

The Turkish Competition Board rules that the tying arrangements on cartridges implemented by leading printers manufacturer does not constitute an abuse of dominant position (Xerox)

Turkey, Unilateral practices, Tying, Dominant position, Relevant market, Abuse of dominant position, Manufacturing

Turkish Competition Board (Rekabet Kurulu), 17 November 2011, File n 11-57/1470-527, Xerox

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The Competition Board (the “Board”) decided that integrated circuit implementation in cartridges branded Xerox does not create an abuse of dominant position as stated in Article 6 of the Act No. 4054 on the Protection of Competition (the “Competition Act”) since this system does not prevent consumers to buy cartridges from third party cartridge producers than Xerox.

Competition Infringement Allegation

Within the preliminary investigation, it was alleged that the integrated circuit implementation in the Xeroxbranded cartridges prevents interoperability of third party cartridges for printers of this brand.

Integrated Circuit Implementation

The Board, as a result of the examination conducted, has reached from *Xerox Buro Araclari Ticaret ve Servis A.S.* (“Xerox”) the following information concerning cartridges branded Xerox with integrated circuit: There are implemented circuit in more than 50 toner cartridges that authenticate them to printer models, branded Xerox, still being sold in the market The integrated circuit in printers branded Xerox may be used for different purposes such as (i) to determine whether the said cartridge pertains to the relevant printer, (ii) the follow-up of the cartridge life and to inform the consumer accordingly, (iii) to report the cartridge level in printers which can be remotely controlled. Integrated circuits are also implemented in various competitors’ cartridges [1] active in the market. The cartridge with integrated circuit may technically be re-used. As a matter of fact, a discharged cartridge may be refilled as means of resetting or replacing the integrated circuit. Different options exist in case of a cartridge runs out: (i) an original cartridge may be purchased in lieu of the discharged cartridge, (ii) a cartridge indicated as compatible with various printer models may be purchased, (iii) the discharged cartridge may be refilled by resetting or replacing the integrated circuit. The use of an original cartridge assures a high quality printing performance. However, the use of optional ways such as refilling of a discharged cartridge

may pose risks of poor quality printing or even result with a breakdown of the printer notwithstanding these ways are financially more advantageous.

Abuse of a Dominant Position

The Board, by taking into account that the abusive behavior related to the claim is a unilateral behavior, stated that it may only constitute an abuse of a dominant position. Indeed, Article 4 of the Competition Act, being on agreements and concerted practices between undertakings or decisions and practices of associations of undertakings, requires at least the presence of two undertakings.

The Board, in order to evaluate whether this claim constitutes an abuse of dominant position pursuant to Article 6 of the Competition Act, first determined the element of relevant market and then examined whether *Xerox* is in a dominant position.

Determination of the Relevant Market

Relevant Product Market. The Board stated that markets including products as printers are “primary” or “initial” markets because they require, in due course, supplementary products or services. As for markets, including products and services such as replacement parts, consumable material, repair or maintenance and repair services used with the principal product and requiring a certain period after the purchase of the principal product, the Board set forth that they are “secondary” or “consecutive” markets. The Board pointed out that, in case of existence of secondary markets, the market may be defined in three different ways: The system market including both the primary and secondary products; The primary market including replacement parts for all brands or the total secondary market including consumable material or service; The brand’s-specific secondary market including replacement parts, consumable material, technical service, maintenance and repair services related to any brand.

Nevertheless, the Board, despite having made all these determinations, did not specifically delineate the relevant market and assumed that the market was, in the strict sense, the market of consumable material (or ink/toner cartridges) used for printers branded *Xerox*.

Relevant Geographical Market. The Board did not make any determination concerning the relevant geographical market.

A Dominant Position Evaluation

The Board, despite not having specifically determined the relevant market, particularly examined *Xerox*’s position in the secondary market with a view to determine whether *Xerox* is in a dominant position.

Secondary (Ink/Toner Cartridges) Market. The Board, in examining *Xerox*’s position in the secondary market, took in account the XXV. Report on Competition Policy [2] (the “Competition Report”) of the European Commission (the “Commission”) and made the dominant position evaluation in accordance with - the price and life of the product in the primary market, the transparency of the prices in the secondary market, the balance between the products’ price and the principal product’s price in this market and the level of the costs in the process of obtaining all this information - criteria [3].

The Board, as a result of the examination conducted, determined that the low price difference between the printer and cartridge branded *Xerox* and the total cost of the toner cartridge proportionally outweighs the cost of the printer.

