



## **Data Portability and Abuse of Dominance: Insights from the Turkish Competition Board's Case Law**

**Authors:** Dr. Gönenç Gürkaynak, Dilara Yeşilyaprak

### **I. Introduction**

This article seeks to shed light on the Turkish Competition Board's ("**Board**") case law, with a particular focus on the recent Sahibinden decision<sup>1</sup>, where the Board examined how restrictions on data portability can constitute abuse of dominance. Before delving into the Sahibinden decision, a general framework on data portability, its relevance with competition law and two of the Board's preceding decisions will be briefly outlined.

### **II. Understanding Data Portability within Competition Law Framework**

Data portability is the ability of a data subject or machine user to transfer their data from service A to service B.<sup>2</sup> Data portability may have a positive impact on the competitiveness of the market and the consumers. Particularly, it can increase the competition in the market by mitigating consumer lock-ins and switching costs.<sup>3</sup> In this context, data portability may lower entry barriers for competitors by enabling consumers to utilize competing platforms for the same service.

On the other hand, incumbents may restrict data portability to strengthen their entrenched position in the market they are operating. Therefore, within the competition law framework, restricting or prohibiting data portability may constitute an abuse of dominance, and is closely linked to two main theories of harm: (i) the creation of lock-in effects and entry barriers due to increased switching costs and (ii) the increase in competitors' costs.<sup>4</sup>

In Türkiye, Article 6 of the Law on the Protection of Competition Law ("**Law No. 4054**") governs the behaviour of dominant firms and provides a non-exhaustive list of specific forms of abuse of dominance. Even though Article 6 does not specifically address restricting or prohibiting data portability as a specific form of abuse, Article 6(a) conveys that directly or indirectly preventing entries into the market or hindering competitor activity in the market may constitute an abuse and as provided below, data portability is usually assessed under the relevant provision.

### **III. Predecessors to Sahibinden Decision**

The Board's case law relating to data portability restrictions consists of three decisions: Bilsa, Nadir Kitap and Sahibinden decisions, with Bilsa and Nadir Kitap decisions preceding Sahibinden decision.

In *Bilsa*<sup>5</sup> decision, the Board investigated whether Bilsa, a provider of school management software, hindered access to information within its developed school software programs through encryption and whether it prevented third party access (including competitors) to and transfer of “*school and student*” data stored within its system to other programs, making schools become dependent on Bilsa and artificially hindering activities of competing software companies in the market. The Board concluded that encrypting data did not constitute a violation on its own<sup>6</sup> and instead, Bilsa’s behaviour which aimed at preventing schools from accessing their data in a clear and accessible format when switching to competing software providers, constituted a violation. Hence, the Board concluded that Bilsa’s encryption strategies and restricting the transfer of data to competing software providers were deemed to create an artificial barrier to entry in the “*school software market*.”<sup>7</sup> Accordingly, the Board evaluated that these actions amounted to abuse of dominance in the “*school software*” market within the scope of Article 6 of Law No. 4054. Accordingly, the Board imposed an administrative monetary fine of 246,457.67 Turkish liras on Bilsa. The Board further ruled that, in case the schools request their data from Bilsa, Bilsa is obliged to comply by delivering the data in an unencrypted, accurate, understandable, secure and clean format.<sup>8</sup>

In *Nadir Kitap*<sup>9</sup> decision, the Board investigated whether Nadir Kitap, a platform mediating the sale of new and second-hand books, abused its dominance in the “*platform services mediating second-hand book sales*” market by restricting second-hand booksellers’ access to and the portability of their book data. The data in question included information such as the book’s title, author, name, and publication year, related to books sold through Nadir Kitap’s website. The Board highlighted that Nadir Kitap unjustifiably rejected requests for access to and portability of book data uploaded to its platform by second-hand book sellers. Moreover, second-hand book sellers who transferred the data in question to competing platforms through alternative means had their Nadir Kitap memberships suspended, and their memberships were not reactivated until the relevant data was removed from the competing platforms.<sup>10</sup> The Board also noted that Nadir Kitap was an important commercial partner for second-hand book sellers, and while it was determined that some sellers could operate on multiple platforms, the Board concluded that based on the market structure and the statements of the second-hand booksellers, the data restricted by Nadir Kitap was essential in order to compete in the market.<sup>11</sup> The Board also highlighted that considering the prevailing methods in the market, re-creating the data within the time frame and at the cost required to ensure effective competition would be extremely difficult. Overall, the Board underlined that Nadir Kitap had no valid justification for restricting data portability.<sup>12</sup> Hence, the Board ruled that Nadir Kitap hampered sales activities of the sellers on competing platforms and not only did this increase switching costs, but it also created entry barriers for platforms seeking to enter the market.<sup>13</sup> Ultimately, the Board concluded that Nadir Kitap’s actions constituted an abuse of dominance within the scope of Article 6 of Law No. 4054. Accordingly, the Board imposed an administrative monetary fine of 346,765.63 Turkish liras on Nadir Kitap. Moreover, the Board obliged Nadir Kitap to provide second-hand sellers with their book inventory data in an accurate, understandable, secure, free and clean format.<sup>14</sup>

