
Türk Telekom Decision: Recent Approach to Refusal to Deal

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Introduction

The Turkish Competition Board (the “**Board**”) published its reasoned decision dated 30.09.2021 and numbered 21-46/667-332 (the “**Decision**”) concerning the full-fledged investigation launched against Türk Telekomünikasyon A.Ş. (“**TT**”) upon the complaints of undertakings operating in the retail fixed broadband internet access services market (downstream market). In their complaints, internet service providers (“**ISPs**”) alleged that TT rejected the requests for the provision of service that is necessary for them to provide access to their subscribers on unreasonable or unjustified grounds (no available ports or insufficient technical infrastructure), TT directed the subscribers to its subsidiary TTNET A.Ş. (“**TTNet**”), its conducts resulted in the exclusion of ISPs from the market, thus, constituted discrimination in favor of TT. Therefore, it was claimed that TT abused its dominant position in the wholesale fixed broadband internet access services market (upstream market) through its subsidiary TTNet in the downstream market.

The Board determined that TT is in dominant position in the upstream market, i.e., the wholesale fixed broadband internet access services market, however, it could not determine any finding that TT’s conduct complicated the activities of its competitors requesting port/infrastructure and led to anti-competitive market foreclosure within the scope of the theory of refusal to deal. Therefore, the Board concluded that TT did not abuse its dominant position within the scope of Article 6 of the Law No. 4054 on the Protection of Competition (the “**Law No. 4054**”), and it did not impose an administrative monetary fine. It should also be noted that one of the Board members disagreed with the majority and stated in the dissenting opinion that TT’s conduct constituted an infringement under Article 6 of the Law No. 4054. The Decision contains important points in terms of the principle of “*Ne Bis In Idem*” and the theory of refusal to deal that will be discussed through this article.

The Board’s Assessment

Before delving into the details of the Board’s assessment of TT’s conducts under Article 6 of the Law No. 4054, it should be noted that the Board as usual requested opinion from the Information and Communications Authority (“**ICTA**”). ICTA stated that it has already carried out an

investigation upon the complaints with similar grounds subject to the investigation carried out by the Board and imposed administrative monetary fine pursuant to the ICTA Administrative Sanctions Regulation. TT argued that ICTA is the competent authority in the electronic communications sector, and the conduct subject to the file has already been dealt with by ICTA, thus, the investigation launched by the Board is contrary to the principle of “*Ne Bis In Idem*”. In other words, TT claimed that the person, subject matter, and legal interests are the same. In response to these defences, the Board stressed that the Law No. 4054 is applicable to all sectors of the economy and there is no regulation that excludes its application,^[1] thus, the Turkish Competition Authority (the “**Authority**”) is authorized to investigate and impose sanctions on competition infringements in all sectors including the telecommunication sector. In line with its established jurisprudence, the Board indicated that ICTA, as the regulator of the electronic communications sector, made an assessment regarding the obligations which TT is subject to under the relevant regulation, while the Authority’s investigation limited to the allegations on restricting competition by abusing its dominant position within the scope of the Law No. 4054.

In its assessment under Article 6 of the Law No. 4054, the Board firstly stated that copper and fiber infrastructure lengths are the most appropriate criteria for determining the market shares and infrastructure capacities of undertakings in the relevant product market and determined that TT is in dominant position in the upstream market, i.e., the wholesale fixed broadband internet access services market. The Board further indicated that although the presence of other providers in fiber and cable infrastructure has increased in Turkey, TT still maintains its dominant position with its infrastructure length and the number of households it reaches compared to alternative operators.

In terms of abuse of dominance, the Board assessed the allegations that TT arbitrarily rejected the port allocation applications of ISPs on unreasonable or unjustified grounds (no available ports or insufficient technical infrastructure) and favored TTNNet against other providers within the scope of theory of refusal to deal. In light of the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings, for the existence of anti-competitive refusal to deal, following three conditions should be met cumulatively:

- Refusal should relate to a product or service that is indispensable to be able to compete in a downstream market,
- Refusal should be likely to lead to the elimination of effective competition in the downstream market,
- Refusal should be likely to lead to consumer harm.

First condition on indispensability element or the “essential facilities doctrine” as is known in the doctrine generally refers to the situation where an input is essential for an activity and there is no alternative other than the undertaking possessing such input, or it is not rationally possible to establish an alternative. Accordingly, the Board found that the indispensability condition was met since (i) TT is a natural monopoly with xDSL infrastructure in the wholesale fixed broadband internet access services market, (ii) there is not an alternative to TT’s copper infrastructure as nearly 70% of fixed broadband internet subscribers in Turkey receive services through this infrastructure,

(iii) although the scope of fiber and cable infrastructures has increased in recent years, copper infrastructure is an objective requirement for the retail internet provider market. Thus, the Board concluded that it is indispensable, and it is not economically feasible for competitor ISPs to create an infrastructure that is alternative to the existing infrastructure from ground up in the foreseeable future.

Furthermore, the Board investigated whether TT's rejection of the ISP's requests regarding allocation of ports would eliminate effective competition in the downstream market. The Board found that TT competes with the undertakings requesting the allocation of ports through its subsidiary TNet, therefore, there may be a risk that other ISPs will be eliminated from the market. Therefore, the Board then stated that the change in the market shares of ISPs should also be considered in the assessment of a possible anticompetitive market foreclosure effect. The Board concluded that according to the subscriber-based market shares between 2017-2019, TNet lost 4% share, while other ISPs increased their market shares, albeit to a limited extent. Thus, the relevant conduct did not have a negative impact on the market and did not result in the elimination of effective competition.

Finally, the Board examined the impact of the refusal on consumer welfare and assessed that TT's refusal behaviour is likely to allow TT to make more profit in the downstream market. However, in order to determine whether there is a violation in case of a refusal to deal, it should also be evaluated whether the behavior led to actual or potential anti-competitive market foreclosure. As a result of its assessment, the Board held that there is no significant difference between the allocation rates of other ISPs' requests compared to TNet, and therefore, no anti-competitive market closure was found that would result in consumer harm.

In its final assessment, the Board concluded that there is no evidence of abuse of dominance since the number of requests rejected on the grounds of "no port" or "no infrastructure" and the number of reserved ports are very limited compared to the total allocation size and do not reach a level that would affect competition.

It should be noted that the decision was not unanimous, and one of the Board members disagreed with the majority. In the dissenting opinion, it was argued that TT's rejection of the port allocation applications was not based on a justifiable reason and TT reserved some of the ports and ensured that they would be used for TNet. Therefore, the dissenting opinion concluded that the ports rejected by TT as reserved or malfunctioning, the rate of allocation of the same ports to TNet once the problem is solved, as well as the short duration of allocation compared to other ISPs prove that TT's conducts complicated the activities of its competitors' and resulted in anti-competitive market foreclosure.

Conclusion

As stated above, the Board took into account the change in the market shares of ISPs, and it did not find anticompetitive effect as they continue to exist on the market and albeit to a limited extent,

their market shares have increased. However, telecommunication is an important sector with lots of sectoral and structural problems as well as a heavily and strictly regulated one, since it relies on enormous infrastructure investment to operate, thus, one can argue that it is not sufficient to focus merely on the exits from the market, and therefore effects on the other competitors' investment incentives, e.g., for creation of an alternative infrastructure, may also be taken into account. In any case, the Decision contains important points regarding the theory of refusal to deal, and maybe more importantly the way the Board gives value to concrete evidence of market foreclosure in assessing Article 6 cases.

[1] With the exception of the certain level of merger or acquisition transactions in the banking sector.