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Working Party No. 2 on Competition and Regulation

ROUNDTABLE ON COMPETITION AND EFFICIENT USAGE OF PAYMENT CARDS

-- Turkey --

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1. In recent years, payment card transactions have substantially increased in volume in Turkey similar to many countries, while check and cash usage have decreased. At the Turkish Competition Authority (TCA), department no: 4 is the responsible body for this sector. Turkey has had important competition law cases related to payment cards. TCA has come across with interesting cases related to payment card transactions and has paved a long way in establishing the level playing field for the players of this sector. Below are given two important cases from Turkish jurisdiction.

2. The first case (Benkar Decision) is experienced in the market called "credit cards availing payment in installments". These cards are specific to Turkey especially due to high inflation rates in the country. Not only consumers but also stores take advantage of such system.

3. The second case (BKM Decision) is related to the "interchange fees". In Turkey, the inter-connected infrastructure underlying card payments has been co-ordinated through "Interbank Card Centre (BKM)" which is a joint stock company carrying out clearing transactions between banks in the card payment system.

1. Sample Cases:

1.1 *Benkar Fiba Decision (Joint Venture) (dated 18.09.2001; no: 01-44/433-111) & Benkar Investigation (dated 15.8.2003; no: 03-57/671-304*

4. In year 1998, Benkar Consumer Financing and Card Services (Benkar hereinafter) was the first undertaking in Turkey to launch a shopping cards' system named "Advantage Card" which allows consumers to shop and pay in installments in member stores. Benkar, being the dominant undertaking, was dealing with the exclusive agreements in the market of credit cards that enable consumers to shop and pay in installments where the Advantage Card is valid. This system was called "web". Benkar was accepting stores into its web by concluding exclusive agreements with the owners of these stores. Because of the high inflation rates in Turkey at that time, this system became widespread among the consumers.

5. This case was initiated via the request of the parties concerning the authorization of the joint venture to be established between Benkar of Boyner Holding A.Ş., and Fiba Bank A.Ş of Fiba Holding A.Ş. (Fiba Bank hereinafter) in the field of consumer financing and banking services.

6. Under the Turkish Competition Act no: 4054, mergers and acquisitions are dealt within the framework of **Article 7** of this Act and the Communiqué No:1997/1¹ issued on the basis of this Article. Article 7 prohibits those mergers, acquisitions and joint ventures that create a dominant position or strengthen an existing dominance as a result of which effective competition is significantly impeded in the country or in a part of it.

7. The transaction was assessed to be falling under Communiqué No: 1997/1 having regard to the total turnovers and market shares of the parties. The relevant market was defined as "credit cards availing payment in installments". These cards can be used only at the member shops, and have a tighter area of use when compared to normal credit cards. The geographical market was determined as the territory of Turkish Republic due to the usage of those cards only within Turkey.

8. During the evaluation process, initially the market share was assessed in order to determine whether a dominant position was created or strengthened in the relevant market, and thus whether competition was significantly restricted. Therefore, market shares and entry barriers were checked. The market share of Benkar was %72.9 and % 64.4% in years 2000 and 2001 respectively. Moreover, risks

¹ Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, Amended by the Competition Board Communiqués No. 1998/2, 1998/6 and 2000/2.

arising from network effects were examined with regards to market entry. The Board, which is the responsible body for the application of the aforementioned Act, decided that Benkar benefited from its incumbent firm position in the relevant market, thus attained a quite high market share. This position helps Benkar to put in place easily an obligation on the firms signing the "Advantage Card" contract not to become a member of any other card systems. This was concluded to be an entry barrier as it created hardship for new entrants to find shops or chain of shops to become their own member.

9. Consequently, the Board decided to authorize the joint venture process, to which Benkar was a party, on the condition that the "exclusivity to one party"² clause imposed by Benkar on members should be removed. This exclusivity clause was removed by withdrawing the prior negative clearance decision.

