

# e-Competitions

## Antitrust Case Laws e-Bulletin

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### The Turkish Competition Authority finds that an online platform services for real estate and vehicle sales abused its dominant position through implementing excessive prices (*Sahibinden*)

**UNILATERAL PRACTICES, ABUSE OF DOMINANCE, EXCESSIVE PRICES, SANCTIONS / FINES / PENALTIES, BARRIERS TO ENTRY, AUTOMOBILE, ADVERTISING, CONSTRUCTION, HIGH MARKET SHARES, ABUSIVE PRICING, TURKEY, ONLINE PLATFORMS**

Turkish Competition Authority, Sahibinden, No: 18-36/584-285, 1 October 2018

Gönenç Gürkaynak | ELIG Gürkaynak (Istanbul)

Esra Uçtu | ELIG Gürkaynak (Istanbul)

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This case note analyses the Turkish Competition Board's ("Board") recently published *Sahibinden.com* decision of October 1st, 2018 numbered 18-36/584-285 in which the Board assessed whether Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. ("*Sahibinden.com*") –an online platform which acts as an intermediary for online advertising in terms of various categories such as real estate, automotive, spare parts and accessories and construction machines– violated Law No. 4054 on the Protection of Competition ("Law No. 4054") by way of abuse of dominant position through engaging in excessive pricing in terms of its online platform services for (i) real estate and (ii) vehicle categories.

#### Relevant Product Market Definition

In its evaluation on the relevant product market definitions, the Board first highlighted that the markets in which *Sahibinden.com* operates have the characteristics of multi-sided markets as the company operates as an intermediary between sellers and purchasers through its online platform in different categories.

In this regard, the Board noted that in drawing the borders of the relevant product markets, it is necessary to take into consideration the behaviours/reactions of the different sides of the market interacting with each other through the relevant online platform. Moreover, the Board also touched upon the difficulties in the application of the SSNIP test in terms of the relevant product market definitions involving multi-sided markets such as the present one and it mainly argued that it is possible that a hypothetical increase in prices would not affect the consumers' behaviours.

The Board also stated that due to their business strategies/plans, online platforms are not prone to switch to providing alternative services such as newspaper or television. Accordingly, the Board concluded that it is not necessary to conduct an assessment on the supply-side substitutability in the present case.

As for the demand-side substitutability, the Board noted that it is necessary to evaluate the reactions of the two different sides of the platform in the event of a change in the price/quality of the services offered therein. In this regard, the Board considered that it is unlikely that the two sides of the online platforms would consider offline channels as a substitute in view of the differences between these two channels such as the transaction costs gains, networks effects and the zero-pricing strategy towards consumers in the online platforms. The Board also referred to its precedents involving multi-sided markets where offline channels were not included within the relevant product market definition (e.g. *Booking.com* (05.01.2017; 17-01/12-4) and *Yemeksepeti* (09.06.2016; 16-20/347-156)).

Based on the above considerations, the Board defined the relevant product markets as (i) “online platform services market for real estate sales/rental” and (ii) “online platform services market for vehicle sales”. The Board defined the relevant geographic markets as “Turkey”.

### **The Board’s Substantive Assessment**

Before evaluating whether Sahibinden.com violated Law No. 4054 by way of applying excessive pricing, the Board first provided detailed explanations on the assessment of excessive pricing under competition law. To that end, the Board stated that excessive price is defined as the price that is set highly above over the competitive level constantly as a result of exercising market power. Moreover, the Board explained that the excessive prices are deemed as a competition law violation when they directly result in decrease in consumer welfare and inefficiency in the allocation of resources. In this regard, the Board highlighted that from economic perspective, generally, there are two negative outcomes arising as a result of the excessive pricing: (i) inefficiency in the allocation of resources as the monopolist prices are higher than marginal costs and (ii) increase in prices to be paid by consumers as the prices are set above from the perfect competition markets.

