The Competition Board (“Board”) concluded its investigation with regard to the booking services provided by Booking.com B.V. (“Booking.com”) and by Bookingdotcom Destek Hizmetleri Limited Liability Company. During its investigation, the Board has evaluated whether Articles 4 and 6 of Act No. 4054 on the Protection of Competition (“Competition Act”) were violated by Booking.com’s “best price guarantee” practices. As a result of the investigation, the Board decided that Booking.com violated Article 4 of the Competition Act and, therefore, an administrative fine of 2,543,992.85 TL should be imposed on the undertaking concerned in accordance with Article 16 of the same Act. The reasoned decision has not yet been published.

The investigated undertakings

Booking.com is an undertaking operating in the online reservation providing services market.

Bookingdotcom Destek Hizmetleri Limited Liability Company is an undertaking operating as the Turkish representative of Booking.com. It did not receive an administrative monetary penalty as it has no decisive influence on the implementations that are subject to the investigation.

Legal Framework of the Investigation

The Board decided that Booking.com’s agreements with accommodation facilities are within the scope of Article 4 of the Competition Act, since the agreements include articles regarding price parity and best price guarantees. Article 4 reads as “Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings that have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.”
The Board did not evaluate the infringement within the scope of Article 6 of the Competition Act (abuse of dominance). Article 6 reads as “the abuse, by one or more undertakings of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.”

Furthermore, Booking.com could not benefit from the block exemption defined in Block Exemption Communique numbered 2002/2 due to the fact that its’ market share exceeds the 40% amount in the relevant market in which it provides services, and that are the subject of the vertical agreement. Booking.com also could not benefit from the individual exemption, since it did not fulfill the conditions determined in Article 5 of the Competition Act. As a result of its examination, the Board decided that Booking.com has violated Article 4 of the Competition Act, and imposed an administrative fine, accordingly.

Background of the Investigation

The “most favored nation clause,” “most favored customer clause,” and “price parity clause” implementations (“MFN”) have been under scrutiny of the US, European and Turkish competition authorities for some time. The common application of the MFN clause is as follows: The seller undertakes that if it offers more favorable conditions to a buyer other than the one benefiting from the MFN clause, it will also offer the favorable conditions to the MFN customer. [7]

Furthermore, as a consequence of the developing usage of the internet platforms as distribution channels, we have recently observed a growing interest in the MFN clauses that are placed in platform agreements. In that sense, a considerable number of investigations have been concluded by the USA, European and Turkish Competition Authorities with regard to MFNs in online travel agency sites, price comparison sites, and online marketplaces, where the site operators wish to ensure that they can offer the lowest prices in the market.

The Turkish Competition Authority recently published its short form decision with regard to Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda San. ve Tic. A.Ş. [2] (“Yemek Sepeti”), where it applied Article 6 of the Competition Act. In the relevant decision, the Board imposed an administrative monetary fine on Yemek Sepeti, ordered it to end any type of MFC practices that prevent competing platforms to offer better or different conditions, and revise its agreements within such scope. The Booking.com decision is the second significant development with regard to the application of the MFN clause in platform agreements.

Conclusion

As mentioned above, the reasoned decision has not yet been published. However, the short form decision leans towards some points with regard to the Board’s assessment of the MFN clauses. Firstly, the Board determined the grounds of the infringement as Article 4 of the Competition Act, instead of Article 6 of the same Act. The various competition authorities throughout the world generally evaluated the MFN clauses within the scope of the articles corresponding to Article 4 of the Competition Act (for instance, Article 101 of the Treaty on the Functioning the European Union). On the other hand, there is no obstacle for an MFN clause to be evaluated within the scope of Article 6. Indeed, as stated above, we have recently seen the application of Article 6 in the Yemek Sepeti decision. Secondly, the Booking.com decision will be an important decision in terms of evaluating the competitive effects of the MFN clauses in the platform markets. The decision found that the MFN clauses in the Booking.com agreements are anti-competitive. As a final point, the Booking.com decision differs from the global authority’s decisions in terms of imposing a monetary fine on the undertaking concerned. Certainly, the reasoned decision will be a useful guide with regard to the legal background of the MFN clauses’ competitive analysis.

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