

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

THE REGULATED CONDUCT DEFENCE

-- Turkey --

14 February 2011

The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2011.

Please contact Mr. Sean Ennis if you have any questions regarding this document [phone number: +33 1 45 24 96 55 -- E-mail address: sean.ennis@oecd.org].

JT03296395

1. Introduction

1. The Act on the Protection of Competition No: 4054 (the Competition Act) in principle does not have any express exemption and/or exception for any specific market/industry and undertaking regardless of whether state-owned or private. However, the Turkish Competition Authority (TCA) may have difficulty in enforcing the Competition Act in some cases in particular where;

- there is a specific regulatory framework providing legitimacy to a particular conduct, which is normally an infringement in the absence of such regulatory framework,
- the Competition Act is not applicable to conduct authorized by another specific act according to Turkish legal system,
- there is a special law which envisages an exception from the coverage of competition law¹,
- there is a specific administrative decision/action which may allow the allegedly anticompetitive conduct.

2. In this contribution, the experience of the TCA will be analyzed with a view to providing light for the policy of the TCA with respect to regulated conduct defense.

2. Regulated conduct defense in regulated sectors

2.1 Electricity market

3. Three cases handled by the TCA where regulatory conduct defense was addressed in the analysis of the relevant infringements may be summarized below.

4. In the first case on “electricity distribution companies”², the TCA investigated price increases by electricity distributors. It was claimed that the electricity distribution companies had increased their retail prices well above the inflation rate amounting to excessive pricing through monopolistic power in their respective regions. The TCA conducted a benchmarking analysis comparing costs and cost variables among distribution companies and concluded that there were some signs of excessive pricing in some regions which should be examined in a more detailed analysis. However, the TCA rejected to initiate an investigation in this case on the ground that tariffs of those companies were subject to approval of newly established Energy Market Regulatory Authority (EMRA) and the issue was completely within the competence of the EMRA. At a later stage, the TCA had submitted the analysis and conclusions of an *ex officio* study on the matter to the EMRA.

5. It is here possible to consider that the case is a typical illustration by which TCA has made it clear that regulated conduct (particularly regulated prices) which falls into competence of sector specific regulators were accepted to be out of the scope of the Competition Act.

6. In the second case involving TEDAŞ³ (the electricity distribution and retail incumbent), it was alleged by the private energy suppliers that TEDAŞ had abused its dominant position by not participating

¹ In the Banking Law, mergers and acquisitions are excluded from application of the Competition Act where sectoral share of the total assets of the banks involved does not exceed 20%.

² Decision of the TCA is dated 30.4.2002 and numbered 02-26/262-102.

³ Decision of the TCA is dated 9.12.2004 and numbered 04-78/1114-281.

in balancing and settlement mechanism in the electricity market, therefore evading costs of the mechanism. Private energy suppliers requested the TCA to require TEDAŞ to participate in the settlement mechanism.

7. Balancing and settlement mechanism was adopted by the EMRA to balance the load on the grids and to settle financial reimbursement among suppliers/eligible customers. Suppliers and eligible customers were free to conclude bilateral contracts for electricity trading. However, they were also under the obligation to participate in the settlement mechanism for their realized energy generation or consumption that did not meet the quantity agreed in their contracts. In fact, the real matter in this case was prices of settlement fixed by the public wholesale company, TETAŞ. At that time, settlement prices were not market prices; TETAŞ was entitled to fix settlement prices for three periods during a day according to a regulation adopted by the EMRA. TETAŞ was also exclusively entitled to buy electricity surplus of suppliers and to sell electricity to market participants, which were in short of energy. The gap between selling and buying prices for balancing the load in grid was creating a significantly disadvantageous position for participants of the mechanism. For example, a generator who supplied much more than the contracted quantity had faced very low prices for its surplus, whereas it was charged with very high prices in case it had fallen short of its contractual obligations. The TEDAŞ (the defendant), which had the greatest number of captive customers served at regulated tariffs, had also certain contracts with eligible customers subject to freely agreed tariffs between the parties. However, as TEDAŞ was not a participant of the settlement mechanism it was not exposed to the costs of balancing and settlement.

