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ROUNDTABLE ON FIDELITY REBATES

-- Note by Turkey --

15-17 June 2016

This document reproduces a written contribution from Turkey submitted for Item 6 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/fidelity-rebates.htm>*

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TURKEY

1. Fidelity rebates have been addressed by Turkish Competition Board (Board) in various contexts and gone through a gradual and sound evolution since 2005. Considering the relevant decisions of the Board at the beginning of this period, fidelity rebates and similar practices were heavily dealt within the Article 4¹ of The Act On the Protection Of Competition (Act No 4054 or Act) which deals with agreements, concerted practices and decisions limiting competition as a corresponding article of Article 102 of TFEU and; subsequently Article 5² of the Act which deals with exemptions. Those decisions³ are either about grant or withdrawal of block or individual exemptions for the contracts or practices involving exclusivity or fidelity rebates. In fact, the Board particularly dealt with exclusivity contracts or *de facto* exclusivity arrangements within Article 4 and 5 of the Act at the beginning of this period. After the beginning period the decisions⁴ have transformed to those mostly about rebates in the context of abuse of dominant position (Article 6 of the Act).

2. When we examine the relevant decisions regarding the terminology, it seems that the Board has been using pretty similar concepts compared to the background paper. Most common terms found in the decisions are “loyalty rebates”, “share of need/market share rebates”, “target rebates”, “exclusivity rebates”, “*de facto* exclusivity rebates”, “bundle rebates”, “quantity enforcing”, “full-line forcing”, “rebate/risturn agreements”. The more specific terms such as “individualized quantity/target rebates”, “standard quantity rebates”, and “retroactive rebates” are mainly found in abuse of dominant position cases in order to articulate the loyalty-inducing effect of the rebate schemes under the scrutiny.

3. Since fidelity rebates have predominantly been evaluated within the context of exclusionary practices either unilaterally or via restrictive (vertical) agreements, the main concern of the Board was whether rivals can adequately access to complementary markets, especially to the end users. Therefore the Board considered, whether the rebate scheme is composed of standard quantity rebates or individualized target rebates, whether the schemes are retroactive or top slice rebates, whether there are contractual or *de facto* exclusivity arrangements, the maturity level of the market, the level of the trade in which the rebates under scrutiny take place and the existence of alternative sufficient access to distribution channels and the coverage of the rebate scheme as primary indicators in order to distinguish between anti-competitive and pro-competitive fidelity rebates. The Board generally takes into account these indicators in order to decide either to cut-off the inquiry or open an investigation. The indicators signaling that the rebate scheme under scrutiny is economically justifiable (standard quantity rebates) or has limited effect in the market due to case specific reasons (such as growing market structure or limited coverage) enable the Board to benefit from quasi- safe harbor presumptions. On the other hand, the Board might decide to monitor⁵ the relevant market and the

¹ <http://www.rekabet.gov.tr/en-US/Pages/Act-No-4054>.

² Ibid.

³ *Ülker - 05-38/487-116, Mey İçki - 06-59/775-M, Coca Cola - 07-70/864-327, Mey İçki - 08-28/320-104, Unilever - 08-33/421-147, Mey İçki - 09-27/575-135.*

⁴ *Amadeus - 08-01/6-5, Mey İçki - 08-28/320-104,, Microsoft - 08-35/465-165, Paşabahçe - 08-56/893-354, Ülker - 08-66/1059-414, Mey İçki - 09-27/575-135, Turkcell - 09-60/1490-370, etc.*

⁵ *Ülker - 05-38/487-116, Unilever - 08-33/421-147.*

undertaking after a decision of negative clearance or an exemption or might take a decision of partial negative clearance emphasizing probable violation of Article 6 of the Act⁶.

4. Fidelity rebate cases addressed within context of Article 4 of the Act has not evaluated any specific rival's situation in the market but the market itself. Yet, in *Doğan Yayın Holding*⁷, *Kale Kilit*⁸ and *Türk Hava Yolları A.O.*⁹ (which are all abuse of dominant position cases) "as efficient competitor" (AEC) was mentioned. Moreover in *Kale Kilit*, the Board used "competitive rival" concept as well as AEC and concluded that the effective prices of Kale Kilit were higher than even those competitive rivals' relevant costs. AEC test has been mainly focus of predation or price squeeze cases so far and either AEC or any other type of competitor has not been dealt within the context of fidelity rebates other than the cases abovementioned.

