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The Turkish Competition Board imposes heavy fines on banking cartel (Akbank, Denizbank, Finans Bank, Turkiye Garanti Bankasi)

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Turkish Competition Board, 7 March 2011, File n 11-13/243-78, Banking Cartel

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The Competition Board (the "Board") conducted an investigation and decided that *Akbank T.A.S.* ("*Akbank*"), *Denizbank A.S.* ("*Denizbank*"), *Finans Bank A.S.* ("*Finans Bank*"), *Turkiye Garanti Bankasi A.S.* ("*Garanti Bankasi*"), *Turkiye Halk Bankasi A.S.* ("*Halk Bank*"), *Turkiye Is Bankasi A.S.* ("*Is Bankasi*"), *Turkiye Vakiflar Bankasi T.A.O.* ("*Vakiflar Bankasi*") and *Yapi ve Kredi Bankasi A.S.* ("*Yapi ve Kredi Bankasi*") which are all active in the banking sector have respectively infringed Article 4 of the Act No. 4054 on the Protection of the Competition (the "Competition Act") by making an anti-competitive agreement and thus, imposed heavy administrative fines on them [1].

Competition Infringement Allegations

Two allegations for competition infringements were made against the banks, which initiated a comprehensive investigation. The first allegation consists of the participation of banks to a "gentleman's agreement" implemented in their business operations since 2001 in regards to direct deposit of salaries/wages to employees' bank accounts and thereupon, promotional offers by banks so as to trigger their consumer banking business. Within this agreement, the participant banks decided that (1) promotions will not be granted to private companies, (2) other banks will not make proposals to institutions which protocols are still in force, (3) even if proposals have already been made to those institutions, they will be withdrawn and (4) if a promotion has already been granted to an institution which has a protocol with another bank, the promotion will be registered as damage.

The second allegation consists of the determination and fixation of the amount of promotional offer bid made by *Akbank*, *Denizbank*, *Finans Bank*, *Garanti Bankasi*, *Is Bankasi* and *Yapi ve Kredi Bankasi* to be submitted within Eregli Demir ve Celik Fabrikalari T.A.S.'s ("Erdemir") 2005 Wage Payment Tender.

Wage / Promotion System

Pursuant to the current legislation in force, private institutions are obliged to procure direct deposit of wages disbursement service from banks. As for public institutions, they get this service for a period between two and five years from banks which make the most appropriate -cost-effective and convenient- proposals within the wage disbursement tender.

Procurement of such service is an important revenue stream for banks to strive for growth in their retail banking division. Indeed, banks may generate income by way of depositing the wages- usually allowing around 1 – 2 days wage standby period in their Deposit Funds. By cross-selling other ancillary services and financial products to the payees, the banks may boost their incremental profits significantly. Hence, banks make promotion offers to employer institutions to be able to streamline wider banking services as means of electronic wages disbursement services. Nevertheless, the amount of the promotions offered to consumers varies from institution to institution. As a matter of fact, banks determine and measure the amount of the promotion on the basis of the profit margin that they will derive from the employer institution.

Relevant Market

Relevant Product Market. The Board determined the relevant product market as the “personal (high street banking) banking services” market. Indeed, the banking sector principally provides brokerage services on transfer of funds between account owners and investors. Within this scope, wage payments made by institutions correspond to an important resource for banks.

Furthermore, banks have also the possibility to reach a large number of customer portfolio through direct deposit wage payments system. As a matter of fact, a bank which reaches an agreement with an institution, first of all, cross-sells a bank card to the institution’s employees in connection with their deposit accounts and then commercializes personal banking products such as credit card, consumer credit loans/ car finance/ housing credits. Even though the clients may get these services from other banks, they may find the products more attractive and get better deals from the provider banks which make their wages payment due to customers’ habitudes, also privileges granted by banks such as cheaper interest rates on consumer credits or interest free credit cards and lower transaction cost for the fund transfer to other banks.

As seen, the interest of both parties’ - the clients and the banks - is not based on only electronically transferred wages system but also include all other retail or personal banking services.

