

COMPETITION BOARD'S "SAHIBINDEN" DECISION ON EXCESSIVE PRICING ANNULLED

Article 6 of Law No. 4054 on Protection of Competition prohibits undertakings which are dominant in a specific market to abuse their dominant position. Being one of the most controversial forms of abuse, the Competition Authority defines excessive pricing as an unreasonable price difference between the economic value and the actual price of the product.¹

Between 1997 and 2017, out of 14 decisions where allegations of excessive pricing were examined, the Competition Board (the "**Board**") has imposed monetary fines only in two of its decisions.² In its recent decisions, the Board considered excessive pricing as a form of infringement only in cases where (i) entrance to the market is not possible or probable, and thus (ii) the market mechanism cannot regulate the price itself³. In 2018, excessive pricing once again became a hot topic with the Sahibinden decision⁴. The decision revolutionized the Board's established practice both in terms of identifying the elements of dominant position in digital platforms and excessive pricing.

¹ Dictionary of Competition Law Terms, Competition Authority

² Harun Gündüz, Investigations on Competition Law Breaches and Fines: An overview of Competition Authority's Last 20 Years, p. 66

³ For example, in its *Belko* decision dated 6 April 2001 and numbered 01-17/150-39, the Board concluded that the municipality provided Belko with a right of monopoly. In addition, in its *Tüpraş* Decision dated 4 November 2009 and numbered 09-52/1246-315, the Board ruled that Tüpraş is in dominant position in the market due to high entry barriers.

⁴ Board's decision dated 1 October 2018 and numbered 18-36/584-285

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Sahibinden Decision and the Rectification Claim

On 1 September 2018, the Board concluded that Sahibinden (i) is in dominant position in the markets for (a) online platform services for real estate sales/rental services and (b) online platform services for vehicle sales services and (ii) abused its dominant position in these markets through excessive prices imposed on its corporate customers. As a result, the Board imposed an administrative monetary fine of over TRY 10 million against Sahibinden.

The Board's established criteria on excessive pricing - which is having a monopoly or a monopoly-like market power with high entry barriers - is not evaluated in the decision. Although the Board may have overlooked such criteria due to network effects and Sahibinden's multisided platform status, in its Biletix decision⁵, the Board established that Biletix which is also another multisided platform is not an "*absolute monopoly resulting from non-temporal and un-exceedable entry barriers*". This indicates that the Board does not necessarily differentiate between multisided platforms on its excessive pricing decisions. However, in its Sahibinden decision, the Board changed its stance specifically towards platform business models.

While evaluating Sahibinden's market power, the Board disregarded the fact that neither the sellers nor the purchasers are bound with a single platform, rather they tend to simultaneously use several platforms (multi-homing) in the market for real estate sales/rental services and vehicle sales services. On the contrary, the Board ruled that the cost of using several platforms (multi-homing cost) increased Sahibinden's market power yet did not provide a basis for this approach in its decision. In addition, economic literature which indicates that inter-platform competition would be higher in platform business models with multi-homing tendency, should be taken into consideration.⁶ The fact that multi-homing, as one of the most important market dynamics, was not thoroughly discussed in the Sahibinden decision creates uncertainty on the Board's general approach towards multi-homing.

While concluding on an excessive pricing practice, the Board reviewed Sahibinden's past and current commission rates and stated that the increases in these rates had been relatively high. In addition, by comparing the prices, the Board concluded that Sahibinden charged higher prices to its customers than its competitors.⁷ Sahibinden has 43.3 million users monthly, whereas its closest competitor hürriyetemlak has 7 million users.⁸ It requires questioning the identification of

⁵ Board's decision dated 6 June 2012 and numbered 12-30/896-274

⁶ Please see: Rochet, J., and Tirole, J. (2003). Platform competition in two-sided markets. Journal of the European Economic Association, 1(4): 990-1029; Rochet, J., and Tirole, J. (2004). Two-sided markets: An overview, <https://pdfs.semanticscholar.org/1181/ee3b92b2d6c1107a5c899bd94575b0099c32.pdf>; Chen, Kai and Tse, Edison T., Dynamic Platform Competition in Two-Sided Markets (2008). SSRN: <https://ssrn.com/abstract=1095124> or <http://dx.doi.org/10.2139/ssrn.1095124>

⁷ Board's decision dated 1 October 2018 and numbered 18-36/584-285, p. 26

⁸ The monthly user numbers were extracted from the undertakings' official websites: <https://www.sahibinden.com/kurumsal/hakimizda/> & <https://www.hurriyetemlak.com/hurriyet-emlak/hakimizda/>; Date of access: 21.11.2019

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“economic value” in terms of platform economies if it is expected for economic value of these two platforms to be equal for user. Significance of network effect on the platform value has only been evaluated as an entry barrier⁹ and its effect on the economic value of the service provided by Sahibinden was not assessed

One of the reasons for the Board to establish excessive pricing in the decision, lies behind the comparison between the equity capitals and net profit rates of undertakings with platform business models operating in different sectors. The bare fact that an undertaking is operating through a platform business model was considered sufficient for a meaningful comparison of profitability. It is possible for undertakings operating through platform business models to have similar operation costs and financial expenditures with each other, yet it should also be considered, even though Sahibinden’s capital needs and operational costs may be similar with other platforms, the prices of the mediated products (and thus the revenues generated by the platforms) are not comparable.