10. Furthermore, according to the exclusive agreement in force at that time, when a store becomes a part of Benkar web system, that store could no more be a part of another system that provides similar system and services. Benkar at that epoch had the widest store network, especially among textile shops. Thus, it was benefiting from the network externalities to a great extent. In addition to that, those member stores (most of which are either small or medium sized shops working on their behalf and on a local basis) or store chains (those are relatively bigger enterprises which are working nation wide) were prevented from having membership agreements with banks that offer a similar system on better terms. Therefore, not only the store and store chains, but also consumers were suffering. On one hand, store and store chains were suffering because they had to obey the requirements that were imposed by Benkar, which was not a bank but actually acting as a financial undertaking with respect to commissions and fees. On the other hand, consumers holding Benkar cards would not be able to access the better terms that could be provided by other credit cards issued by banks. This was, in return, were preventing those consumers who prefer to shop and pay in installments in an inflationist environment. Therefore, the TCA ruled that the exclusivity imposed by Benkar formed a serious barrier to entry into the relevant market and it would be especially hard for the undertakings (in this case the banks) that were willing to enter into this new type of credit card market system to find stores or store chains to be a part of their system. The Board pointed out the fact that this exclusivity was narrowing the alternative of not only those banks that were trying to set up similar systems in the market but also the small or medium sized shops. The Board informed all the banks actively taking part in the relevant market that such an exclusivity clause is forbidden and every bank could negotiate directly in the market to have memberships.

11. This decision is noteworthy from another perspective as well. Although it was not directly aiming to protect SMEs, as seen from the consequences of the Board decision, it not only enabled the consumers to reach better terms with respect to opportunities from the usage of alternative cards, but also indirectly protected the competitiveness of small or medium sized shops by giving them the chance to choose among various alternatives.

12. However, Benkar continued its infringement of the Law on the Protection of Competition no 4054 via application of its exclusivity clauses. Thus, the Competition Board initiated an investigation. During the investigation process, Benkar was sold to HSBC Bank. At the end of the investigation, all such practices were eliminated in the relevant market. At the same time, with the entry of more and more banks into this market, a level playing field was sustained for the players of this market.

1.2. *Interbank Card Centre (BKM) Decision (dated 01.07.2005; no: 05-43/602-153)*

13. Upon the complaint of Turkish Union of Employers of Gasoline Dealers and Gas Companies (TABGİS), the TCA initiated an investigation against Interbank Card Centre (BKM) in order to determine

² I.e., Benkar was free to conclude agreements to increase the number of members of its web, whereas member stores could not join another payment system.

whether there is an infringement of competition through fixing clearing commission rate by the banks under the body of BKM.

14. **Article 4** of the Turkish Competition Act no. 4054 aims at preventing the distortion or restriction of competition directly or indirectly in a particular market for goods or services by agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings; whereas, **Article 5** empowers the TCA to issue both individual and block exemptions on the basis of the certain criteria. According to this article those agreements, concerted practices, and the decisions of associations of undertakings that prevent or distort competition according to article 4 can be exempted on an individual basis or through block exemptions on the condition that specific criteria are satisfied. Thus, the TCA can grant *individual or block exemptions*, when the relevant conditions foreseen in the Law are fulfilled³.

15. In the investigation process, BKM requested for exemption for its practice of fixing a common clearing commission and as a result, assessment for exemption is included in the investigation proceedings. In the Decision, the relevant market for fixing clearing commission rate is determined as “market for payment services by credit cards”.

16. BKM is a joint stock company carrying out clearing transactions between banks in the card payment system. In card transactions, BKM’s Board of Directors determines the clearing commission rate paid by the acquiring bank to the issuing bank. Issuing banks are those which publish credit cards and distribute them to customers; acquiring banks are those which provide point of sale (POS) terminals for member stores by means of making agreements with these stores against a certain amount of commission (member store commission). Clearing commission obtained by issuing banks from acquiring banks are reflected on acquiring banks as cost and acquiring banks reflect this cost to member stores as member store commission. Clearing commission rate is equally applied among all of the banks. Essentially, clearing commission is a service cost reflected first by the issuing bank to the acquiring bank and then by the acquiring bank to the member store within member store commission; therefore it has a nature of price.

17. In card payment systems, clearing commission determined by banks together with financial institutions is a practice that takes attention of competition authorities and that has been the subject of a number of cases throughout the world. In this framework, in the mentioned decision of the Competition Board, international approaches are taken into consideration by assessing NaBanco Decision in USA, Visa International-clearing commission Decision of EU, Mastercard Decision by OFT in England and regulations by the Central Bank of Australia.