Relevant Geographical Market. The Board determined the relevant geographical market as “Turkey” by taking into account that banking services are provided country-wide.

Evaluation of the Allegations

Prohibition to Grant Promotions to Private Companies. The banks acquire the possibility to find a multitude of clients / funds to cross-sell their personal banking products by offering promotions to private companies. Therefore, it is not wrong to ascertain that the promotion offered by banks to institutions constitutes the main competition instrument among banks.

However, the Board, on the basis of the documents and information obtained within the investigation, stated that banks have agreed not to grant promotions to private companies in 2001 and that this agreement was actively implemented until 2009. Consequently, the agreement between banks is considered to be in contradiction with competition rules since it eliminates the basic competition instrument among them.

Prohibition to Make Offers to Companies Which Are Parties of a Protocol. Banks, taking into account the amount of the promotion that they will offer to institutions, enter into protocols with them for a period, which will be beneficial to them.

Thus, the early termination of the protocols may result in damage for the banks. Thence, banks may apply different solutions in order to prevent the early termination of the protocols. Nonetheless, these solutions must not limit / restrict institutions' rights of choice and violate competitions rules. Otherwise, the Competition Act will be infringed.

The Board, throughout the investigation process conducted against the banks, found strong evidences suggesting that banks, as a result of the "gentleman's agreement", have limited institutions' service procurement alternatives by the non early termination of the protocols and that this has resulted in the exclusivity of the banks. Moreover, the Board also found important indications presenting that, as a result of the "gentleman's agreement", the competition between banks was also restrained. Indeed, by reason of this agreement, the amount of the promotions does not increase in favor of consumers, thus a bank that works more actively than others may not propose a higher and better promotional offers and win more tenders, which led distortion of competition.

The Board, in order to confirm the strong evidences and indications that it has found, also analyzed respectively the particular cases; *Erdemir Tender, THY Tenders, Mugla Municipality Tender* and the *Viransehir Public Hospital Tender*.

Erdemir Tender. Erdemir has entered into a protocol for direct deposit of wages to its employees respectively with *Is Bankasi*, *Akbank*, *Halkbank*, *Pamukbank*, *TEB*, *Tekfenbank*, *Sekerbank*, *Denizbank*, *HSBC* and *Yapi ve Kredi Bankasi* for the period of 01.08.2003 – 31.07.2005. When the protocols were about to reach its end, *Erdemir* has asked new proposals from the banks.

The Board, on the basis of the documents and information obtained throughout the investigation, determined that the banks have made a consensus to offer fixed amount of promotion and made their proposals on this amount within *Erdemir* 2005 Wages Tender.

The Board has also determined that similar behaviors have also been observed among banks within the aforementioned tenders where the banks colluded to set the amount of offering bid. For instance, within the *Mugla Municipality Tender*, banks, as a result of the "gentleman's agreement", have not offered proposals to the consumers to choose from, thus the tender was again won by *Yapi ve Kredi Bankasi*. Similarly, *Garanti Bankasi* has withdrawn its proposal within the *Viransehir Public Hospital Tender*, thus the tender was won by *Is Bankasi*.

The Board, in the light of all the examinations that it has made, concluded that the "gentleman's agreement" made among the banks is an anti-competitive agreement contrary to Article 4 of the Competition Act, which dismantles the free market professedly.

Exemption Evaluation

The Board determined that the "gentleman's agreement" concluded among banks cannot benefit from individual exemption since none of the conditions laid down under Article 5 of the Competition Act is fulfilled. As a matter of fact, the "gentleman's agreement" only procures financial benefits to banks, which mitigates several costs such as transaction costs arising during the tender process.

Additionally, the Board also stated that this agreement does not procure any advantages to the consumers and that the competition restriction resulting from this agreement is not proportional. Indeed, the banks compensate or minimize their damages through high penal clauses set forth in their protocols.

