Fair Competition or Not?: The TCA's *Align* Decision

*By Can Saricicek, Ozlem Basiboyuk, Defne Celer*

The Turkish Competition Authority (“**TCA**”) concluded its investigation into Align Tech Turkey Tıbbi Cihazlar Limited Şirketi (“**Align**”) regarding the claims that Align abused its dominant position through predatory pricing and foreclosing the market via rebate systems with its [decision](https://www.rekabet.gov.tr/Karar?kararId=32dfce66-b923-4863-a7ce-80e4c4be148c) dated 07.12.2023 and numbered 23-56/1119-397.

Align allegedly engaged in exclusionary or exclusivity-enhancing practices to disadvantage competitors in the clear aligners market through practices such as sales campaigns, rebate systems, and tying strategies. Furthermore, as the manufacturer and supplier of iTero in the digital intraoral scanner market, Align was accused of strengthening its market strategy by offering these devices to physicians under highly favourable terms, on condition that the purchase of its clear aligners. This approach allegedly created *de facto* exclusivity by restricting the sales of competing clear aligner brands and intraoral scanner suppliers, as physicians were required to meet annual purchase targets set by Align.

**Does Align Have the Dominant Position?**

The TCA began its assessment by determining whether Align has a dominant position in the relevant markets for clear aligners and intraoral scanners. To assess the existence of a dominant position, the TCA firstly evaluated market shares of Align and its competitors in the relevant product markets for clear aligners and intraoral scanners, as market share is the primary indicator of dominance.

In the product market for clear aligners, the TCA identified four key players: Align, Orthero, ClearCorrect, and Istanbul Aligner, and calculated market share estimates based on their data. Align, which entered this market in 2018, has maintained a market share exceeding 40% in terms of both turnover and case numbers consistently since its entry. In contrast, in the product market for intraoral scanners, where Align competes with its iTero product (introduced in 2018), the TCA determined that Align's market share consistently remained below 40%. Moreover, it was determined that another competitor in this market held a significantly higher market share. Consequently, the TCA limited its dominant position analysis to the clear aligner market.

### The TCA also emphasized that while market shares and concentration levels are key indicators of market structure and competition levels, determining dominance requires a broader analysis. This includes structural assessments and evaluations of the current and future market conditions, as well as the potential for competition within the market.

It was indicated by the TCA that high market shares are unlikely to generate significant anti-competitive effects if entry into the market is sufficiently easy and, in this framework, dominant position assessments should not be based only on the current structure of the market. The TCA assessed that there are no specific entry barriers to the market for clear aligners used by physicians that would utterly prevent new entries to the market. However, for a device that is costly and requires after-sales support, the presence of strong brands, the portfolio strength of established undertakings and the need for adequate infrastructure to provide sufficient after-sales technical service are considered as factors that make it harder for undertakings to enter the relevant market. It was evaluated that even though the product market for clear aligners in Türkiye is a relatively new market and currently is at the growing phase, new entry into the relevant market is limited as brand recognition plays an important role in entry and thus gaining the support of strong undertakings active in the market is crucial. Taking into account the fact that Align has maintained its power in the relevant product market over the years, it was concluded that the new entries to the market did not exert competitive pressure on Align.

The TCA also assessed buyer power in determining whether Align held a dominant position. It was evaluated that the demand structure in the clear aligners market is fragmented, with a large number of physicians acting as buyers. This disorganization, coupled with the absence of sufficiently concentrated buyer power, means that physicians lack the ability to exert significant competitive pressure on Align.

As a result, the TCA concluded that Align held a dominant position in the product market for clear aligners as of 2020.

**A Closer Look at Align's Alleged Behaviors**

### *Tying*

Firstly it was alleged that Align abused its dominant position by tying its iTero intraoral scanner with its clear aligners (Invisalign) through its Digital Evolution Programme (“**DEP**”), resulting in the exclusion of competing clear aligner brands and hindering competitors in the intraoral scanner market. Tying occurs when a dominant undertaking requires customers purchasing one product (the tying product) to also purchase another product (the tied product) from the same undertaking. This practice raises concerns about harm to consumer welfare, as it may allow the dominant firm to maintain or strengthen its position in the tying product market or exclude competitors in the tied product market, effectively transferring market power. However, the TCA emphasized that a dominant position in the tying product market is necessary to harm consumer welfare but is not sufficient on its own to establish a violation.

