RECENT DEVELOPMENTS IN TURKISH COMPETITION LAW CONCERNING BANKING SECTOR

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ABSTRACT

One of competition law's primary concerns is with agreements between competitors. Competition law generally forbids competitors if they have the purpose or effect or likely effect of substantially lessening competition. The general view of price fixing is that two or more parties agree to restrict competition between themselves by setting fixed or minimum prices below which they will not sell. Worldwide competition laws and authorities treat price fixing harshly.

Recently an investigation conducted by the Turkish Competition Board in order to determine whether twelve banks operating in Turkey violated competition rules by making agreements and/or engaging in concerted practices in the deposits, loans and credit cards sector has been concluded. The investigation was carried out as a result of the preliminary inquiry initiated by the Competition Board in response to the claims that credit card issuing banks determine interest rates including retail and late interest rates in collusion, in order to establish a system in which all interest rates consisting of those for deposits, loans and credit cards were determined jointly. In this article, we would like to analyse

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the decision of the Turkish Competition Board in the light of competition law principles and practices.

***Key Words**: Competition Law, Banking Sectör, Collusion, Interest Rates, Administrative Fine.*

TÜRK REKABET HUKUKUNDA BANKACILIK SEKTÖRÜ İLE İLGİLİ SON GELİŞMELER

ÖZET

Rekabet hukukunun temel konularından biri rakipler arasındaki anlaşmalardır. Bu tür anlaşmalar rekabeti önemli ölçüde kısıtlayıcı amaç veya etkiye sahipse, rekabet hukuku kuralları ile yasaklanmaktadır. Özellikle fiyat tespiti konusundaki anlaşmalarla, iki veya daha fazla teşebbüs sabit veya asgari fiyat sınırları belirlemek suretiyle rekabeti kısıtlamak konusunda mutabakata varmaktadırlar. Dünya genelinde rekabet hukuku kuralları ve yetkili merciler fiyat konusundaki anlaşmaları cezalandırmaktadır.

Türkiye'de de Rekabet Kurulu'nun on iki banka ile ilgili rekabet kurallarını ihlal edecek surette mevduat, kredi ve kredi kartı hizmetleri alanında anlaşma veya uyumlu eylem içerisinde bulunmak suretiyle rekabeti ihlal ettiği yönünde açtığı soruşturma yakın zamanda sonuçlandı. Soruşturma, kredi kartı ihraç eden bankaların kredi kartı alışveriş ve gecikme faizi oranlarını da kapsayacak şekilde faiz oranlarını anlaşarak belirlediği iddiaları üzerine, Kurul'un, mevduat, kredi ve kredi kartı olmak üzere tüm faiz oranlarının birlikte belirlenip belirlenmediği yönünde başlattığı ön araştırma sonucunda açılmıştı. Bu makalede mevcut bilgiler ışığında rekabet hukuku prensip ve uygulamaları çerçevesinde Rekabet Kurulu'nun kararı üzerinde durulacaktır.

***Anahtar Kelimeler:** Rekabet Hukuku, Bankacılık Sektörü, Faiz Oranları, İdari Para Cezaları, Danışıklılık.*

INTRODUCTION

Fundamental legal regulation concerning competition law has been accepted in 1994 in Turkey. Accelerating the efforts in the journey

to the European Union, Turkey has courageously taken new steps in the field of competition law.

First, Act no 4054 on the Protection of Competition dated December 7, 2004 was put into force. According to the 1st article of this Act, the purpose of this regulation is to prevent agreements, decisions and applications blocking, distorting or limiting the competition in the good and service markets as well as to prevent enterprises from abusing their domination and thus to provide a protection competition by making required regulations and inspections.

After the acceptation of the Act on the Protection of Competition (Competition Act), the enterprise owners were significantly worried. It was not very realistic to anticipate the tradesmen, who have been working for years without strict control, to adapt the new Act easily. Although there are various violations of the competition rules as elsewhere, Turkish enterprises have generally overcome the adaptation problem to the new legal environment.

One of the recent major developments concerning the practice of competition law in Turkey was on March 8th, 2013. The investigation of twelve banks, started on November the 2nd, 2011 by the Competition Commission has been completed and the banks were fined 1.116.957.468, 76 TL (620.532.000 $) in total for breaching the Competition Act[1]. This penalty is the highest administrative fine ever to be given in the Turkish competition law.

This paper gives brief information on the reasons for fining the twelve banks in the light of the official announcements made by the Competition Commission. Moreover, there shall also be an evaluation by presenting the grounds of defence suggested by the banks, regarding this decision which hasn't been finalized, yet.