18. In the defenses of BKM, it is generally argued that fixing clearing commission rates by BKM is not contrary to the Act No. 4054 and exemption via Article 5 of the aforementioned Act should be given to the application of fixing common clearing commission rate. Moreover, it is argued that each of the items contained in the fixed clearing commission rate is an element of cost in terms of issuing banks. In this frame, it is stated that BKM needs a centralized clearing commission rate; in addition, payment guarantee provided by issuing bank includes risks such as fraud in the card market and as a result constitutes a high-

³ Those conditions are:
“...a) *Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,*
b) *Benefiting the consumer from the above-mentioned,*
c) *Not eliminating competition in a significant part of the relevant market,*
d) *Not limiting competition more than what is compulsory for achieving the goals set out in (a) and (b).”*

cost item; besides, funding costs resulting from the period between shopping date and payment date are a burden for issuing banks.

19. During the investigation process, it is established that clearing commission fixes a part of the costs and the income of issuing and acquiring banks; determining a common clearing commission rate among banks affect competition at issuing and acquiring levels; issuing banks cannot follow an individual pricing policy for the services they provide for acquiring banks and that clearing commission which is the base price for member store commission is an important element of cost in respect of member stores. In this frame, it is concluded that BKM's fixing clearing commission rates in the framework of the authority within the Company's Main Agreement has a nature of a decision of an association of undertakings, which includes price fixing according to Article 4 of the Act No. 4054 and that this practice is contrary to the law.

20. In the assessment of exemption included in the Decision, it is stated that fixing common clearing commission rates in credit card payment systems, as seen in other countries, can be granted exemption generally in respect of competition law practices. In addition, it is evaluated that fixing a clearing commission rate through mutual agreements between banks included in the system requires a lot of agreements and is not practical and it is stated that fixing a clearing commission rate commonly can be granted exemption provided that a cost-based approach is adopted. Moreover in the investigation stage, BKM is required to have a consultancy firm make a clearing commission formulation study in order to fix clearing commission rate by a more objective method. For exemption assessment, the Competition Board predicates on this study, which is established to be more objective in comparison with previous clearing commission rate fixing methods. In this frame, it is stated in the Decision that certain cost items in the formula should be adjusted in order to grant exemption to the clearing commission formula proposed by the consultancy firm.

21. In this framework, as a result of the investigation made about Interbank Card Center Inc. the decision dated 01.07.2005 and No. 05-43/652-153 is taken by the Competition Board. It is decided that;

1. Fixing a common clearing commission by BKM's Board of Directors means a decision of an association of undertakings within the scope of the Act No. 4054 on the Protection of Competition and it is contrary to Article 4 thereof,
2. Therefore, according to Article 16(2) of the Act (According to Communiqué No. 2005 /2 amended by the Communiqué No. 2005/3), BKM is imposed at discretion an administrative fine of 5.800 YTL which is the minimum fine amount,
3. As a result of peculiar conditions of card payment systems market, the application of fixing clearing commission rate commonly can be granted exemption within the scope of Article 5 if certain conditions are fulfilled; however in its present form, these requirements are not fulfilled,
4. In order to grant exemption to common clearing commission application within the scope of Article 5 of the Act, in case overnight interest rate determined by the Turkish Central Bank is taken as a basis in the formula applied by BKM for the calculation of funding cost and sunk cost is not taken into consideration in operational costs item, individual exemption might be granted,
5. These amendments should be made within 90 days and documented to the TCA, in case the practice continues without making the adjustments required by the TCA, an investigation will be initiated and the concerned party will be informed that proceedings will be carried out according to Article 16 and 17 of the Act No. 4054,

6. The period of exemption will be set as 2 years after fulfillment of necessary requirements is documented,
7. According to Article 19 of the Act No. 4054, it is irrelevant to impose, because of periods of limitation, the administrative fine which should be imposed on BKM according to Article 16(1)(c) of the Act No. 4054 since BKM has not notified, within due time, its decisions related to fixing a common clearing commission rate which have a nature of a decision of an association of undertakings,
8. In respect of proper functioning of credit card payment system, Competition Board opinion about the need to give Banking Regulation and Supervision Agency the power of regulating and monitoring related to the functioning of credit card system in the prepared draft of “Act on Debit Cards and Credit Cards” will be sent to Banking Regulation and Supervision Agency according to the Articles 27(g) and 30(f) of the Act,
9. Competition Board opinion about abolishing the provision “where goods and services are bought with credit card, the seller or the provider cannot require an additional payment under commission or a similar name” included in Article 10/A (amended by the Act No. 4822) of the Consumer Protection Act No. 4077 will be sent to the Ministry of Industry and Commerce according to Articles 27(g) and 30(f) of the Act.