Following its analysis, the TCA found no evidence that Align tied the sale of its clear aligners and iTero scanners through an agreement. Align sold these products independently, and it was confirmed that other intraoral scanners could also be used with Align’s clear aligners, indicating that no technological tying existed. Consequently, the TCA concluded that Align did not engage in tying practices and had not abused its dominant position in this regard.

### *Predatory Pricing Analysis*

Secondly, it was claimed that Align engaged in predatory pricing in both the clear aligner and the intraoral scanner markets. Predatory pricing is an anti-competitive strategy in which a dominant undertaking deliberately sets prices below cost in the short term, sacrificing profits to foreclose competitors, discipline their behaviour, or deter their market entry. Although this strategy initially benefits consumers with low prices, it can lead to negative consequences in the medium and long term, such as higher prices, reduced quality, and diminished consumer choice once competition is weakened.

The TCA utilized the average avoidable cost (“**AAC**”) criterion to evaluate whether Align incurred avoidable losses through its pricing strategy. Prices set below AAC suggest that the dominant undertaking is sacrificing profits to exclude equally efficient competitors. Align’s AAC calculation included sales, marketing, and distribution expenses, as well as production and import costs. Align argued that import costs from its parent company, Align Switzerland, should be excluded from AAC since these were intra-group transactions. However, the Economic Analysis and Research Department (“**EARD**”) of the TCA stated that the total amount paid for imported products should be included in AAC, as these costs reflect the expenses Align would have incurred if it had produced the goods itself. The TCA agreed with the EARD and calculated AAC using both margined and unmargined prices from intra-group transactions.

Accordingly, the TCA found that Align’s average revenue from clear aligner sales consistently exceeded its AAC during the inspection period, whether or not profit margins from intra-group sales were included. The only exception was in June 2018, a period when Align had not yet achieved a dominant position in the market. As a result, the TCA determined that Align’s pricing in the clear aligner market did not constitute predatory pricing.

### *Rebate Systems*

Rebate systems, which involve offering price discounts in exchange for specific purchasing behaviours, can have anti-competitive effects when implemented by dominant undertakings. These effects are generally categorized as exclusionary, limiting competitors' market access, or discriminatory, favouring certain customers over others. Loyalty rebates, in particular, are closely scrutinized because they may foreclose the market for competitors by restricting their ability to grow and achieve sustainable scale, potentially forcing them out of the market. In this case, the TCA analysed Align’s two-tier rebate system in the clear aligner market, including (**i**) the Advantage Program and (**ii**) the Growth Program.

The Advantage Program is available to all orthodontists holding *Invisalign* certification, which is offered exclusively to orthodontists, not dentists. This certification has two types: individual and hybrid programs, each with varying fees. However, orthodontists can partially recoup their certification costs by treating a specified number of patients using Invisalign aligners, ensuring equitable access to the program. Through the Advantage Program, orthodontists earn points for each case treated, allowing them to progress to higher discount tiers. Points are collected annually, from July 1 to June 30, and additional points can be earned by participating in training programs, albeit with a cap on training-related points. Discounts are applied immediately upon tier advancement, and orthodontists who fail to maintain sufficient points are reassigned to a lower tier rather than losing all benefits. While the program incentivizes increased case treatments, the incremental nature of the discounts and the higher point requirements for advanced tiers reduce its loyalty-enhancing effects.

The Growth Program, offered alongside the Advantage Program, provides orthodontists with three components: (**i**) the Clinical Experience Program, (**ii**) the Advanced Clinical Experience Program, and (**iii**) Move360. Participants commit to enhancing their expertise, meeting higher point thresholds, and attending at least two Align-organized training events annually. Unlike the Advantage Program, the Growth Program features quarterly progress reviews. If orthodontists fail to meet point commitments within a specified timeframe, their participation in the Growth Program is terminated, and they are reverted to their original tier in the Advantage Program. This structure incentivizes orthodontists to maintain consistent growth and participation, thereby enhancing the loyalty effects of the Growth Program.

