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Preventing Data Portability as Abuse of Dominance: The TCA's Approach in Sahibinden Decision

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Introduction

On 23 August 2023, the Turkish Competition Authority ("**TCA**") announced that it had fined Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.?. ("**Sahibinden**") for abuse of dominance and required the undertaking to implement certain remedies. The TCA decided ("**Sahibinden Decision**") that Sahibinden had infringed Article 6 of Law No. 4054 on the Protection of Competition ("**Competition Law**") in the market of vehicle sales/rental platform services by way of preventing data portability and implementing exclusivity through the non-compete obligations in its agreements.

Although the reasoned decision has not yet been published, the remedies imposed on Sahibinden provide valuable insights into how the TCA approaches conduct or complaints related to data portability.

Background information – data portability cases at a glance

Data portability in the online platform services market for real estate sales/rental services was identified in the *Sahibinden/REOS Decision* and eventually addressed by the *Sahibinden Decision*.

Sahibinden/REOS Decision

Before delving into the details of the remedies imposed on Sahibinden, it is worth noting that the TCA hinted through its previous decision ("**Sahibinden/REOS Decision**") that it is in favour of imposing a remedy concerning data portability on Sahibinden. The TCA issued its *Sahibinden/REOS Decision* after it had assessed the allegations that Sahibinden had abused its dominant position in the online platform services market for real estate sales/rental services via its exclusionary behaviours.

The complainant, REOS Bili?im Teknolojileri A.?. ("**REOS**"), argued that integration with Sahibinden, i.e., access to application programming interfaces ("**API**"), is a mandatory element of the provision of collective and multiple listing services. REOS stated that via this way real estate

agents can input their listings and publish them on their chosen platforms by using REOS. The term "inputting" included not only the creation of the listing but also the updating and removing of the listing as well. Therefore, it is alleged that Sahibinden's refusal to provide this integration caused two different infringements of competition law, namely refusal to deal without objective justification and complicating the activities of other undertakings or excluding them from the market by preventing interoperability.

By way of background, REOS is active in designing technological solutions to the real estate sector and provides portfolio and demand, and (CRM) customer tracking and digital marketing platform services for real estate agencies, brokers, and consultants. According to the complaint, REOS intends to operate as a collective listing provider. The basis of its business model is to bring together platforms such as online listing platforms (e.g., Sahibinden, Emlak Jet), the websites of real estate agents, and the listing portals of real estate chamber associations under a single roof so buyers can access multiple property options. While the system itself requires Sahibinden to allow access to its API so that the collective and multiple listing service can operate, i.e., to ensure interoperability, Sahibinden rejected REOS' requests for integration.

After considering the benefits and harms that granting such interoperability may bring, the TCA decided that the harms outweighed the benefits and concluded that an integration involving such core activities of Sahibinden could ultimately mean the transfer of economic rents to REOS and/or the undertakings integrated through Sahibinden and could lead to the problem of free-riding. In light of these considerations, the TCA decided that Sahibinden's acceptance of the integration would mean the transfer of its business activities to REOS and therefore the refusal should be considered justified.

One of the key analyses in the decision is the finding that the expected benefits of integration also can be achieved through data portability, which is considered to be less restrictive of competition. The survey conducted as part of the investigation showed that real estate agents had motivations to multi-home. However, the TCA found that the barriers to multi-homing, such as limited time, the costs associated with multi-homing, the inability of agents to adapt to the software interface of a second platform, and consequently the emergence of limited competition due to high concentration in the market for online listing services market, have resulted in a market environment where data portability is not yet available.

Although the TCA's analysis showed that a market failure had occurred, and data portability had been considered an appropriate remedy, the decision did not impose such a remedy. This may raise the question as to why the TCA did not impose data portability but did so this time. The next section examines the Sahibinden Decision in which the TCA decided to impose a data portability obligation.

Sahibinden Decision

In the *Sahibinden Decision*, the TCA examined allegations that Sahibinden (i) made it difficult for its business members to use more than one platform by preventing them from transferring their data, (ii) implemented de facto/contractual exclusivity in this way and through the non-compete obligation imposed in its contracts, (iii) made it difficult for its business members to use more than one platform by imposing sub-user restrictions, (iv) did not publish promoted ads transparently, (v)

did not act transparently in the publication of its native ads, (vi) favoured itself through the ranking algorithm, and (vii) favoured itself/provided misleading results in other services it provides (such as real estate/vehicle valuation, referral to the authorised dealer in the sale of new vehicles, provision of expertise).

As a result of the investigation, the TCA concluded that Sahibinden holds a dominant position in the markets for "online platform services for property sales/rental activities" and "online platform services for vehicle sales activities of business members." It is concluded that Sahibinden has made it difficult for its business members to use more than one platform by preventing them from transferring their data. This action effectively implements de facto/contractual exclusivity and imposes a non-compete abuse in its contracts. Therefore, it is decided that Sahibinden has infringed Article 6 of the Competition Law by abusing its dominant position via preventing data portability.

