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The Turkish Competition Authority
fines an online platform €3.8M for
abusing its dominant position by re-
stricting data portability (*Sahibinden*)

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Gönenç Gürkaynak

gonenc.gurkaynak@elig.com

Founding Partner

ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Harun Gündüz

harun.gunduz@elig.com

Partner

ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Baran Can Yıldırım

can.yildirim@elig.com

Counsel

ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Ceren Durak

ceren.durak@elig.com

Associate

ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Esra Aydemir

esra.aydemir@elig.com

Lawyer/Attorney

İmge Doğa Özden

imge.ozden@elig.com

This article summarizes the Turkish Competition Board's (" **Board** ") Sahibinden decision ¹ (" **Sahibinden Decision** " or " **Decision** "), where the Board imposed an administrative monetary fine of TRY 40,150,533.15 on Sahibinden Bilgi Teknolojileri Paz.ve Tic. A.Ş. (" **Sahibinden** "), a leading online platform in Türkiye, on the ground that Sahibinden abused its dominance position and violated Article 6 of the Law No. 4054 on the Protection of Competition (" **Law No. 4054** ") through restrictions on data portability and non-compete clauses. Additionally, the Board decided to impose certain measures on Sahibinden to terminate the violation and re-establish the effective competition in the market.

Relevant Product Markets

The Board evaluated that Sahibinden's activities concerning individual members did not lead to any competition concerns in relation to data portability considering that (i) there was no data portability restriction towards individual members, (ii) individual members did not possess an ad portfolio that require data portability and (iii) individual members do not publish significant number of ads regularly. In this light, in terms of the assessment regarding restriction of data portability, the Board defined the relevant product markets for the assessment of data portability as "*online platform services for corporate members' real estate sales/ rental activities*" and "*online platform services for corporate members' vehicle sales activities*". The Board stated that Sahibinden holds a dominant position in both of the relevant product markets, by considering the network effects, economics of scale, user preferences, Sahibinden's first-mover advantage, and its significant market share compared to its competitors.

On the other hand, alongside the allegations of abuse of dominance by restriction of data portability, the

following matters have also been assessed: (i) the functioning of Sahibinden's advertising services, (ii) whether the ad characteristic of Sahibinden's "doping" advertisements are clear, (iii) whether Sahibinden's ranking algorithm for both advertisements and services such as doping or native ads operates in a manner to lead to self-preferencing (iv) whether the recommendation systems providing services such as real estate valuation and referral to an authorized dealer for new car sales are operated transparently, and (v) whether the referrals restrict competition in the relevant markets. However, the Board did not make an exact market definition since allegations concerning ancillary services are not capable to change the result of assessment on abuse of dominant position.

The Board's Remarks Regarding Data Portability

The Board's primary focus in the Sahibinden decision was the restrictions on data portability, which allegedly obstructed corporate members' ability to list and manage ads across multiple platforms. Before making assessment on the investigated conduct, the Board explains in detail the concept of data portability under competition law and makes references to the decisions of foreign competition authorities, as well as the Board's previous decisions.

In this light, the Board noted that restrictions on data portability can be evaluated in terms of various theories of harm:

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

1. Restriction of data portability may constitute a switching cost for the data owner. Due to switching costs, data owners choose to stay in the first platform they enter even though there is a cheaper and better alternative, as they find it burdensome to transfer the data to another platform. Therefore, companies can bind the users to their own services and restriction of data portability can obstruct users to benefit from several platforms for the same services and may reduce the competition and innovation.
2. Restrictions of data portability may increase the cost of competitors since competitors will be forced to allocate extra resources to incentivize the use of their platforms. In this framework, restriction of data portability by a dominant undertaking may result in entry barrier for competitors by creating artificial switching costs, leading to exclusionary abuse of dominance.
3. The fact that users who are not satisfied with the service offered by a platform can easily switch to other services when data portability is possible can also limit excessive pricing practices.

Restrictive Clauses in Contracts Concluded with Corporate Members

The Board also evaluated Sahibinden's contracts concluded with corporate members of the platform. In this scope, the Board indicated that the following provision in the contracts aims to prevent corporate members from transferring from Sahibinden's Portal to a different database platform:

“The user agrees and undertakes not to reproduce, copy, distribute or process any image, texts, visual or auditory media, video clips, files, databases, catalogues or lists contained within the Portal, and not to compete directly or indirectly with Sahibinden, either through these actions or by any other means.”

