Intergovernmental Group of Experts on Competition Law and Policy

18th SESSION

10-12 July 2019

Room XVII, Palais des Nations, Geneva

Thursday, 11 July, 2019

Competition Law and Regulation in Digital Economy

Contribution by The Turkish Competition Authority

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The development and spread of Internet and digital technologies create new business models and opportunities resulting in many social and economic benefits. For example e-commerce which decreased operational costs significantly has altered the traditional context of commerce.

However, this new digital economy also rises concerns regarding the implications of possession of data, measurement of market power and assessment of unilateral or multilateral behaviours which may damage effective competition. The accelerating pace of digital economy and the rise of global digital leading firms like Amazon, Google and Facebook; heated the discussions on whether current competition law tools are proper and adequate in protecting and promoting competition in digital markets. Multi-sided platforms, network effects and market power related to data possession are some of the topics frequently discussed in the context of digital economies. This note summarizes Turkish Competition Authority's (TCA) experience with digital economy specifically focusing on most favoured customer (MFC) clauses, excessive pricing, tying and exclusivity in digital platforms.

Turkish Competition Authority's Cases in Digital Economy

Most favoured customer clause in digital platforms

In 2016, TCA fined Turkey's first and largest online food delivery platform called Yemeksepeti due to MFC condition that was imposed on its member restaurants[1]. MFC clause was limiting restaurants ability to offer discounts, promotions and more extensive services through any other platform. In Yemeksepeti decision, imposition of MFC clause was regarded as a unilateral conduct. It was demonstrated that Yemeksepeti was clearly in dominant position in the market for "online food delivery services". The case was TCA'S first investigation regarding competition law aspects of MFC clauses. This case is also important because it is the first time the Board has recognized the exclusionary effects of MFC clauses.

In 2017, Booking.com, which is an online accommodation booking platform, was fined for the MFC clauses in its contracts with accommodation providers and the best price guarantee practices[2]. Differently from Yemeksepeti decision, Booking.com's practices were not regarded

[1] Yemeksepeti decision, 09.06.2016, No. 16-20/347-156, https://www.rekabet.gov.tr/Karar?kararId=0bd0157a-2b4d-43ce-85a3-2af821bb387b

[2] Booking.com decision, 05.01.2017, No. 17-01/12-4, https://www.rekabet.gov.tr/Karar?kararId=d2bfb2c8-e517-498a-9542-07e3cad8a419

as unilateral conduct. Instead Booking.com's MFC clauses were found to be infringing Article 4 of Competition Act which prohibits agreements restricting competition. Yet again, the analysis conducted in this case was also very similar to Yemeksepeti case that it focused on exclusionary effects of MFC clauses imposed on members by a powerful digital platform.

Excessive Pricing

Sahibinden is an online platform where user can publish adverts under various cathegories such as real-estate, vehicles, vehicle spare parts, second-hand goods, handy work requests and pet adoption. While membership is free for buyers, sellers must pay certain fees to publish adverts depending on their idendity (individual members, corporate members).

In 2018, Sahibinden was fined for excessive pricing[3]. In the decision, the relevant product market was defined as "online platform services for real estate sales and rentals" and "online platform services for vehicle sales". Sahibinden.com was found to have dominant position in the said relevant markets. In this section of the analysis, Sahibinden's prices between 2015-2017, website visit statistics and number of corporate members in comparison to its competitors were taken into consideration. Sahibinden preserved its market leader position from 2014 to 2017. The analysis showed that Sahibinden's position was even stronger in online platform services market for vehicle sales as the competition was weaker in this market. It must be also noted that structural peculiarities of the markets such as entry barriers due to network effects and Sahibinden's first mover advantage were also other factors that bolstered the conclusion of dominance in the relevant market.

In order to assess whether Sahibinden's charges are excessive or not, profit margins of Sahibinden and its competitors in both relevant markets, Sahibinden's price trends and market share responses to its price surges were analysed. It was shown that while Sahibinden's prices were slightly higher than its competitors in 2014, after this year, they rose significantly and got much higher. Against sharp rise in its prices, Sahibinden succeeded to increase its sales and grow its market share. It was also demonstrated that Sahibinden's return on equity and profitability on net sales were unexpectedly high.

[3] Sahibinden decision, 01.10.2018, No. 18-36/584-285, https://www.rekabet.gov.tr/Karar?kararId=8a58df07-f31b-457e-b936-9fa3afd5fdbf

Tying and Exclusivity

In 2018, TCA fined Google for abusing its dominant position through its agreements with the mobile device manufacturers[4]. Furthermore, TCA ruled that anti-competitive provisions which involves tying and exclusivity should be removed from the contracts that were signed between Google and mobile device manufacturers.

In this case, it was found that Google was dominant in the market for "licensable mobile operating systems". Google's close to monopoly market share, network effects and limited buyer power were taken into consideration in reaching this conclusion.

Google and mobile device manufacturers signed some agreements which include exclusivity and tying. In Mobile Application Distribution Agreements (MADA) signed with device manufacturers, Google stipulated that "Google Search" should be assigned by default at points designated by contract and "Google Search Widget" should be located on the home screen. Google also enabled Google Chrome and Google Webview, which are the in-app internet browsers, via MADA, to be assigned as the default and single component. Through MADA, an actual and potential foreclosing effect was created against alternative search services on the device manufacturers' side. Google also agreed to give manufacturers a share of advertising revenue by means of Revenue Sharing Agreements (RSA) signed with device manufacturers, provided that Google Search is installed by default and competing applications are not installed on devices.

Through the distribution of its services and applications on the Android platform, Google has access to important user data and ad space, and converts this ad inventory into revenue through products/applications it develops in advertising. Google's business model in the licensable mobile operating system market is based on the effort to transfer the broad consumer data collection capability from general internet search activities to the licensable mobile operating system market. In fact, for today's platform economy broad consumer data obtained from different devices, especially mobile, is the most important input required to generate revenue.

Google's tying and exclusivity practices also have an impact on mobile apps and app stores. An application store is an important factor in the success of an operating systems because there

[4] Android decision, 19.09.2018, No. 18-33/555-273, https://www.rekabet.gov.tr/Karar?kararId=7d9ba7e3-2b8f-4438-87a5-26609eab5443

is a cross-network effect between end user and app developer sides if the market. In this context, when a mobile operating system/device manufacturer (e.g. Android) achieve a large scale of mobile applications on its app store this serves as an important leverage in advertising services market. The importance of the Google Play app store for device manufacturers using a licensable mobile operating system stems from the fact that it is the app store that offers the highest number of apps. Google requires device manufacturers who want to use their own operating system not to use Android Forks that contain different application stores on any device they produce. Due to this commitment, device manufacturers who cannot give up on Google Play app store and hence do not use alternative app stores.

Consequently, with the abovementioned tying and exclusivity practices, it was concluded that Google complicated the activities of its competitors and prevents them from entering the market, thus damaging the competition in the market. Google's competitors, who want their products and services to be installed in mobile devices at the production stage, were unable to enter the market due to the said agreements (MADA, RSA) that Google signed with manufacturers. Device manufacturers who wanted to offer alternative search services on their products were hesitant because of Google's contract terms and behaviors.