#### **IV. Sahibinden Decision**

Sahibinden is an online platform connecting sellers and buyers across various categories, primarily focusing on real estate and vehicle sales or rentals. Its business model generates revenue through subscription packages for corporate members, promoted listing services, and fees for individual listings which exceed a free quota.

In *Sahibinden* decision, upon a complaint concerning, inter *alia*, the high concentration of online platform services market for real estate sales/rental services, Sahibinden's incumbent position in this market, lack of motivation and operational difficulties concerning listings across multiple platforms, and need for an imposition of a data portability obligation on Sahibinden to tackle market failures, the Board investigated Sahibinden's activities. While the Board evaluated that activities *vis a vis* individual members did not give rise to concerns in terms of data portability since the individuals members (i) have not encountered restrictions on data portability, (ii) did not possess an ad portfolio that required data portability, and (iii) did not regularly publish a large number of ads on the platforms similar to corporate members. It investigated whether Sahibinden abused its dominant position in the *online platform services for corporate members' real estate sales/rental activities*" and "*online platform services market for corporate members' vehicle sales activities*" market in Turkiye by prohibiting its corporate members to access and port their data to other platforms.<sup>15</sup>

The Board evaluated the contracts that Sahibinden concluded with its corporate members and the actions taken in connection with these contracts. For instance, the Board specifically drew attention to the following clause:

*"Sahibinden only permits Corporate Members to view listings through the Sahibinden Interface for the sole purpose of accessing the content of the listings. Any attempt to access a specific number or all listings from the database for purposes other than this, including copying listings partially or entirely, publishing them directly or indirectly on other platforms, compiling, processing, transferring them to other databases, making them accessible or usable by third parties from those databases, or providing links to listings on Sahibinden, is not permitted or approved by Sahibinden. Such actions are unlawful, and Sahibinden reserves all rights to take necessary legal action, including claims, lawsuits, and follow-up proceedings."*<sup>16</sup>

The Board further added that the contracts included provisions such as temporary suspension, termination of memberships, and unilateral termination.

While the Board found no evidence that Sahibinden actually enforced above mentioned sanctions in cases of non-compliance, it appeared that Sahibinden utilized its technical capability to block access to the platform in case of detecting non-compliance<sup>17</sup> The Board also highlighted that the data subject to portability in this case referred to the data entered into the Sahibinden platform by the corporate members themselves. The Board specifically underlined that the case did not address granting a competitor direct access to Sahibinden's entire database but rather focused on preventing data transfer initiated voluntarily by the corporate members.<sup>18</sup>

In order to assess how Sahibinden's actions affected the competitors, the Board compared the total number of listings and average unit prices published on both Sahibinden and competing platforms for the years 2019, 2020 and 2021.<sup>19</sup> Accordingly, the Board conveyed that members

using both Sahibinden and any competing platform simultaneously have consistently published more listings on Sahibinden in all these years. Also, it was evaluated that the average unit price of listings published on the Sahibinden platform has consistently been higher than the average unit prices on other platforms.

Additionally, the Board gathered information and opinions from Sahibinden's competitors, and corporate members. Competitors highlighted the first mover advantage, the two-sided nature of the market, and strong network effects, as well as the economies of scope derived from Sahibinden's multi-category listing platform.<sup>20</sup> They also emphasized the need for substantial investment costs and marketing/advertising expenses to achieve these goals. They even conveyed that free pricing strategies were regarded ineffective to compete with Sahibinden. Moreover, the Board determined that the corporate members are motivated to post listings on multiple platforms, however they have faced significant challenges in posting and updating listings separately on multiple platforms. The Board added that to overcome these challenges, competitors have tried various methods such as integrating their systems with the corporate users' channels or establishing integration between competing platforms, but these efforts were generally ineffective. Hence, the Board explained that data portability has become almost an avoidable element of competition with Sahibinden.<sup>21</sup>

