermore, the TCA has reiterated in its latest decision in 2016 that Network has not provided its services to any other undertaking other than its shareholders and therefore, Network does not meet the requirement of full-functionality of a joint venture. Thus, the joint venture is not under the influence of the parties; and the joint venture can rely its existence in the market on the sale or purchase transactions realized with its shareholders for a limited period; thus, the joint venture would provide its services not only to its shareholders but also to other undertakings.

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 relatively limited despite such determinations, the TCA decided to impose a full-fledged investigation regarding the allegations.

Evaluation of Network’s Activities: Remedying of a Non-Full-Function Joint Venture and Cooperative Behavior

The Network Decision (in 2016 entails the first evaluation and determination of the TCA as regards the establishment of a joint venture (turnkey Network) of the companies in the market players have collectively acted in order to receive high commission rates through sale conditions, and complicated the activities of competitors.

To determine whether Network has been engaged in an anti-competitive behavior, the TCA evaluated the lists of member workplaces. The TCA further considered whether the objectives set by such lists have been consistent with the market power of the joint venture and the market power of the parties to the joint venture.

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In addition to the cost harmonization, Network is also determined to be leading to a cooperation between the two undertakings.

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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 these 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 ventures have been fined due to facilitating the collusion and engaging in the collusion. Also, it explicitly suggests that any joint venture which would 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.

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2. In line with its previous decisions, the TCA has made the following evaluations on the relevant market:
   1. The meal card services sector bears the characteristics of a two-sided market: (a) the relations of a meal voucher firm with the member workplaces (e.g. restaurants) and the relations of a meal voucher firm with its customers (e.g. employers offering meal cards to their employees).
   2. The main function of meal card services is to meet the food needs of customers’ employees.
   3. Meal card services may be considered as more convenient for employers and employees since meal 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”.
   4. This calculation is based on the exchange rate for the release date of reasoned decision (19.04.2019: 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).
5. TCA’s Network Decision dated 28.08.2001 and numbered 01-37/365-97.
6. Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control, par. 85.

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Further, the TCA stressed that since meal 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.”