Additionally, the TCA identified two other programs offered by Align. The New Client Programme (“**NCP**”) targets newly certified orthodontists, providing a one-time, two-tier rebate that cannot be utilized in subsequent years. The Dental Service Organization (“**DSO**”) program is designed for corporate-level customers operating one or more dental clinics, allowing them to become Align customers at a corporate level. These programs, although supplemental, reflect Align’s broader efforts to engage customers across different levels of the market. The TCA concluded that these rebate systems, while enhancing loyalty, are structured in ways that limit their anti-competitive impact.

Incremental rebate systems generally enhance greater customer loyalty than fixed-rate systems, but their design significantly influences their market impact. In progressively increasing systems, discounts between higher tiers grow, whereas in diminishingly progressive systems, discount increases become smaller as customers advance. The criteria for moving between tiers also affect loyalty. When points or sales thresholds rise sharply at higher tiers, the incremental benefit diminishes, reducing the system’s loyalty-enhancing effects. In Align’s Advantage Program, lower tiers require fewer points to advance compared to higher tiers, which weakens the loyalty effect as orthodontists progress through the system.

The TCA also evaluated the selection criteria for Align’s Growth Program and noted that, although it is intended to be objective, it contains subjective elements. Terms like “respected and prominent figure in the orthodontic community” or “significant orthodontic experience” allow for interpretive discretion, which could lead to inconsistencies or biases. Such subjectivity might result in some orthodontists receiving privileged discounts based on preferential selection, while others, potentially tied to competitors, are excluded. This undermines the Advantage Program’s primary purpose of being a non-personalized rebate system.

The length of the reference period is another critical factor in rebate systems. Programs without a time-bound reference period reduce loyalty effects because customers do not risk losing discounts. Conversely, longer reference periods increase switching costs and enhance loyalty effects. Align’s Advantage Program, with its one-year reference period and non-personalized structure, has limited potential to enhance customer loyalty. However, the Growth Program, with quarterly evaluations within the same one-year reference period, exerts greater pressure on orthodontists to meet targets and avoid reverting to their original rebate tier. These frequent evaluations encourage orthodontists to focus on short-term goals while maintaining loyalty. Furthermore, the transparency of the system ensures orthodontists can calculate their discounts without fear or uncertainty, reducing artificial loyalty effects.

The TCA assessed that Türkiye’s growing demand for orthodontic services, particularly in the clear aligner market, combined with an influx of new orthodontists, reduces the likelihood of market foreclosure. Align’s rebate systems, which do not impose specific annual growth targets, do not inherently limit competitors' market access. The expanding number of orthodontists and the growing orthodontic market in Türkiye make it less likely that Align’s rebate systems would block competitors from entering or expanding. The TCA concluded that while Align’s systems provide competitive advantages to participating orthodontists, they do not significantly harm competition or exclude rival players.

The TCA also noted that exclusive practices by dominant undertakings can lead to anti-competitive effects, such as blocking distribution channels or increasing competitors' costs, which can reduce market access for competitors and stifle innovation. Even the risk of exclusionary effects, even if unrealized, can lead to findings of anti-competitive behaviour. To determine if the Advantage Program created *de facto* exclusivity in the clear aligner market, the TCA evaluated its operational efficiency. It observed increased participation among orthodontists, particularly in higher tiers, and concluded that the system functioned effectively.

Further analysis of market dynamics revealed that ClearCorrect’s successful entry and substantial growth demonstrated new players could establish themselves based on performance. The TCA emphasized that market points, independent of market share, are key indicators of potential exclusion risks. Despite Orthero’s market share decline, its orthodontist network was maintained and even expanded in some periods. Similarly, Align and ClearCorrect increased their orthodontist partnerships throughout the inspection period, indicating that Align’s rebate system did not restrict competitor’s access.

The TCA noted that while Orthero’s visibility ratio declined over time and ClearCorrect’s ratio fell slightly compared to its initial entry, ClearCorrect maintained relatively high visibility in relation to its market share, demonstrating continued access to key sales points. Thus, Align’s practices did not restrict competitor’s access to an extent that would force market exit.

Moreover, the TCA emphasized the need to assess the combined effects of the Growth Program and the Advantage Program. While the Growth Program includes quarterly evaluations and growth discounts, increasing its potential for *de facto* exclusivity compared to the Advantage Program, the TCA highlighted the difficulty in distinguishing their separate effects. Despite this, the TCA found that Align’s practices had not resulted in significant exclusionary effects in the clear aligner market.

