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COMPETITION COMMITTEE**

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Working Party No. 2 on Competition and Regulation

ROUNDTABLE ON REGULATION AND COMPETITION IN THE HEALTH PROFESSIONS

-- Turkey --

The attached document is submitted by the delegation of Turkey to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 11 October 2004.

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COMPETITION IN HEALTH PROFESSIONS

The Contribution of Turkey

1. Health services are delivered by a range of different health practitioners, including doctors, dentists, pharmacists, nurses and related para-professionals such as dental auxiliaries (dental therapists and dental hygienists). One thing all these professions traditionally have in common is a high level of regulation. Turkey has also legislated to protect public health and safety by limiting who may practise as a health professional and how service providers may represent themselves.

2. Government regulation is the preferred method by many people and is the dominant market perspective today. In part due to the public's perception of healthcare as a right rather than a privilege, access to healthcare became a priority of all the governments. Government regulation is justified by several assumptions, which must be accepted before government regulation makes sense:

- The healthcare market is flawed and is not capable of responding to free market forces. Government regulation can compensate for the flaws in the system and improve market performance. These flaws include a lack of information by the consumer (asymmetric information), dissociation between healthcare consumers and payers, and lack of equity in access.
- The healthcare market is fundamentally different from other economic institutions. The two primary differences are that the physician is both the provider of healthcare services and the consultant who decides what a patient needs for healthcare, and the dissociation of payer and consumer. Physicians not only influence the cost of individual treatment but also the services and assets of local hospitals, often without regard to cost. Third party payers insulate the patient from the cost of healthcare. Both of these factors may also be accepted as powerful inflationary forces.
- Another line of argument in favour of regulating health care professions takes into account externalities. This means that the health care services affect someone who is not involved in the buying or selling of the service itself. The price paid in the transaction therefore does not reflect all of its advantages or disadvantages.

Current Situation in Turkey

3. In Turkey health professions are self-regulated through professional bodies organised at national or even local level. This regulation can affect, the number of entrants into the profession, the prices professionals may charge, the organisational structure of professional services undertakings, the exclusive rights they enjoy and their ability to advertise.

4. Most healthcare legislation in Turkey requires practitioners to hold certain qualifications before they can enter a profession, and to be licensed by a registration board while they continue to practise. Some legislation also reserves the right to practise in certain areas of health care exclusively for certain professions. In addition, health practitioner legislation often regulates the business conduct of registered professionals. The three main self-regulatory professional bodies are “Turkish Pharmacists’ Association” (TPA), “Turkish Medical Association” (TMA) and “Turkish Dental Association” (TDA).

Turkish Pharmacists' Association

5. Pharmacy regulation, in Turkey, is closely interlinked with the regulation of drugs, poisons and controlled substances. State regulation controls or influences virtually every aspect of pharmacy, including the prescription medicine prices, ownership restrictions (only pharmacists may own pharmacies), obligatory registration to professional bodies (Turkish Pharmacists' Association and its local subsidiaries) and license requirements. TPA is a professional body founded by Act No:6643, Turkish Pharmacists' Association Act. TPA has constitutional protection (like TDA and TMA) with legal personality and empowered with public powers such as generating regulations relevant to its members. Prescription medicine prices are determined (annually) by a committee which is under the supervision of Health Ministry.

6. TPA regulates the pharmacy business in similar ways to the regulation of other health professions i.e. requirement of appropriate qualifications and registration by a local pharmacy board. State legislation prohibits the handling and selling of pharmaceuticals in retail shops other than registered pharmacists. Pharmacy legislation also restricts the ownership of pharmacies. Non-pharmacists may be employed by pharmacists (i.e. medicines can be packed by non-pharmacists). New pharmacies can be founded without any location limitation.

Turkish Medical Association

7. TMA is a professional body with legal personality, empowered with public powers such as generating regulations relevant to its members. This licence stems from Article 124 of the Constitution. TMA was established by Act No:6023, Turkish Medical Association Act. TMA represents more than 70000 physicians (nearly % 80) all over Turkey which are organised under 54 sub-local branches.

8. Article 4 of the relevant Act defines the power and duties of TMA Board. Accordingly “*to promote its members financial welfare and status*” is a duty of the board. Article 7 enforces membership in order to practise medical activity, Article 28 bans any type of advertising for members. Finally Act No:6023 clearly articulated TMA's power to impose minimum service fees. (as a result of the Article 28 of Act No: 6023, which constitutes the legal basis of TMA's price regulations)

9. TMA has different regulations, one about principles of setting minimum prices and one about the discipline and punishment rules, which are applicable on all member physicians. According to the “Disciplinary Rules” practising in more than one private consultancy is banned and will be fined.

Turkish Dental Association

10. Turkish Dental Association (TDA) represents more than 16500 dentists all over Turkey. In order to practise privately a dentist should be a member to TDA. According to TDA's data approximately % 70 of all dentistry services in 2003 were conducted by private sector (mainly sole practices). This feature of dentistry differs from the general healthcare services. Many health professions in Turkey operate under public entities (i.e general hospitals) and/or public insurance organisations pays for these services. Accordingly consumers/patients of dentistry services face the cost of treatment directly and this leads to a more competitive environment between dentists.