Prescription Period Evaluation

The Board determined that both *Pamukbank* and *Halkbank* took part to the act subject to investigation between 2001 – 2002 but could not find any document presenting that they continued to be part of this act between 2002 – 2005. For that reason, the Board analyzed the prescription period and decided, in line with the " *lex mitior*" rule which foresees that in penal law, provisions in favor of the suspected shall be applied, that the prescription period of 5 years set forth in the Competition Act shall be taken into account in lieu of the prescription period of 8 years stated in the Misdemeanor Law No. 5237. Thus, the Competition Board, by considering that the prescription period has ended, concluded that *Pamukbank* and *Halkbank* may not be subject to an administrative fine.

Administrative Fine

Pursuant to Article 16 of the Competition Act, parties which infringe competition rules shall be imposed a fine of one per thousand of their annual gross revenues acquired by the end of the financial year preceding Board's decision. As for Article 5/1 (b) of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practice and Decisions Limited Competition, and Abuse of Dominant Position (the "Regulation"), an administrative fine between five thousand and three percent of the annual gross revenues will be imposed on the parties which infringe competition rules and commit "other violations".

The Board, in the light of the above-stated legislations and by considering that services related to wage payments constitute a minor part of banks' activities, thus a minor part within banks' revenues, decided to take as basis, the gross revenues of the banks gained from personal banking and calculated the fines on those revenues in lieu of considering banks' 2011 gross revenues. Furthermore, the Board determined the method for calculating basic amount of the fines on the basis of the rates set forth in the Regulation and also took into account the upwards and downwards adjustment to reflect the aggravating and mitigating factors stated in the Regulation. Thus, the Board imposed the administrative fines by calculating in different rates and amounts for each banks.

Dissenting opinions

The arguments alleged in the dissenting opinions may be regrouped as follows:

Existence of Competition Infringement. It is stated that there are not any infringement of competition since banks' costs are in reality higher than the stated in the decision (for instance ATM installation or card printing costs), also the consumers benefit from banks' financial services practice, competition still exists in the relevant product market, banks' practice results from the need of the banking sector and other similar situations.

Non-Exemption. It is argued that the banks' acts are within the scope of individual exemptions, thus, there is no need to impose a fine for them.

Calculation of Administrative Fine. It is pointed out that the Board should have taken into consideration banks' 2010 gross revenues and not the gross revenues of the banks only gained from personal banking.

Application of the Regulation. It is said that the Board should not have applied the Regulation because the Regulation is contrary to law since it states the minimum and maximum limit of administrative fines.

Conclusion

The decision of the Board is an important decision concerning the banking sector. As a matter of fact, even though the

banking sector is a particular sector, it is a sector submitted to competition rules. Within this framework, the Board examined the “gentleman’s agreement” concluded between banks and determined that it constitutes a violation of competition. Despite the dissenting opinions, the majority of the Board thinks that the “gentleman’s agreement” violates competition rules and lessens the competition substantially. Indeed, the Competition Act states that there should be limitation of competition in the relevant product market. As the “gentleman’s agreement” may prevent a bank from proposing higher promotion and win more tenders with its hard work than the others, the competition between banks is limited.

Moreover, the majority of the Board does not think that the “gentleman’s agreement” may benefit from individual exemption, neither. As a matter of fact, no advantage was indicated by banks within the investigation in favor of consumers and, in addition, the competition is restrained in the relevant product market more than what it is compulsory since banks compensate or minimize their damages through high penal clauses set forth in their protocols.

Nevertheless, the Board’s decision concerning the method in calculation of the administrative fines imposed on the banks may be criticized. Indeed, the Board rather than taking into consideration banks’ 2010 gross revenues, only considers the gross revenues of the banks gained from personal banking. The Board’s decision may call several critics since, on the one hand, it is contrary to the objective of competition law and policies, and on the other hand, it causes inequality and obvious disparity with undertakings imposed by a fine on their gross revenues. There is also no doubt that this situation represents an apparent unfairness on the implementation of the Regulation. Nevertheless, in lieu of violation of the law, it would be better to review or possibly overhaul the Regulation.

[1] The investigation started on August 2009. The motivated decision was published in the official website of the Competition Authority on September 5, 2011.

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