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The Turkish Competition Authority finds the bundled sales of a telecommunication company not to be anti-competitive (*TTNET*)

UNILATERAL PRACTICES, ABUSE OF DOMINANCE, TYING, TELECOMMUNICATIONS, REBATES, TURKEY, EFFECT ON COMPETITION

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Fırat Eğrilmez | ACTECON (Istanbul)

Barış Yüksel | ACTECON (Istanbul)

Özlem Başiböyük | ACTECON (Istanbul)

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Turkish Competition Authority to Shape the Future of Multi-Play Services in Telecommunication Industry [TTNET]

INTRODUCTION

On 21 December 2018, Turkish Competition Authority (“TCA”) published its *decision* ↗ [1] regarding the investigation conducted against TTNET A.Ş. (“TTNET”), the leading internet service provider in Turkey, which is vertically integrated with the incumbent wholesale broadband access provider, Turk Telekom. The decision comprises of TCA’s assessment as to whether TTNET had abused its dominant position, in violation of article 6 of the Law No. 4054 on Protection of Competition (“**Competition Law**”), via certain types of bundled sales of fixed broadband internet and pay TV services.

Bundled package of TTNET called the “*New Year Campaign with Tivibu*” (“**Campaign**”), which was at the focal point of the investigation had been provided within the period of January-July 2016. TTNET offered broadband internet and pay TV services through the Campaign and the Campaign was basically a marketing strategy whereby two separate offers [2] that were already being offered to the customers separately was merged under a single offer.

Characterization of the Campaign from the Competition Law Perspective

The decision signifies that the most challenging aspect for the TCA was the characterization of TTNET's conduct in terms of competition law. As per the TCA's Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines**"), in order for a joint offer of more than one product to be deemed as a "package rebate", the price of the bundle shall be lower than the sum of the stand-alone prices of the individual products forming the bundle [3]:

"In package rebates known as multi-product rebate or mixed packaging, the products may be offered for sale separately, however when they are bought separately the total price of the products adds up to more than the package price."

However, the Campaign in question was not a conventional form of a packaged rebate, whereby a discount is offered for the bundled purchase of two separate services, simply because TTNET did not actually offer a discount for the Campaign (*i.e.* the price of the Campaign was equal to the sum of the stand-alone prices of the two services offered as a bundle).

It should further be emphasized that the Campaign constituted a "soft bundle", as both the broadband internet and pay TV service in the Campaign was also available in the market on a stand-alone basis. Moreover, the customers who purchased the Campaign provided separate commitments for the broadband internet and pay TV services in the Campaign and the validity of these commitments were not dependent on each other in any way.

Thus, it was clear that the Campaign was merely a marketing strategy rather than a package rebates from a strictly economical perspective.

Yet, the TCA indicated that even though the Campaign did not meet the "formal requirements" of a package rebate (or soft bundling) in terms of competition law, a detailed analysis should be carried out in order to evaluate the effects of the Campaign on the customer behaviours and the level of competition in the relevant markets.

As a result of its assessments the TCA decided that the Campaign shall be deemed as a bundled discount that might cause competition law-related concerns, when it is considered within the scope of the following aspects:

- Behavioural economics
- TTNET's de-facto practices
- Complementary and close substitutional character of the services comprising the bundle Below, the TCA's analysis regarding these aspects is explained in greater detail.

Remarks of TCA in relation with Behavioural Economics

Regarding the behavioural economics, the TCA put emphasis on "*framing effect*" and "*status quo bias*". The TCA explained that, the Campaign is designed to create a perception that the "soft bundle" offered to the customers generates a greater advantage/discount than the option to purchase the services in the bundle separately and thus, creates a framing effect that renders one of the two options with equal expected returns, predominantly preferable vis-à-vis the other option via the style of presentation. The TCA further indicated that the methods used in the announcement of the campaign, namely commercial videos and announcements took place in the internet, were more likely to create a perception on the consumers that the internet and TV services are only provided together.

As for the *status quo* bias, which can be defined as the tendency to preserve the current position or previously given decisions, the TCA expressed that once consumers have opted for the Campaign, they are more likely to ignore new options and maintain the *status quo*. Therefore, according to the TCA, once the will of consumers are shaped to purchase the broadband and pay TV services together (*i.e.* once the Campaign is purchased) by means of the framing effect, the fact that the individual services in the Campaign may be cancelled separately would become negligible due to the *status quo* bias.

Last, the TCA drew attention that on the contrary to the remarks made by TTNET, certain advertising material had suggested that the price of the Campaign was considerably lower than the stand-alone prices for the services in the bundle. The TCA expressed that, such practices reveals that the Campaign is designed to lead customers to purchase broadband and pay TV services as a bundle and more importantly to make them believe that the sum of the stand-alone prices of the services comprising the “soft-bundle” are actually higher than the Campaign prices.

Remarks of the TCA in relation with TTNET’s De-facto Practices

The TCA focused on the behaviours displayed by the sales team of TTNET, during the period when the Campaign was active. The TCA expressed that, the sales team did not promote a bundled version of the services with pay TV, when phone calls were made with the customers in relation with the broadband internet services, however the findings demonstrated that the employees were encouraged to offer a bundled option, when customers are contacted vis-à-vis, in a TTNET customer centre or when the services are installed on the premises of the customer.