All in all, the Board held that data portability restrictions made it difficult for corporate members to use multiple platforms, forced corporate members to work exclusively with Sahibinden and therefore limit inter-platform competition.<sup>22</sup>

Separately, the Board underlined that the contracts Sahibinden concluded with its corporate members included a non-compete clause. The Board specifically highlighted that the phrase "*...not to compete directly and/or indirectly with Sahibinden through these actions or by other means*" constitutes an indefinite non-compete obligation, and further added that this obligation prevented the corporate members from competing with Sahibinden in any manner.<sup>23</sup>

Ultimately, the Board determined that the data portability and non-compete restrictions created de facto/contractual exclusivity and hindered the activities of Sahibinden's competitors. Hence, the Board concluded that Sahibinden violated the Article 6 of the Law No. 4054 and imposed an administrative monetary fine of 40.150.533,15 Turkish liras on Sahibinden.<sup>24</sup> Furthermore, the Board imposed several obligations on Sahibinden. These included revising contracts with corporate members and removing any anti-competitive provisions, establishing a free of charge infrastructure to enable data portability between Sahibinden and competing platforms, and ensuring seamless data transfers upon request. The Board also required Sahibinden to report compliance to the Board decision and submit annual reports for a period of three years to demonstrate its compliance.<sup>25</sup>

## **V. Conclusion**

Bilsa, Nadir Kitap, and Sahibinden decisions are cases in which the Board assessed whether restricting or prohibiting data portability constitutes an abuse of dominance. In all these decisions, the Board not only found violations but also imposed obligations on the dominant undertakings. In Bilsa and Nadir Kitap decisions, the focus of the obligations was on access to data. In contrast, in the Sahibinden decision, the Board required Sahibinden to establish a free

infrastructure to ensure seamless and up-to-date data transfer. Overall, these decisions demonstrate that the Board is vigilant in ensuring data portability and actively monitors the anti-competitive practices of dominant undertakings.

Article Contact: Dr. Gönenç Gürkaynak

E-mail: gonenc.gurkaynak@elig.com

(First published by Global Legal Group on January 13, 2025)

## ENDNOTES

---

<sup>1</sup> Decision of the Board dated 17.08.2023 and numbered 23-39/754-263.

<sup>2</sup> Turkish Competition Authority (2023), The Impact of Digital Transformation on Competition Law, <https://www.rekabet.gov.tr/Dosya/3-2-1-the-impact-of-digital-transformation-on-competition-law.pdf> (Last Accessed: December 19, 2024).

<sup>3</sup> Souto, G. A. (2018), “Data Portability: A Necessary Right for Users and Competitors of Digital Platforms”, pp. 3-4. <https://ssrn.com/abstract=3293056> (Last Accessed: December 19, 2024).

<sup>4</sup> Decision of the Board dated 17.08.2023 and numbered 23-39/754-263, paras. 148, 149.

<sup>5</sup> Decision of the Board dated 21.03.2007 and numbered 07-26/238-77.

<sup>6</sup> Ibid, para. 570.

<sup>7</sup> Ibid, para. 580.

<sup>8</sup> Ibid, para. 740.

<sup>9</sup> Decision of the Board dated 07.04.2022 and numbered 22-16/273-122.

<sup>10</sup> Ibid, para. 358.

<sup>11</sup> Ibid, para. 359.

<sup>12</sup> Ibid, para. 360.

<sup>13</sup> Ibid, para. 361.

<sup>14</sup> Ibid, para. 367.

<sup>15</sup> The Board also inquired whether Sahibinden engaged in self-preferencing in services like property valuation and vehicle sales and failed to transparently publish sponsored listings and native advertisements by favoring itself through ranking algorithms. However, the Board found no violation concerning these allegations. Decision of the Board dated 17.08.2023 and numbered 23-39/754-263, para. 807.

<sup>16</sup> Ibid, para. 182.

<sup>17</sup> Ibid, para. 197.

<sup>18</sup> Ibid, para. 389.

<sup>19</sup> Ibid, paras. 312, 341.

<sup>20</sup> Ibid, para. 231.

<sup>21</sup> Ibid, para. 405.

<sup>22</sup> Ibid, para. 406.

<sup>23</sup> Ibid, paras. 561, 635, 811.

<sup>24</sup> Ibid, para. 817.

<sup>25</sup> Ibid, para. 817.