11. Similar to “Medical Association” TDA, which was established by Act No:6023, “Turkish Dental Association Act”, is a professional body with legal personality, empowered with public powers such as generating regulations relevant to its members. Article 11 of the relevant Act bans advertisement and Article 42 prohibits working in more than one clinic and/or private practise.

12. Article 40 of Act No: 3224 constitutes the legal basis of TDA's service price regulations. In this process TDA designs regulations which contains minimum service fees varying from city to city and Ministry of Health approves them with or without change.

13. As mentioned above most of the dental services in Turkey have traditionally been delivered through privately as sole practices or as partnerships of dentists. In some areas of health care, such as general medical services-hospitals, increasing number of entities are owned by non-professional, corporations. In dentistry some jurisdictions (Article 45 of TDA Act) prohibit employment of health professionals by non-professionals or ownership of related facilities.

14. It can be argued that ownership restrictions ensure the owners of a clinic are held accountable for the quality standards, thus protecting the consumers from inappropriate commercial behaviour. However, ownership restrictions potentially impose significant costs on the public by limiting health care businesses' access to capital, thus constraining innovation and growth. Accordingly these type of restrictions may increase the cost of relevant services and limit the variability for patients/customers. Moreover ownership restrictions also impose costs on dentists. They reduce employment options for dentists who prefer to concentrate on clinical care.

15. Act No:3575 is also crucial in order to examine the potential competition pressure on dentistry services. This Act is specifically designed to define the rules that dental para-professionals (dental prosthetists and dental technicians) should follow during their related practises. According to the Act No:3575 and "TDA" Act it is forbidden for all para-professionals (dental hygienists, therapists, prosthetists and technicians to practise) to practise any dental service apart from the ones that clearly mentioned in the related regulations. Within this framework hygienists are not able to perform basic teeth cleaning, such as scaling and polishing.

16. Like any other sector of the economy, health care sector overall and each individual profession, has its own distinctive characteristics. Health professional markets have a high degree of self-regulation and restrictions which affect competition. The following broad issues of concerns can be summarised across health professionals in Turkey:

- Reservation of work/monopoly-reserving a field of activity to particular professionals,
- Entry restrictions—regulating entry into the market, including the imposition of educational and competency standards, licensing and certification requirements, and restricting entry by foreign professionals and para-professionals,
- Regulation of service prices, in particular via obligatory fee schedules,
- Prohibition of advertising and promotion,
- Restrictions on ownership and business structure for professional practice,
- Privately imposed restrictions, which may be provided for via self regulatory arrangements imposed by bodies such as professional associations. (i.e. obligatory membership requirements)

17. Restrictions imposed by legislation generally fall outside the reach of the Turkish Competition Act and competition issues in relation to those restrictions are overseen by the Turkish Competition Authority. Privately imposed restrictions with no legislative protection are very much within the reach of the Act.

Two “Inability” Cases: “Turkish Medical Association”¹ and “Turkish Dental Association”²

18. Within Turkish legislation cases against health professional bodies have been conducted (Cases: *Turkish Medical Associations and Turkish Dental Association, 13 Nov 2003*). Summary of the allegations of these two cases can be summarised as follows:

- Turkish Medical Association and Turkish Dental Association and their regional subsidiaries impose minimum service fees to their members..
- TMA and TDA required all its members country-wide obey the pre-defined minimum service fees.

19. The scope “Turkish Competition Act” (Act on the Protection of Competition No:4054) is defined in Article 2 as follows: “*Agreements, decisions and practices which prevent, distort or restrict competition between the undertakings which operate in or affect goods and services markets in the territory of the Republic of Turkey and the abuse of dominant position by those undertakings which are dominant in the market and all kinds of operations and practices which are considered to be a merger or an acquisition by which competition in the market is significantly impeded, and all operations concerning the measures, decisions, regulation and supervision for the protection of competition are within the scope of this Act*”.

20. To answer the question of whether this scope covers professional bodies (TMA and TDA in relevant cases), it has to be examined the meaning of undertaking and association of undertakings which are defined in Article 3 as follows respectively: “*any natural or legal person who produces, markets or sells goods and services, and who forms an economic whole, capable of acting independently in the market*” and “*any association whether with or without a legal personality, which is formed by enterprises to carry out certain objectives*”.

21. TMA and TDA members are professionals who produce and sell medical and dental services in the market. They are assessed as undertakings in means of Article 3 of Competition Act. Thus, TMA and TDA are associations of undertakings. The public powers enjoyed by these Bodies or their establishment by law makes no difference. The European Commission reached the same conclusions in cases COAPI and CNSD. The point is whether they have the power to effect the economical conducts of their members, which are undertakings.