The TCA assessed the effectiveness of the Growth Program and concluded that it operated efficiently, as evidenced by a continuous increase in the number of orthodontists registered over eleven quarters. The program’s impact was further analysed by evaluating whether competitors could offer effective prices below Align’s ACC. This analysis considered orthodontists’ core demand for cases under the Advantage Program. The TCA determined that Align’s AAC was not expected to fall below competitors’ effective prices, indicating that the Growth Program was unlikely to exclude equally efficient competitors. Additionally, the limited share of cases from orthodontists participating in the Growth Program, combined with the rapid expansion of the Turkish clear aligner market, suggested that the program did not have an exclusionary effect on competitors.

The TCA further determined that taking into account the limited share of cases from orthodontists participating in the Growth Program within Align’s total case volume and the rapid growth of the Turkish clear aligner market, the Growth Program is not considered to have an exclusionary effect on competitors.

However, the TCA noted potential anti-competitive concerns if the growth rate of the clear aligner market were to slow or if Align’s rebate systems were merged or restructured to include additional loyalty-enhancing features.

In terms of the NCP, the TCA evaluated that the effect of NCP is limited as the share of physicians registered with NCP in the total number of active physicians has been gradually decreasing since 2019.

Regarding the NCP, the TCA evaluated its limited impact, observing a gradual decrease in the share of physicians registered under the NCP since 2019. The NCP was characterized as a simple, two-tier, one-time rebate available to newly certified orthodontists. Due to the requirement of new certification for participation, orthodontists could not benefit from the program’s rebate beyond their first year. As a result, the TCA concluded that the NCP lacked loyalty-enhancing effects and, provided that its rebates do not constitute predatory pricing, does not violate competition law.

The TCA also examined Align’s bundling of clear aligners with intraoral scanners and determined that, as of 2023, at least one other market player had successfully introduced an alternative package. This finding further demonstrated the absence of significant anti-competitive effects stemming from Align’s bundled offerings.

The TCA analysed Align’s pricing strategies and their impact on competition, focusing on the rebates offered through the Digital Evolution Program (“**DEP**”) agreement. Between 2020 and 2022, Align provided rebates as part of packages combining clear aligners and intraoral scanners. In some cases, the total rebate was allocated to clear aligners for calculating the effective price, raising concerns about whether the effective price could fall below the AAC and potentially exclude equally efficient competitors from the market. However, the analysis revealed that DEP participation by orthodontists and the number of cases treated increased consistently, demonstrating the program's effectiveness. The conditions and discounts offered under DEP varied based on orthodontists’ entry year and certification status, resulting in diverse cost and revenue scenarios.

The TCA found that, for predatory pricing to be proven, the cost of the DEP package would need to exceed its revenue. However, both clear aligners and iTero scanners were determined to have separable and non-predatory prices. Even under the most disadvantageous scenario for Align, no violation of competition law was identified. When attributing package discounts solely to iTero, the analysis showed that the effective price did not fall below the product’s cost. Additionally, DEP participation was voluntary, allowing orthodontists to choose the most favourable offers, further reducing the risk of excluding competitors.

The TCA concluded that DEP does not currently exhibit anti-competitive effects and does not exclude Align’s competitors from the clear aligner market. However, potential concerns were noted if Align were to gain dominance in the intraoral scanner market or if the volume of cases pledged under DEP significantly increased, as these factors could pose exclusion risks for competitors in the clear aligner market. In conclusion, while DEP is presently compliant with competition law, future market dynamics may warrant closer scrutiny.

**Conclusion**

The TCA concluded that although Align holds a dominant position in the market for clear aligners, its practices did not violate Article 6 of the Competition Law. Consequently, the TCA determined that there was no need to impose an administrative fine on the undertaking.

However, two members of the TCA issued a dissenting opinion, expressing disagreement with the decision. They argued that the TCA failed to shift the burden of proof to Align after demonstrating the potential for exclusionary behaviour. Additionally, they criticized the TCA for overlooking key considerations, such as the relatively low total cost of predatory behaviour in the pricing analysis and the strategies employed by large multinational companies, including value transfers, tax implications, and exchange rate differences. Furthermore, the dissenting members pointed out that the investigation did not adequately account for the low elasticity of consumer demand in dental treatments and failed to recognize the dental treatment market as operating under "monopolistic competition." As a result, they believed that the exclusionary effects of Align’s programs and discounts on physicians were not fully understood.