The Board then provided explanations on the application of the Economic Value Test (“EVT”) (also known as the “United Brands test”), used in the determination of excessive pricing and which mainly consists of two stages namely, (i) comparison of the price of goods/services with their costs (price/cost comparison) and (ii) comparison of the prices with the undertaking’s previous prices or prices of competing products (price comparison). The Board also pointed out the difficulties in the application of the EVT such as the determination of a benchmark for costs and of the reasonable profit margin. In this regard, the Board held that in the instances where price/cost comparison cannot be made, excessive pricing can be determined solely through price comparison, which is the frequently-used criterion in the determination of excessive pricing.

### **Assessment on Sahibinden.com’s Dominant Position**

In its assessment on the market power of Sahibinden.com, the Board evaluated Sahibinden.com’s market power separately for each of the relevant product markets, by taking into consideration the two-sided nature of these markets, based on the three following parameters; namely (i) number of visits, (ii) number of commercial members and (iii) revenue generated from commercial members. Moreover, the Board reviewed changes on these parameters based on Sahibinden.com’s pricing behaviour over the years.

The Board recognized that there is not a natural monopoly in the markets, and there are not any legislative special rights or intellectual property rights that can create entry barriers. The Board stated that there are competitors active in the markets and also new players entering into the markets. That being said, the Board also provided that the networks effects existing due to the nature of two-sided markets would constitute a significant entry barrier in the markets and the costs arising from multi-homing strengthen Sahibinden.com's market power. The Board pointed out the importance of the domain name "Sahibinden" (meaning rent/sale by the owner) in the eyes of consumers and providing services in more than one category, which are also considered as entry barriers. The Board also highlighted that the new entries into the market did not have any impact on Sahibinden.com's market power yet.

As a result of its assessment of the specific parameters of the case, the Board concluded that (i) Sahibinden.com has a higher market share compared to its competitors and considerable market power to set prices and (ii) the current competitive pressure in the relevant markets is not sufficient to overcome such power. Accordingly, the Board held that Sahibinden.com enjoys dominant position in the two relevant product markets.

#### **Assessment of Sahibinden.com's Conducts within the Scope of Excessive Pricing**

The Board first noted that Sahibinden.com's costs could not be determined separately for each goods/services category due to its business model. Therefore, the Board conducted its assessment only by comparing Sahibinden.com's prices with its previous prices and prices of its competitors; thus without the price/cost comparison analysis. The Board also compared equity and net sales profitability rates of Sahibinden.com with certain undertakings offering online platform services in different sectors.

The Board concluded that (i) Sahibinden.com applied price increases much higher than its competitors in both markets, (ii) this pricing is far from what should have been observed in competitive markets and (iii) the market does not have the necessary competitive structure to correct itself in the short and mid-terms.

Based on the foregoing considerations, and contrary to the case handlers' majority opinion defending that the conducts under scrutiny may not be deemed as excessive pricing for several reasons and also since it may be expected that the recent entry of several strong global actors in the markets will exert competitive pressure on Sahibinden.com's pricing, the Board concluded that Sahibinden.com's pricing behaviors constitute excessive pricing and imposed an administrative monetary fine against Sahibinden.com for the relevant practices.

The Board's decision also includes a dissenting vote from one of the Board member, who, in line with the majority opinion of the case handlers, argued that Sahibinden.com's behaviors cannot be deemed excessive pricing and thus there is no need to impose an administrative monetary fine against Sahibinden.com. In this regard, the dissenting vote mainly set forth that (i) Sahibinden.com's strategic business decisions contributed to reaching its position in the markets, (ii) high pricing conduct does not have a direct effect on consumer welfare, and (iii) the market has faced new entries from certain strong local and global players such as Facebook Marketplace and Letgo, which will increase the competitive structure in the markets in mid-long term and this constitutes a presumption that the prices will converge to the levels observed in competitive markets. The dissenting vote also asserted that even though an administrative monetary fine were to be justified, the determination of the base level of the relevant fine in the decision is erroneous.

The Board's decision is important as it provides detailed insight on the evaluation of excessive pricing in digital markets and it constitutes the first ever condemnation for excessive pricing in the online platform markets.