Sahibinden argued that the relevant provision served as safety measure to protect the data on the platform, propriety of which may belong to third parties. Sahibinden also stated that relevant clauses of the contract prohibiting data transfer aims to protect the

platform against pirate integration activities. The Board concluded that relevant restrictive clauses in the contracts exceed the limits of a safety measure and prevented corporate members from accessing, copying and transferring their own data to any third-party platform, including the members' own website, unless Sahibinden gives a written permission.

Reviewing the contracts in detail, the Board noted that while there was no evidence indicating that Sahibinden implemented any sanctions for the violation of the abovementioned provision in practice, such as suspension of contracts, termination of membership etc., Sahibinden still has the ability to block access to the platform in case of a non-compliance.

Additionally, the Board noted that the indefinite non-compete obligation in the contracts prohibits corporate member from working with third parties in parallel to Sahibinden or acting as a competitor of the platform. That said, the Board noted that, there is no finding indicating that the non-compete obligation in the contracts has been enforced, and that there is not a general practice preventing members from uploading their own advertisement data to their own channels or move the relevant data to other platforms. On the other hand, the Board found that there is a common practice to prevent members from transferring their advertisement data to competing platforms. Therefore, the Board stated that the restrictions mainly prevent the transfer of data to competing platforms, and members' ability to access multiple platforms, including competitors, which in turn leads to *de facto* exclusivity.

The Board's Assessment Regarding Sahibinden's Restrictions of Data Portability

The Board evaluated that the data portability restrictions of Sahibinden restricts competition between platforms. Indeed, these restrictions make it difficult for corporate members to use more than one platform, restricts platforms' access to corporate

members, and thus force corporate members to exclusively work with Sahibinden. This makes it difficult for competitors to expand their user network, increase their scale, enter the market and hold on to the market by restricting their access to both corporate members and therefore to individual members and advertisers, and restricts the competition between platforms.

The Board stated that due to the restriction of the competition between platforms, the platforms' incentive to innovate would be reduced, the development of innovative products/services would be restricted, and the variety and quality of products/services offered on platforms would decrease. As a result, both advertisers, individual members and platform users in general may be negatively affected.

As a result, the Board concluded that Sahibinden obstructed corporate members to use more than one platform by preventing data portability, and that imposed *de facto*/contractual exclusivity and complicated the activities of its competitors by implementing data portability restrictions and non-compete obligations. The Board stated that the mentioned practices took place in the same markets, towards the same customers and during the same periods and that they serve the same economic purpose leading to similar effects, result in exclusion of competitors and restriction of competition.

Therefore, all these practices constituted a single violation. Ultimately, the Board decided to impose an administrative monetary fine of TRY 40,150,533.15

on Sahibinden and imposed compliance measures, including (i) revisions of contracts between Sahibinden and corporate members to remove clauses that lead to violation, (ii) establishing a free of charge infrastructure for corporate members to effectively transfer their data on Sahibinden's platform to other competitor platforms and keeping such data up to date, and (iii) establishing necessary infrastructure to allow seamless data transfer, if requested and therefore ensure that the request from competing platforms are responded to continuously and effectively.

Conclusion

While there are a few Board decisions ², where the Board addressed the data portability issues, the Sahibinden Decision is one of the few examples, where the Board evaluates competition law aspects of data portability. Importantly, the Decision's references to the Digital Markets Act ³ (“*DMA*”), which covers, among other the concept of "data portability" can be signalling that the Turkish Competition Authority will continue to scrutinize the undertakings operating in digital sectors.

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2. The Board's Bilsa decision dated 21.03.2007 and numbered 07-26/238-77; the Board's Nadir Kitap decision dated 07.04.2022 and numbered 22-16/273-122; the Board's Trendyol Dolap decision dated 27.02.2023 and numbered 23-11/177-54.
 3. Please see Digital Markets Act, accessible at : <http://data.europa.eu/eli/reg/2022/1925/oj> last date of access January 5, 2024

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