Individual Exemption by the Turkish Competition Authority to the Leading Mobile Telecommunications Companies

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On 09.09.2019, the Turkish Competition Authority ("**TCA**") published its reasoned decision[1] in which it granted individual exemption to the Facility Consolidation Cooperation Agreement ("**Agreement**") signed between Vodafone, TT Mobil and Turkcell, the only three mobile operators in Turkey. The concerned decision is important to illustrate the potential approach to be pursued by the TCA with regard to the cooperation agreements between mobile telecommunications service providers.

Per the Agreement, the parties agreed to share all kinds of passive mobile infrastructure elements used in the provision of mobile electronic communications services such as tower, field, cabin, energy and ventilation. The notifying parties stated that the main aim of this Agreement is to create cost efficiency, effective use of resources and constitution of an environment of cooperation to ensure that the obligations of the parties to the legislation are fulfilled.

One of the most significant details with respect to the evaluation of the respective notification is that in accordance with the relevant legislation of the Information and Communication Technologies ("**ICT**"), mobile operators are already encouraged, and even obliged in certain areas, to share facilities provided that the necessary conditions are satisfied. Information and Communication Technologies Authority's ("**ICTA**") aim on imposing such obligations are; providing effective and efficient use of country's resources by avoiding repeated investments, reflecting of increasing infrastructure investments to the consumer at minimum level and ensuring the sustainability of mobile communication.

As the Agreement is made between competitors, in order to be deemed as lawful, it must satisfy the conditions[2] set forth in the Article 5 of the Competition Act regarding individual exemption.

As for the first condition concerning the efficiency gains expected to arise from the Agreement, the TCA focused on whether the concerned cooperation would strengthen the parties' market power and whether it would bring with any efficient gains. The TCA held, by taking into consideration the information provided by the parties as well as the relevant regulations, that passive network sharing provides significant efficiency gains in terms of both actual and planned cost savings.

Whilst assessing whether said efficiency gains also benefit the consumers, the TCA particularly focused on the improvements regarding the quality of the service provided. The TCA further expressed that the Agreement will contribute to the consumer welfare to an appreciable extent due to enhancement of the signal quality and strength, reduction of imports, saving on energy expenditures and increase in the quality of service. By pointing to the consumers' rate of switching between different mobile operators (rendered possible by ICTA's mobile number portability regulations), it is clarified that the market has a competitive structure and that the operators will have sufficient incentives to reflect the efficiency gains to their subscribers via increasing their service quality, and providing more comprehensive, more diverse and cheaper services in order to gain new subscribers and to retain existing subscribers.

As for the third condition of the individual exemption, the potential restrictive effects of the Agreement have been evaluated by the TCA. When the market structure and the quality of services provided was analyzed, the market data indicated that as of the third quarter of 2018, Turkcell, Vodafone and TT Mobil had 43.3%, 30.9%, 25.8% market shares in terms of number of subscribers, respectively. Whereas Turkcell's market share in terms of revenue was slightly higher (45.2%) when compared with its market shares in terms of traffic and number of subscribers. The TCA stressed that although there is increasing competition in the market between the existing operators, there has been no change in the long-standing trilateral structure of the market due to significant entry barriers. It should be noted here that there are two major reasons as to why the Turkish mobile telecommunications market consists of only three players. First, the existing players are reluctant to allow Mobile Virtual Network Operators ("**MVNOs**") to use their networks (also there are no sector specific regulations that oblige the operators to provide access to MVNOs) and the current tax regime creates a significant disadvantage for potential MVNOs. Second, ICTA and the relevant ministry does not opt for an authorization regime that would introduce new market players and allow the existing players to acquire all newly available spectrum.

With respect to the potential anti-competitive effects of the Agreement, the TCA particularly focused on the (i) possibility of exchange of sensitive information between the operators, (ii) cost similarities and (iii) the right of first refusal stipulated in the Agreement. The first two concerns were eliminated as there was a specific provision in the Agreement that aimed to prevent any exchange of sensitive information, and the TCA concluded that there were material differences between the cost structures of the operators. As for the right of first refusal in the Agreement, the parties stated that such a provision was necessary to ensure that the other party is able to maintain its activities by paying the facility fee, in case one party decides to leave the facility. The parties stressed that this was crucial for the protection of the consumers since it guarantees that the subscribers of the mobile operator that would be able to maintain its activity in a given facility won't encounter any degradation in the service quality.

As one of the most critical issues concerning this Agreement, the operators were asked whether facility sharing could lead to an entry barrier for existing or potential competitors. Upon this inquiry, the operators declared that in the event that the criteria set forth in the relevant ICTA regulations are met, new entrants would be able to benefit from the Agreement as well.

In the light of the above, the TCA concluded that the conditions required for an individual exemption were cumulatively satisfied in the case at hand. The TCA's decision will serve as an important guide as to the future assessments for determining when the expected efficiency gains could be deemed sufficient to outweigh the potential anti-competitive effects of such agreements. The evaluations of the TCA both with respect to the efficiency gains and the anti-competitive effects should be taken into consideration when designing similar cooperation agreements.

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[1]TCA's decision dated 11.04.2019 and numbered 19-15/203-90.

[2] The relevant conditions are as follows:

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,

b) Benefitting the consumer from the abovementioned,

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).