22. Competition Board decided not to conduct investigations on both of these cases for the following reasons.

23. The Act on the Protection of Competition No:4054 (hereinafter, referred to as the Turkish Competition Act), which was passed by the Parliament on 13th December 1994, is accepted as a “general” law within Turkish legislation system. This means Competition Act aims to settle the competition rules nationwide and is applicable to any areas not covered by a “special” act. However as mentioned above TMA and TDA foundation laws clearly articulate these professional bodies to impose minimum service fees for their members. Accordingly as a result of the Article 28 of TMA and Article 40 of TDA Acts respectively, which constitute the legal basis of TMA and TDA’s price regulations; decisions and actions of these two professional organisations’ can not be accepted under the scope of Competition Act.

¹ Board Decision No:03-73/876 (c)-376 and Date: 13.11.2003

² Board Decision No: 03-78/876 (b)-375 and Date: 13.11.2003

24. Together with its enforcement role, the Turkish Competition Authority (TCA) has a competition advocacy role with regard to specific measures which may distort competition. The TCA has attached great significance to following up these sorts of measures in order to eliminate them in a reasonable way. However, during the very first years of the TCA, the advocacy role was not understood well. It is thought that only the enforcement of competition rules would be sufficient. By the time the TCA has begun to perceive and understand that it must have an advocacy role in eliminating the distortions arising from foundation laws of professional bodies. Accordingly in November 2003, the TCA has taken initiatives, to review the foundation laws which give certain association of undertakings, namely Turkish Medical Association, Turkish Dental Association, Turkish Association of Bars, Turkish Union of Chambers of Accountants and Financial Consultants, the power of fixing minimum prices. In accordance with the Article 30 of Competition Act, Turkish Competition Authority sent its opinions to the Government about the needed remedies relevant to above TMA and TDA's foundation laws³.

Case: Opticians Associations⁴

25. In a letter of complaint, following infringements were claimed to have been committed: Associations placed revenue sharing systems and price fixing provisions in their regulations, 17 optician associations arranged meetings at the beginning of each year, in which they generated two different mandatory fee scales; one for social security institutions' purchases, one for individual purchases, associations required all the optic shops country-wide obey the above mentioned price lists.

26. The parties are opticians associations, formed by opticians who produce and/or sell goods and services in the market. According to Article 3 of the CA which includes the definitions of "undertaking" and "association of undertakings", there is no doubt that opticians who act independently in the market should be assessed as undertakings. Again in Article 3 it is defined that "*any association whether with or without a legal personality, which is formed by undertakings to carry out certain objectives*" are to be assessed as "association of undertakings". Thus, the parties are associations of undertakings in means of the Competition Act.

27. Article 4 of the CA says "*Agreements and concerted practices of the undertakings and decisions and practices of association of undertakings, the object or effect or the possible impact of which is, directly or indirectly, to prevent, distort or restrict competition in a certain market for goods and services, are unlawful and prohibited.*" And Article 4-a describes one type of prohibited practices as follows: "*To fix purchase or sales prices or factors which form the price (such as cost or profit) or all other trading conditions concerning purchase and sales of goods and services*"

³ In addition, in November 2003, the TCA has taken initiatives, to review the foundation laws which give certain association of undertakings, Turkish Association of Bars, Turkish Union of Chambers of Accountants and Financial Consultants, the power of fixing minimum prices. Actually it is important to mention on the final decision of High Council of state-which is the appeal court- about the Competition Board's TAECA (Turkish Architects' and Engineers' Chambers Association) decision. In this particular case (No:02-04/40-21 and Date:22.01.2002) Competition Board decided that, TAECA's foundation law (Act No:6235) includes no delegation relevant to setting prices. It has general rules which say that TAECA is in charge of regulating the conducts of its members. However, there is no clearly articulated delegation of power to set minimum prices. So, TAECA has exceeded the limit of its powers by setting the prices and breached the Competition Act. Accordingly High Council of state's final decision will guide the future actions and policies about all professional bodies, including Medical, Dentists' and Pharmacists' associations.

⁴ Board Decision No: 01-42/424-103 and Date: 31.08.2001

28. The parties infringed Article 4 in two ways: First, they accepted some rules in their regulations, which are contrary to the CA. The goal of these rules was to prevent price competition and attain a single and fixed price level among optic shops. The rules were considered as “decisions” of association of undertakings by the Authority. Second, due to the mentioned rules, associations generated mandatory fee scales and forced optic shops to obey these lists. These behaviours are obviously against Article 4, especially 4-a.

29. The approval of Ministry (one of the defence statements) is related to other administrative concerns and has got nothing to do with competition issues. When approving a regulation, Ministry is not obliged to check the regulation for competition concerns. This duty/licence is given solely to the Competition Authority by the Competition Act. Price fixing action between competitors is per se illegal in all national competition laws.

30. The Authority concluded that the parties infringed Article 4 by the mentioned behaviours and thus, should be punished due to Article 16/2 of the CA. It also required the parties remove the restrictive rules off the regulations. However, because negotiations between the Authority and the parties ended positively and parties agreed to abolish the mentioned restrictions in the regulations, the Authority has decided to take this positive approach into account.