Furthermore, the Board also stated that the cartridges' prices are accessible and that the passage costs between printers are not high. In the light of the foregoing, the Board determined that it is possible to switch between different printers.

In conclusion, the Board set forth that the above-stated determinations depict that *Xerox* cannot increase its prices in the secondary market independently from the primary market and concluded that *Xerox* is not in a dominant position in the relevant market.

Primary (Printer) Market. The Board, in order to determine whether *Xerox* is in dominant position, examined the breakdown of the market shares held by competitor parties operating in the primary market and determined that 3-4 undertakings have higher market shares than *Xerox* in the relevant market [4].

Decision

The Board examined both the printer market corresponding to the primary market and the ink/toner cartridges market (used in printers branded *Xerox*) corresponding to the secondary market.

As a result of the examination, the Board determined that, despite the integrated circuit implementation, cartridges may also be obtained, - through refilling of the cartridge and / or the use of a compatible cartridge, procured from other sources than *Xerox*- and stated that there are other competitor undertakings, which act in the same way.

In conclusion, the Board decided that *Xerox* is not in a dominant position in the consumable material (or ink/toner cartridges) for printers branded *Xerox* market. For that reason, the Board decided not to initiate an investigation against *Xerox*.

Evaluation

We understand from the Board's decision that the Board has in reality examined whether *Xerox* is in a dominant position in the secondary market. As a matter of fact, the Board had already determined in its decision dated 15.08.2008 and numbered 08-33/417-143 that *Xerox* is not in a dominant position in the primary (printer) market. In other words, in this decision, the Board has in reality examined if *Xerox* is in a dominant position in the secondary market even if it is not in a dominant position in the primary market. The below evaluations may be made concerning the said decision: All the information reached by the Board during the preliminary investigation is related to the secondary market; The Board did not specifically determine the relevant market. However, in order to determine whether an undertaking is in a dominant position, the relevant market shall be specifically determined. As a matter of fact, in accordance with the relevant market, the dominant position of an undertaking may change; The Board, in evaluating the dominant position of *Xerox*, first examined its position in the secondary market and referred to the criteria stated in the Commission Report. Moreover, the Board, within the examination of the primary market, did not make any determination with regards to the dominant position, however, merely stated that there are 3-4 undertakings which have more market power than *Xerox*.

The Board has provided, by this decision, a new dimension to the notion of "dominant position" set forth in the Competition Act. As a matter of fact, it is commonly agreed that an undertaking is in dominant position in the primary market because it may control the economical parameters in that market. However, this decision brings a new perspective and reveals that an undertaking, despite not being in dominant position in the primary market, may be in dominant position in the secondary market.

This possibility was also examined in 1995 within the *Pelikan/Kyocera* case [5] in the European Union. Even if the

Commission decided within this case that *Kyocera* was not in dominant position in the primary market, the Commission stated that an undertaking not in dominant position in the primary market may be in dominant position in the secondary market and determined the criteria to be taken into account within the examination.

As it can be seen, in order that competition is fully protected in the relevant market, the dominant position evaluation shall be made in two steps: the dominant position shall first be examined in the primary market, then in the secondary market. The sole evaluation of the dominant position in the primary market may cause deficiency in the system.

Finally, it shall be indicated that explanations stated in the said decision are extremely poor and do not permit a good understanding of the subject matter. Nevertheless, important decisions such as this decision shall be drafted in more detail by the Board.

[1] Some undertakings which have integrated circuit implementation are as follows: *HP, Samsung, OKI, Epson, Lexmark, Philips, Sagem, Utax, Sharp, Develop* and *Olivetti*.

[2] To consult the Commission Report, see the following link: <http://ec.europa.eu/competition/pub...>

[3] See 85 - 86 of the Commission Report. These criteria are also stated in the decision dated 15.08.2008 and numbered 08-33/417-143 of the Board on printers branded *Xerox*. To consult the decision, see the following link: <http://www.rekabet.gov.tr/dosyalar/...>

[4] The Board has already determined that *Xerox* was in dominant position in the primary (printer) market in its decision dated 15.08.2008 and numbered 08-33/417-143. For detailed information, see fn. 4.

[5] See 85 - 86 of the Commission Report. The Commission also analyzed this subject respectively in *Info-Lab/Ricoh, Hugin Kassaregister AB* and *Hugin Case Register Ltd, Hilti AG* and *Tetra Pak International AG* cases. For detailed information, see Van Beal, Ivo and Van Bael & Bellis, *Competition Law of the European Community*, The Hague 2005, p. 149, fn. 526, <http://books.google.com.tr/books?id...>

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