On the flip side, the TCA determined that TTNET employees were actively offering bundled sales of pay TV and broadband internet services with the Campaign conditions, while promoting pay TV services through all types of communications made with the customers. The TCA set forth that TTNET might have chosen to refrain from offering bundled sales through its operations of broadband services, since it is deemed to be in dominant position in the mentioned market. The TCA further expressed that foregoing marketing strategies of TTNET do not differ in essence, since they aim to promote broadband and pay TV services to the customers as a bundle.

Remarks of the TCA in relation with Character of the Services Comprising the Bundle

The TCA set forth that the broadband internet services and pay TV services are deemed to be complementary and that TTNET built its sales strategy upon this fact. Within this context, the TCA first examined the churn rates of the customers who purchase the services for broadband internet on a stand-alone basis and who purchase internet and pay TV services as a bundle. The churn rates of the customers that prefer bundled services were revealed to be lower when compared to the customers that prefer stand-alone services. The TCA expressed that the difference in the churn rates of bundled and stand-alone products signifies the close complementary relation between pay TV and broadband services and refutes the argument that joint promotion of those products could not be deemed as bundled sale.

The TCA further examined the number of TTNET subscribers purchasing stand-alone internet services, stand-alone pay TV services and bundles between January 2015 and June 2017 and concluded that the rate of increase in the number of subscribers of bundles surpassed the rate of increase in the number subscribers of each stand-alone service in the period where the Campaign was active.

In light of the foregoing, the TCA expressed that pay TV and broadband internet services are complementary and that there is an increasing trend to purchase these two services as a bundle from the same supplier.

Cost/Revenue Analysis and Effects-Based Approach

After determining that the Campaign should be deemed as a bundle that might give rise to concerns related with competition law, the TCA moved on with a cost/revenue analysis in order to determine whether the prices of the Campaign were below-cost. The economic assessments showed that the prices of broadband internet services were above-cost, whereas the prices for pay TV services were below-cost.

The TCA expressed that the analysis of prices and costs may be either be made via:

- considering the costs and the price of the bundled product as a whole, pursuant to the approach adopted in the TCA's previous decisions [4] or
- based on the as-efficient competitor test, through which the total discount provided for the bundle is attributed to one of the products comprising bundle. In light of the foregoing, the TCA concluded that if:
- the first method is used, the maximum profit generated from the services included in the Campaign could not compensate for the overall costs and,
- the second method is used, the competitors could not economically replicate the rebate scheme that had been applied by TTNET. After concluding that the Campaign did lead to below-cost pricing, the TCA proceeded with an effects-based analysis per the article 25 of the Guidelines, which sets forth that an assessment on exclusionary conduct shall be based on an examination concerning the actual or potential anti-competitive foreclosure stemming from such conduct.

Within the scope of its effects-based analysis the TCA determined that approximately 20.000 new subscribers have purchased the Campaign. When this number was compared with the average number of new subscribers of TTNET's competitors, the TCA stressed that the campaign did not foreclose the market for broadband internet services. In support of the foregoing, the TCA also indicated that TTNET's market share on the market for retail fixed broadband internet services decreased over the period of 2015-2017.

The TCA further compared TTNET's and its competitors' performance in the market for pay TV services by assessing the number of subscribers and the number of new subscribers. The TCA also took into consideration TTNET's competitors' ability to respond to the Campaign with plausible commercial strategies and decided that TTNET's competitors that provide OTT services were able to replicate TTNET's bundled offers in the relevant period. Lastly, the TCA considered the design of the Campaign as a factor that mitigates the foreclosure effect. This was due to the fact that it allows the customers to cancel their subscriptions for the individual services in the bundle independently.

CONCLUSION

In light of the assessments made throughout the investigation, the TCA determined that the Campaign did not lead to market foreclosure and that TTNET's conduct may not be deemed as abuse of dominance. Although the decision, which is not final yet (i.e. the decision does not preclude any action to appeal), does not entail an administrative fine, it includes significant remarks that may help stakeholders of the Turkish telecommunication industry to make reliable predictions regarding the future of the industry and that of the multi-play services in a period where convergence is re-shaping the industry.

Even though TTNET's bundled sales (multi-play services) were not deemed to be anti-competitive, the TCA made it clear that the convergence of different services in the telecommunications industry causes concerns related with inter-network and intra-network competition and that the way in which multi-play services are provided is of crucial importance. While emphasizing that inter-network and intra-network competition would help multi-play services improve, the TCA points out that current status of both are not at desired levels.

Aiming to ensure competition at both levels, the TCA decided to issue an opinion addressed to the Information and Communications Technologies Authority ("ICTA"), indicating that a regulation would support the competitiveness of the market, while referring to draft rules on multicast access services, which fell off the agenda without coming into effect, after being opened to public consultation by ICTA. According to the TCA the relevant regulation should include the following:

- conditions on provision of IPTV multicast access services,
- detailed rules aiming to ensure access of competing operators to IPTV multicast access services in an efficient way, in relation with the following:
 - topology and network management,
 - application and allocation processes
 - commitments on service level
- rules in relation with pricing of IPTV multicast access services on wholesale level. It should be reminded that this opinion does not bind ICTA in any way but that ICTA may take steps in that direction if it considers that the TCA's concerns are valid.

[1] TCA's decision dated 27.08.2018 and numbered 18-29/497-238

[2] "New Year Campaign" concerning fixed broadband internet services and "Tivibu Her Yerde Campaign" concerning pay TV services (Tivibu package).

[3] The Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings, para. 70.

[4] Decisions of the TCA; dated 05.02.2015 and numbered 15-06/74-31; dated 19.12.2013 and numbered 13-71/992-423.