5. The Board has been strict with the (*de facto*) exclusivity arrangements as well as fidelity rebates conducted by dominant undertakings with the assumption that such practices are very capable of excluding rivals out of the market. These presumptions apply mostly after taking into account the circumstances of the case. The main motivation here is again keeping adequate access to complementary markets by rival firms. In this respect, the scope and the coverage of the rebate schemes in the market, the characteristics of the schemes, the importance of the rebates with respect to the limitation of end consumer choice, the maturity level of the market are important parameters functioning as a litmus paper. Those rebates are assumed to increase the switching costs of the dealers and create artificial bottlenecks in the distribution channels.

6. In *Kale Kilit*, the Board conducted predation analysis, taking into account all rebates granted, as well as structured *rule of reason* and exclusionary object analyses. In predation analysis the Board used dominant undertaking's average avoidable cost and long run average incremental costs. On the other hand in *Doğan Yayın Holding* and *Türk Hava Yolları A.O.*, the Board mentioned that non-contestable portion of the demand could exist, but in neither case the Board conducted an ultimate analysis to estimate the extent of the non-contestable portion of the demand. However, in *Türk Hava Yolları A.O.* the Board attempted to presume the relevant range and concluded that neither method are proper in order to make a sound estimation.

7. Apart from those exclusivity arrangements, the Board has assessed fidelity, market-share, target, growth rebates besides those rebates focusing on naked restrictions. Concerning abuse of dominant position cases, the Board took into consideration various factors in order to complete a structured *rule of reason* analysis. Existence of dominance and/or unavoidable trading partner, market coverage, loyalty inducing effect of the scheme, exclusivity arrangements, existence of naked restrictions targeting directly rivals, the extent of rebates, the proximity of rebate thresholds to the demand of dealers, the reference period, transparency of the scheme, the structure of the industry, the level of the trade, the maturity of the market, the importance of the rebates within the budget of the dealers, the existence of alternative distribution channels, whether the end consumer choice is limited or not directly or indirectly, consideration of but for scenarios are primary factors analyzed in detail in recent fidelity rebates cases.¹⁰

8. At the beginning of this period the Board addressed fidelity rebates – exclusive arrangements mostly within the restrictive (vertical) agreements, group or individual exemptions and negative clearance contexts. Afterwards, as conditional rebate schemes and exclusivity arrangements

⁶ *Mey İçki – 08-28/320-104.*

⁷ *DYH – 11-18/341-103.*

⁸ *Kale Kilit – 12-62/1633-598.*

⁹ *Türk Hava Yolları A.O. – 15-29/427-123.*

¹⁰ *Turkcell – 09-60/1490-370, DYH – 11-18/341-103, Kale Kilit – 12-62/1633-598, Türk Hava Yolları A.O. – 15-29/427-123.*

are mostly intertwined practices, the Board mostly examined fidelity rebates under the exclusive dealing context. The Board conducted predation analyses only in *Kale Kilit* and *Türk Hava Yolları A.O.* Although the claims of the plaintiff is a very important driver for the determination of the theory of harm in such cases, the case handlers and the Board have not been willing to avoid to conduct any other possible theory of harm analysis as long as it is relevant. How the fidelity rebate schemes are used by the dominant undertaking, whether they constitute the main tool of the pricing mechanism or (quasi) exclusive dealing agreements are most likely to determine the choice of theory of harm.

9. The Board has examined three main points in fidelity rebates cases in the context of abuse of dominant positions. These are exclusionary objective, exclusionary potential of the rebate scheme and actual exclusionary effect.¹¹ The Board has examined particularly internal documents as well as credible testimonials with respect to exclusionary objectives; conducted detailed structured *rule of reason* analyses taking into account various factors abovementioned with respect to exclusionary potential/likely effects and; made empirical analyses, post-market data examination with respect to actual effects.¹² One of the persistent challenges in such cases is that the collection of sound data from all market players in order to incorporate the whole market and provide consistency.

10. Regarding objective justifications, the Board has given credit to only those rebate schemes which are related to cost savings and uncustomized schemes which establish quasi exclusivity. As fidelity rebate cases mostly include other allegations like predation and exclusive dealing, the Board has tried to conduct all possible analysis as long as the claims were credible. The initiation of fidelity rebate cases are mostly driven by complaints as these arrangements take place in the trade chain of goods and services yet, the Board might initiate additional investigations when happens to come across such schemes in the course of another inquiry. There are some decisions of Board regarding monitoring the market and the relevant practices with respect to fidelity rebates as the Board did not come to any violation decision but put forward some hesitations and such cases were brought in front of the Board again by notification or complaint.

¹¹ *Microsoft – 08-35/465-165, İzocam – 10-14/175-66, Kalekim - 11-03/42-14, Turkcell – 09-60/1490-370, DYH – 11-18/341-103, Kale Kilit – 12-62/1633-598, Türk Hava Yolları A.O. – 15-29/427-123.*

¹² *Turkcell – 09-60/1490-370, DYH – 11-18/341-103.*