[1] As a rule, multilateral cooperation especially concerning the payment system between the banks is inevitable. In terms of competition, especially the cooperation in payment transactions which influence price and condition is critical. Agreements between banks can also affect their relationship with their clients and thus restrict competition (for further details about the cooperation in banking sector see: **Gerhard WIEDEMANN**, Handbook of Antitrust Law, 2. edn., Munich 2008, § 33.

I. INVESTIGATION PROCEDURE AND THE PRESUMPTION OF CONCERTED PRACTICE

An investigation has been started concerning twelve banks[2] including public banks as well as the enterprises with the following titles: Garanti Payment Systems Inc. and Garanti Estate Finance Consultancy Inc. which are the group companies of Garanti Bank, at a meeting held by the Competition Board on November the 2nd, 2011.

The relevant regulation concerning the agreements which restrict competition includes a presumption: *"In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice"*[3] (CA Art. 4, para. 3).

The application of this presumption to investigations has not always been very smooth. With this presumption, the Turkish competition regime places a heavy burden of proof on enterprises which are accused of anti-competitive practices. The proof of concerted practice allegations under the Turkish Competition law regime includes a

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2 The investigated public banks are: Ziraat Bank, Türkiye Vakıflar Bank and Türkiye Halk Bank. On the other hand investigated private sector banks are Akbank, Denizbank, Finansbank, HSBC Bank, ING Bank, Türk Ekonomi Bank, Türkiye Garanti Bank, Türkiye İş Bank and Yapı ve Kredi Bank.

3 Translation of the paragraph is taken from the official website of the Competition Board (www.rekabet.gov.tr). The rationale of the paragraph is given as follows: *"In a legal regime where agreements restricting competition are prohibited, these agreements are generally made in secret and proving their existence is quite difficult, sometimes even impossible. For this reason, in case the circumstances stated in the third paragraph of the article exist, presumption that undertakings are engaged in concerted practice has been accepted. Thus the burden of proof for not being engaged in concerted practice has been passed to the relevant undertakings and it has been intended to prevent that the Act became unworkable due to the difficulty of proof"* (www.rekabet.gov.tr).

different system for the presumption of concerted practice[4]. Once parallel behaviour in a market between investigated enterprises is ascertained by the Competition Board, the presumption of concerted practice in the Turkish competition law places the investigated enterprise under the burden of proof to explain economic and rational reasons for such parallelism (CA Art. 4 para. 4). Naturally, this unique mechanism causes some problems, and its proper use needs detailed analysis in many points. Most of the problems in this approach relate to the matter of the interpretation of concerted practice. It is not necessary for the Competition Board to prove that the parallel behaviour of the parties have created a competition circumstance that is different to the competition that would have otherwise existed.

The presumption of concerted practice changes the direction of burden of proof from the Competition Board to the investigated enterprises once the Competition Board is able to ascertain conditions indicating parallel market behaviour[5]. Therefore the existence of parallel market behaviour is usually accepted without being properly

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4 For the presumption of concerted practice see: **Yılmaz ASLAN**, Competition Law, 3. edn., Bursa 2010, pp. 146-151; **Gönenç GÜRKAYNAK**, The Problem of Proof Under Turkish Competition Law, International Financial Law Review, Vol. 21, Issue 1, p. 12; **Gönenç GÜRKAYNAK**, The Presumption of Concerted Practice In The Turkish Competition Law: An Institution of Legal Uncertainty With An Uncertain Future, pp. 1 ff (http:// www.geocities.com/gonencgurkaynak/Research.html); **İzak ATİYAS** & **Gönenç GÜRKAYNAK**, "Presumption of Concerted Practice": A Legal and Economic Analysis, (http://myweb.sabanciuniv.edu/izak/files/2008/10/atiyas-gurkaynak-concerted-practice-may-2006.pdf) pp. 20-25; **Nurkut İNAN/Mehmet PİKER**, Competition Law Manual, Ankara 2007, pp. 34-38. For the evidence system of the EU also see: **Ünal TEKİNALP** in TEKİNALP/TEKİNALP, EU Law, 2. edn., İstanbul 2000, p. 397-398 nr. 22-24. For the classification and types of evidences see: **Dilek CENGİZ**, Concerted Practices in Turkish Competition Law and The Results, İstanbul 2006, pp. 265 ff.; **Metin TOPÇUOĞLU**, Concerted Practices in Competition Law, Ankara 2005, pp. 288 ff.

5 **Gönenç GÜRKAYNAK**, (fn. 2), p. 12.

demonstrated by the Competition Board. According to the Art. 4 of CA, enterprises operating under certain circumstances have to prove that they are not involved in concerted practices by using "economic and rational" grounds if they are examined by the Competition Board. In the case of investigated banks, we do not know for certain how the Competition Board has used the presumption of concerted practice.