Establishment of an excessive pricing practice brings forth the question of how much an undertaking’s reasonable margin profit should be. The Board should also provide guidance on a reasonable price range to be set by the undertakings. Otherwise, determination of the prices - which is probably one of the most important market parameters for an undertaking - will lack legal certainty. In its decisions where an abuse of dominant position is established, the Board generally imposes certain liabilities on the undertakings to end their breach. However, even though the Board established an abuse by excessive pricing in Sahibinden decision, it did not impose any liabilities on Sahibinden. It is controversial in terms of legal certainty that the Board concludes on a breach but not provides any guidance on how to stop it.

On 6 March 2019, Sahibinden requested the rectification of the decision. With its decision dated 2 May 2019, the Board restated its findings in its previous judgement and the decision remained unchanged. In response to Sahibinden’s arguments indicating that profitability comparisons between Sahibinden and other platforms are inaccurate, the Board only stated that such approach was adopted since it was impossible to separate between Sahibinden’s costs.¹⁰ The process moved forward with the appeal of the decision.

Administrative Court’s Annulment Decision

6th Administrative Court of Ankara annulled the Board’s Sahibinden decision regarding abuse of dominant position through excessive pricing¹¹. The Administrative Court’s decision includes significant findings on the standard of proof. The Court ruled that some of the findings that are the bases of the breach “*do not exceed an observation or a hypothesis*”, while establishing the

⁹ Board’s decision dated 1 October 2018 and numbered 18-36/584-285, p. 24

¹⁰ Board’s decision dated 2 May 2019 and numbered 19-17/239-108, p. 5

¹¹ 6th Administrative Court of Ankara’s decision dated 18 December 2016 and numbered 2019/246 E. / 2019/2625 K.

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criteria of “being data and evidence based” as a standard of proof. The Court also stated that in order to decide on consumer behavior, comprehensive scientific research should be made on end-users’ behavior.

The Court also ruled that it is contradictory for the Board to advise a cost-based pricing method to Sahibinden while it did not compare the prices and costs due to the inability of differentiating between costs. With regard to Board’s profitability comparison between platforms in differing sectors, the Court stated that “*the comparisons between Sahibinden and other platforms active in different markets are inaccurate, and no price comparison was made with global undertakings operating in different countries*”.

The Court’s ruling stating that “*due to the cautionary approach against excessive pricing and the exceptional nature of this kind of abuse, such intervention should only be possible in cases where there are concrete facts setting forth the positive outcomes of the intervention*” will be of guidance on the prospective excessive pricing cases. While emphasizing that higher prices do not actually challenge but rather ease market entrances, the Court decided that the Board did not make any assessments on how a decrease in Sahibinden’s prices will ease market entrances.

The Court’s evaluation on the multi-sided nature of the market is also of importance. The Court ruled that corporate sellers and individual sellers form two different consumer groups and excessive pricing’s effect on individual users should also be considered besides its effect on corporate users’ welfare. The Court ruled that it is insufficient that the Board did not evaluate whether a decrease in corporate sellers’ prices would lead to charging individual users or not. This ruling indicates that the Court considered the economic implications of two-sided markets and set forth the requirement of analyzing the welfare effects of an abuse on both sides of the market.

Process After the Annulment Decision

The effect of an infringement decision is not only limited to the administrative fines applied. This is because, if an undertaking repeats a practice which the Board had previously deemed as a breach, the relevant undertaking may be subject to another investigation and the Board may impose administrative fines once again. Therefore, Board decisions can ultimately alter an undertaking’s business models and this may be more challenging for the undertakings than the administrative fines itself. Thus, Board decisions based on low standards of proof cause legal uncertainty for the undertakings and affect markets negatively. Sahibinden decision causes legal uncertainty since it lowers the standard of proof for excessive pricing and lacks to provide guidance to stop the breach. The Court’s rather detailed annulment decision also confirms this.

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The Board is expected to reevaluate the case after the Administrative Court's annulment. During its reevaluation, besides taking the Court's guidance into account, the Board will most likely consider its main objective to provide guidance on the standard of proof and excessive pricing. However, whether the Board will repeat its findings on excessive pricing remains a mystery.

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