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# **Turkish Competition Authority Brings Halt to Credit Card Information Storage Services Provided by the Subsidiary of Well-Established Banks**

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Bankalararası Kart Merkezi A.Ş. ("**BKM**") is a corporation and association of undertakings founded by 13 banks. Non-shareholding members such as banks and payment and electronic money institutions are also among the members of BKM. BKM is permitted to operate as a payment system operator under Law No. 6493 and activities of BKM other than system operations are subject to permission of Central Bank of Republic of Turkey ("**TCMB**") pursuant to the Regulation regarding Activities of Payment and Security Conformity Systems. BKM's activities includes authentication, swap and settlement, online payment solutions, digital wallet services and credit card information storage.

In 2017, BKM filed an individual exemption request to the Turkish Competition Authority ("**TCA**") for obtaining an individual exemption request for credit card information storage services, a service which would be provided through a system that is integrated with the member banks.

The relevant services remove the necessity of member businesses to receive or store credit card information of their customers, since the service provider acts as an agent that keeps the card information during the payment transaction and provides encrypted card information for repetitive transactions that will be made by a given customer without requiring the customer to submit her credit card information in each and every transaction. These services significantly reduce the risk stemming from the storing of sensitive credit card information for the businesses that receive recurring payments and create cost-advantages for banks by removing the necessity that they comply with the Payment Card Industry Data Security Standards ("**PCI DSS**"). From the customers' point of view, these services render payments by credit card easier and more secure and thus have a potential to increase the number of transactions made by credit cards.

The TCA granted a one-year individual exemption in light of the available data, expressing that although the overall efficiencies and consumer welfare seem to be increased by the business model so as to exceed their negative impacts on competition, the dynamic nature of the market as well as the expected developments would necessitate close monitoring<sup>1</sup>. One of the main reasons why the TCA considered that a quick re-evaluation might be necessary was that the Banking Regulation and Supervision Authority ("**BRSA**") had recently introduced a draft Communiqué<sup>2</sup> setting forth a new requirement for the businesses to store the credit card information of their customers through a third-party service provider. Although the draft Communiqué was not in force when the decision was issued, it was expected to reshape the existing market-entry conditions. Furthermore, the TCA

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concluded that monitoring the outcomes of the exempted business model for a year was necessary since it might hamper competition in a way to foreclose the market to the competitors of BKM, due to the fact that BKM was formed by the banks with whom the prospective competitors of BKM would have to cooperate and that these banks may be disincentivized to help third parties that compete with BKM.

Following the one-year term for the exemption, BKM made a successive application to the TCA for the extension of the term of the individual exemption and amended the terms of its services as follows<sup>3</sup>:

- The services provided by BKM will be open for all businesses including the undertakings active in the card payment industry, via the abolishment of the rules limiting the scope of the buyers to the businesses that accept recurrent payments,
- BKM's customers will be able to make the credit card payment services they purchased available for third-parties' use,
- BKM's services will be available for different sales channels such as call centres, internet and agencies, etc.,
- BKM's services will be compatible with the new generation payment rules.

Per the assessment made by the TCA, the relevant services generate substantial efficiency gains such as increased customer trust for card payment services and increased success in the collection rate. Although the TCA admits that these services are definitely efficiency enhancing and have positive effects on consumer welfare, it further states that the subject matter of the individual exemption analysis is not whether these services should be provided at all but it is whether these services should be provided by an undertaking that is controlled by the banks. Hence the TCA holds that an exemption should be granted if the provision of these services by BKM satisfies the required criteria (i.e. by creating significant efficiency gains as compared to the same services provided by third-parties whilst not foreclosing the relevant market).

To conduct this analysis the TCA assessed how information storage services provided by BKM diverges from the services provided by its competitors and listed the differences as follows:

- As BKM is entirely controlled by the banks, credit card information would not be shared with any third-party that is not directly associated with the banks when the services are provided by BKM,
- BKM can automatically obtain updated expiration dates of cards due to its integration with the banks' systems and,
- When the services are provided by BKM, SMS's containing "one-time-passwords" (additional safeguards for increasing security) are directly sent by the banks due to BKM's integration with the banks' systems.

The TCA underlined that the foregoing factors indicates that the main difference between BKM and its prospective competitors is the integration between the banks' data systems and BKM. The

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reason why BKM's system is integrated with that of banks is a former agreement made with BKM and the banks, concerning digital wallet services provided under the name of "BKM Express"<sup>4</sup>. The TCA then emphasized that the above listed features could be provided by any competitor of BKM if they were presented with the opportunity to create a similar system-integration.

Based on these evaluations, the TCA concluded that the efficiency gains were intrinsic to the services and that there was no causal link between these efficiency gains and the provision of the relevant services by BKM.

After holding that allowing BKM to provide these services do not create any additional efficiency gains, the TCA further evaluated how BKM's involvement affected competition in the credit card information storage services market. For the purposes of that assessment, the TCA focused on the one-year period when BKM benefited from the initial individual exemption.

The TCA first noted that the potential competitors of BKM comprises of banks and non-bank payment service institutions ("**PSIs**"). The TCA stipulated that it is highly unlikely for the banks to emerge as independent competitors of BKM, which they are associated with, and it also made it clear that the available empirical evidence supported this premise.

With respect to the PCIs, the TCA emphasized that the PSIs need to integrate their systems with the banks to become viable competitors of BKM and that this would only be possible if the banks agree to provide such integration. Yet, the TCA noted, banks' relation with BKM discouraged them from doing so. Considering these, the TCA concluded that the mere presence of BKM in the market has placed the PSIs in a significant competitive disadvantage vis-a-vis BKM. TCA's conclusion was also supported with evidence demonstrating that PSIs integration requests were usually rejected by the banks or that they were canalized to BKM. The TCA stipulated that a scenario whereby PCIs act as re-sellers of BKM could not be deemed as a competitive market and that it was crucial that PCIs are able to compete with the BKM at every level.

Consequently, the TCA decided not to extend the duration of the individual exemption granted to BKM and required BKM to cease its activities thereof in 90 days. Now, both BKM and its member banks are required to put an end to the ongoing storage services in due time and report this to the TCA, to avoid competition law scrutiny. The TCA further held that the decision which granted BKM's so called "BKM Express" services (digital wallet services) an individual exemption, should also be re-evaluated.

The recent decision is also quite significant as it shows that an ex-ante individual exemption analysis made by the TCA based on assumptions may not reflect the market realities. In its initial decision, where a one-year individual exemption was granted, the TCA exaggerated the potential efficiency gains of allowing BKM to provide these services whereas it failed to identify potential negative outcomes. However, in the second decision, the TCA had the advantage of hindsight and it made use of the actual market data to re-evaluate its initial position. The conclusion was that the TCA realized that its assumptions in the initial decision were too optimistic and that an ex-post analysis

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proved them to be wrong. Still, it should be appreciated that the TCA did foresee this in the initial decision and minimized the negative impacts of a potential Type II error by limiting the duration of the individual exemption. We believe that it is prudent for competition authorities to prefer Type II errors over Type I errors in case of uncertainty whilst keeping a close eye on further developments that may altogether remove these uncertainties.

## **Footnotes**

1 The decision of the TCA dated 23.03.2017 and numbered 17-11/134-61.

2 The draft Communiqué has not been entered into force yet.

3 The decision of the TCA dated 12.06.2018 and numbered 18-19/337-167.

4 The decision of the TCA dated 23.09.2016 and numbered 16-31/525-236.