The reason for the investigation is based on the fact that the interest rates applied in the banking sector constitute a violation to the stipulations of Competition Act. The relevant investigation by the Competition Board has been started as a result of the pre-investigation on the allegations claiming that the companies issuing credit cards determine their interest rates by common consent. The main aim of the investigation was to find out whether all the interest rates for credits and credit cards have been determined by common consent.

As a result of the investigation phases, the enterprises involved have been sentenced to pay an administrative fine and this decision was announced on the web site of the Competition Commission on March 8th, 2013 (CA Art. 53/2). However, the considerations which lead to such a decision have not been announced as of May 25th, 2013. For a judicial review, the enterprises involved have to wait until the considerations of this decision are announced (CA Art. 54)[6].

II. THE RELATIONSHIP BETWEEN THE INTEREST RATES AND THE POSITION OF BANKS IN TURKEY

Turkey has struggled with high inflation rates as well as high interest rates in the past years. The average inflation rate reached up to 70.4 between 1993 and 2002. This rate is obviously very high. The high inflation rates lasting for about thirty years has started to decline since 2004. In 2004, the annual inflation rate which was 9.3% gradually decreased and it became 6.2% at the end of 2012[7].

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6 The criminal and civil sanctions for anti-competitive behaviours are thoroughly analysed in: **ASLAN** (fn. 4), pp. 623 ff. For the civil sanctions see also: **Pelin GÜVEN**, Competition Law (Textbook), Ankara 2009, pp. 361-441.

7 For details and figures see: tuik.gov.tr, hazine.gov.tr

High inflation rate naturally causes high interest rate. Banks are corporations attaining a significant amount of their incomes from interests. Therefore, high interest rates are in favour of the banks as a rule.

The decline of the interest rates, in line with the inflation rates, directly affects the balance sheet figures of the banks. This is because the expenses decrease when the interest rate paid to deposit account decreases. Similarly, incomes also decrease due to the interest rates collected from the bank credits and delinquent credit card bills.

The financial system chosen by Turkey requires the application of free market rules. As a requirement of free market economy, prices have to be free in the trading sector and interest rates have to be free in the banking sector. However, in order to protect the rights of the consumers, the default interest rates of the credit cards are limited. Banks can freely determine the credit card interest rates in compliance with the competition rules and on condition that they do not exceed the maximum limits determined by the Central Bank.

III. INTEREST RATES APPLIED BY THE BANKS

As banking is a competitive sector; it is required that the service and commission fees are applied in different amounts and deposit or credit interest rates are set in different ratios. However, in the case constituting the basis for the investigation by the Competition Board, it is accepted that some of these applications violate the 4th article of the Competition Act[8].

When the interest rates of the banking sector are considered, it is seen that there are differences in terms of deposits and credit cards.

[8] For the Agreements, Concerted Practices and Decisions Limiting Competition see: **Ateş AKINCI**, Horizontal Restrictions Limiting the Competition, Ankara 2001, pp. 41-184; **Zekeriyya ARI**, The Concept of Collusion in Competition Law and Its Civil Consequences, Ankara 2004, pp. 30-100.

When the application is considered, it might be said that the deposit interest rates differ from bank to bank although they remain on a limited band. As of May 2013, it is seen that the deposit interest rates vary between 7% and 8.1% in banks. These rates might be considered as a great success when compared to the recent figures in Turkey. However, both Central Bank and the Government have made statements that these interest rates shall be decreased. Especially when it is considered that the interest rates in the industrialized countries are far lower than this; the interest rates in Turkey are still high.

Interest rates for personal or commercial loan are also declining, in line with the deposit interest rates. As the interest rates decrease in general, the interest rates applied by the banks start to be closer to one another as the discretionary room of the banks tighten.

The situation is different with the interest rates applied to the credit cards. This is because there was a new legal regulation as a result of the on-going complaints of the consumers. As a result, the Central Bank was granted the authorization to determine the highest rates for the monthly contractual and default interest rates to be applied to credit cards, in accordance with the article 26/3 of Bank Cards and Credit Cards Law no 5464. The Central Bank determines these interest rates by issuing notifications based on that authorization. Provided that they do not exceed these figures, the interest rates are freely determined at the discretion of the banks.

The real problem with the competition law is that all banks apply the highest rate despite competing below the maximum limits. Although the rates applied by the four investigated banks in total are different, all of the twenty enterprises apply the highest rates determined by the Central Bank and that causes hesitations in terms of competition law. In this regard Turkish Competition Commission applied the competition rules to the banking sector without admitting the possibility that such an action cannot be exempt from the rules due to the states' authority to control national monetary and financial policies[9].

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[9] For the applicability of the competition rules to the banks see: **José ROSELL**: Banking Agreements. Are they anti-competitive?, International Financial Law Review, Vol. 6, Issue 1, pp. 11 ff.