The most significant part of the decision is the obligations imposed by the TCA. According to the *Sahibinden Decision*, Sahibinden is required to comply with the following obligations:

- To fulfil and submit to the TCA, within three months from the receipt of the reasoned decision, the rewriting of the agreement signed between Sahibinden and the business members in a way that does not include the provisions that are the subject of the infringement.
- To create an infrastructure, free of charge, that will allow business members to transfer the data they enter in their real estate and vehicle listings on the Sahibinden platform to competing platforms, and to keep this data up to date.
- If business members with memberships in the competing platforms request that their data be transferred to Sahibinden and kept up to date, and the competing platforms accept this request, Sahibinden shall ensure that the requests of the competing platforms are met uninterruptedly and effectively by setting up the required infrastructure free of charge and as soon as reasonably possible without delay.
- Sahibinden shall submit a report to the TCA for three years from the implementation of the first compliance measure and periodically once a year after that.

Practical application of Data Portability Obligation

The need for data portability in the online platform services market for real estate sales/rental services identified in the *Sahibinden/REOS Decision* is addressed by the *Sahibinden Decision*. This is not the first time that the TCA has decided to implement a data portability obligation; however, there is a significant difference between the wording of the former application of data portability obligations and the latter *Sahibinden Decision*.

One of the notable decisions of the TCA regarding data portability is the *Nadirkitap Decision*. In this decision, the TCA examined whether Nadirkitap Bili?im ve Reklamc?l?k A.?. ("**Nadirkitap**") had abused its dominant position by hindering the activities of its competitors by not providing the data of its seller members who sought to market their products through competing intermediary service providers in the market for online sales of used books. As a result of the investigation, the TCA ruled that Nadirkitap should provide book inventory data to its business users upon their request in an accurate, understandable, secure, complete, free and appropriate format.

The data portability requirement in the *Nadirkitap Decision* pertains solely to granting "access" to data. On the other hand, in the *Sahibinden Decision*, the data portability obligation extends beyond

mere “access” to data. It necessitates the disclosure of data in a transferable format, continuously, and in real-time. This requirement demands a more elaborate solution, distinguishing it from mere “access”.

The wording of the data portability obligation in the *Sahibinden Decision* is similar to that found in the EU’s Digital Markets Act (“**DMA**”). Article 6(9) of the DMA provides that

> *The gatekeeper shall provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.*

However, despite the similar wording and the impression that the TCA may have been influenced by the DMA, notable differences exist. First, Article 6(9) of the DMA regulates data portability for end users as opposed to the *Sahibinden Decision*, which targets business users. Article 6(10) of the DMA on business users states that:

> *The gatekeeper shall provide business users and third parties authorised by a business user, at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services provided together with, or in support of, the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users.*

Thus, what is granted to business users in the DMA is not data portability, contrary to the *Sahibinden Decision*, but access to their data.

Moreover, unlike the DMA, the *Sahibinden Decision* extends the scope of the data portability obligation. It states that Sahibinden shall, free of charge and promptly, provide competing platforms with the necessary infrastructure. This infrastructure facilitates the transfer of data from the competing platform’s users to Sahibinden and ensures their data remains up to date. This part of the *Sahibinden Decision* surpasses the traditional form of data portability, imposing partial (because it is tied to the acceptance of competing platforms) two-way data portability.

At this point, questions arise regarding the TCA’s objectives with this obligation and which aspect of the theory of harm it aims to address. However, any speculation on this matter remains conjectural until the reasoned decision is published, providing concrete insights.

Conclusion

The *Sahibinden Decision* introduces an unprecedented data portability obligation given its target

audience of business users and its two-sided nature. The full implications of this decision will become known once the reasoned decision is published. Moreover, it underlines the TCA's proactive stance in intervening within digital markets, demonstrating its readiness to address emerging challenges, also by way of striving to adopt DMA-like amendments to its Competition Law. Similar obligations likely will feature in other decisions in the coming days, signalling a continuing trend of regulatory action in this domain.

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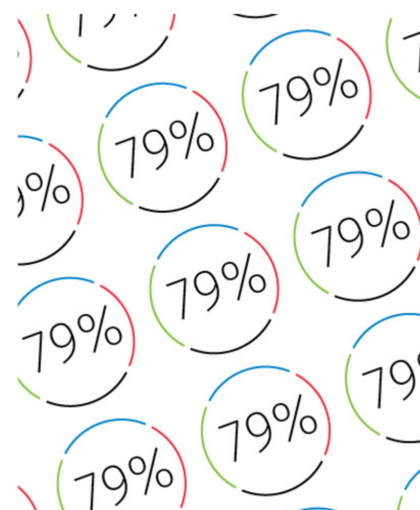

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