IV. INVESTIGATION OF THE COMPETITION BOARD AND ADMINISTRATIVE FINE

The Competition Board has completed the investigation and made a final decision on March 8th, 2013. It is seen in the verdict that the enterprises involved were fined with an unanimous decision. Fine penalty on Akbank, Garanti Bank, Halk Bank, Vakiflar Bank, YapiKredi Bank and Ziraat Bank has been decided unanimously. It is noteworthy to see that all three public banks are included in this group. It is also important to emphasize that these are all large scale banks in Turkey. This decision is important as it underlies that there is a concerted practice amongst these enterprises and this case contains a proper demonstration of parallel behaviour and/or sufficient direct evidence in the opinion of the Board members. At least a degree of certainty that goes beyond any reasonable doubt should be established[10].

Fine penalty on Isbank, Denizbank, Finansbank, ING Bank, HSBC Bank and Turkish Economy Bank in the second group is decided by the majority of the votes. It is important to express that the banks except for Isbank are relatively small banks.

Another issue underlined in the decision of the Competition Board is that the fines are determined based on four different criteria. In other words, the Competition Board evaluated the banks differently from each other.

The fine penalty applied to the banks in the first group, which are Akbank, Garanti Bank and YapiKredi Bank, is 1.5% of their annual gross incomes.

The fine penalty applied to the banks in the second group, which are Isbank, Vakiflar Bank, Halk Bank and Ziraat Bank, is 1% of their annual gross incomes. The fine penalty applied to the banks in the third group, which are Denizbank, ING Bank and HSBC Bank, is 0.6% of their annual gross incomes. And finally, the fine penalty applied to the bank in the last group, which is Turkish Economy Bank, is 0.3% of its annual

10 **TOPÇUOĞLU** (fn.4), p. 291, 294.

gross income. The total fine applied is 1.116.957.000 TL (620.532.163 $).

These details are not included in the English abstract[11]. The legal grounds of the decision are also remain unexplained.

V. THE ANNOUNCEMENT OF THE BANKS ASSOCIATION OF TURKEY

Following the decision of the Competition Board, The Banks Association of Turkey has made a public announcement on March 9, 2013 with regard to this matter. In this public announcement it is

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11 The official announcement made by the Competition Board following this investigation is as follows: "Investigation Concerning Twelve Banks Operating in Turkey Concluded

The investigation conducted in order to determine whether twelve banks operating in Turkey violated article 4 of the Act no 4054 on the Protection of Competition by making agreements and/or engaging in concerted practices in the deposits, loans and credit cards sector was concluded.

The investigation was opened as a result of the preliminary inquiry initiated by the Board in response to the claims that credit card issuing banks determined interest rates including retail and late interest rates in collusion, in order to establish whether all interest rates consisting of those for deposits, loans and credit cards were determined jointly.

During the investigation phase, it was examined whether the twelve banks under investigation

determined maximum interest rates for deposits and increases in interest rates for loans jointly;

engaged in price coordination by informing unannounced interest rate changes to competitors and by exchanging competition-sensitive, prospective strategic information with competitors;

made agreements concerning price increases in fees and commissions for credit cards; and whether

banks with public capital engaged in collusive bidding in public deposit tenders.

As a result of the discussion of the file by the Competition Board, it was determined that article 4 of the Act no 4054 on the Protection of Competition was violated in the deposits, loans and credit cards sector."

declared that the banking sector is under strict control and therefore the working principles are transparent, the competition conditions are harsh and for this reason a concerted action between rivals does not come into question, the members which voted for the application of an administrative fine have not taken these conditions into consideration and necessary steps are being taken in order to bring this matter before the courts.

CONCLUSION

The Competition Board has shown that it will apply the rules of the Competition Act broadly and as far as we understand from the immediate reactions, rely on minimal circumstantial evidence and deductive reasoning to establish a violation of the Article 4. This reflects a tendency towards the protection of the consumers.

Similar to the judgement of the Court of Justice of the EU in *Züchner v. Bayerische Vereinsbank AG* (case no 172/80, 1981 ECR 2021)[12], the Turkish Competition Authority held that parallel conduct in the debiting of uniform bank charges and commissions and similarity between the interest rates applied to the credit card debts does not fit with the essentials of the free market economy. It can be said that the Turkish Competition Commission has ascertained an exhibit of coordination and cooperation between the conduct of the involved enterprises. Since the legal grounds of this decision have not yet been publicized a detailed legal analysis cannot be made at the moment. Also prior to the notification of the rationale of the decision, the fined enterprises cannot apply for a judicial review. As understood from the announcement of the Banks Association of Turkey, this matter will be brought before the courts as soon as the conditions are available.

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