8. The TCA had concluded that the mechanism was not conducive to promotion of private participation and competition, implying an entry barrier for private suppliers in the market for eligible customers. However, the TCA rejected the complaints in the case on the basis that the issue was not a matter of strategic behavior of the defendant (TEDAŞ), but rather it was a problem within the design of balancing and settlement mechanism which had fallen under the competence of sector specific regulator.

9. At a later stage, regulation on balancing and settlement mechanism had been changed by the EMRA and turned into a kind of spot market in which prices were set up on the basis of market rules.

10. In the final case, ÇEAŞ⁴, a regional incumbent electricity producer, was accused of refusal to access to an essential facility. ÇEAŞ, was party to a concession agreement with the Ministry of Energy. The agreement granted ÇEAŞ the rights to operate certain dams and all transmission and distribution facilities in the southern Turkey. Complainants which had established some gas fired generation plants in the region alleged that ÇEAŞ had refused to give access to transmission system and therefore abused its dominant position. The defendant (ÇEAŞ) on the other hand, had based its main argument on the fact that the concession agreement granted protection against competition and claimed that application of the Competition Act would have been an infringement of its contractual rights.

11. The TCA has concluded that neither the Act governing concession agreements nor the agreement itself granted any exclusive right in supply market and therefore imposed a fine equal to 2% of the turnover of ÇEAŞ.

12. Considering the above-mentioned cases in the electricity market of Turkey it is possible to argue that the TCA gives high priority to the evaluation of regulated conduct defense, particularly when there is sector specific regulation and regulator. It is mostly the first step to consider existence of regulation before going on an antitrust analysis. The TCA declines to act for the issues which fall clearly under sector specific regulation, e.g. price or quality regulation. In such cases, the intervention by the TCA takes the form of competition advocacy, rather than enforcement of antitrust rules and procedures.

⁴ Decision of the TCA is dated 10.11.2003 and numbered 03-72/874-373.

13. However, there are some potential areas of conflict in concomitant application of regulatory and antitrust rules. One such area is mergers/acquisitions and particularly privatization which is an ongoing process in Turkey. Privatization of energy utilities would be a highly effective process in shaping the market structure in energy industry. However, there seems to be different “perceptions of competition” among the TCA and sector specific regulator, the EMRA. The TCA favors a much fragmented market structure horizontally and vertically, whereas the EMRA and the Ministry of Energy seem to focus on economies of scale and scope. The TCA gives high importance to retail competition and demand side management as well as wholesale competition. However, retail competition and demand side management does not take much attention from the EMRA. It may be roughly, but not wrong to describe the issue as “competition between many vertically separated suppliers vs. competition between few vertically integrated suppliers”. In fact, the sectoral regulator also has a primary objective of “promoting competition in the market”. Nevertheless, there may be different approaches in attaining this objective. Therefore, even along similar objectives, there is a potential conflict in the application of two legal instruments (e.g. merger control by the TCA and authorization of licensing by the EMRA).

14. A second area of potential conflict is seen in cases involving abuse of dominant position. In general, since regional monopolies like those in electricity distribution are common in the energy sector, there may be several cases where conduct of a utility falls under competence of the TCA and the EMRA at the same time. As it’s explained at the beginning, the TCA tries to make a careful elaboration in such cases to determine whether the conduct is a result of mandatory regulatory rule. Even if there is no such rule, any incentive caused by regulatory rules is taken into account by the TCA. In such situations, the TCA considers that relevant conduct does not fall within its competence. In such situations, the TCA does not enforce competition legislation. The TCA also considers whether it’s convenient to intervene through its tools arising from the application of the Competition Act. As the second case on TEDAS shows, in certain cases it’s the change of regulatory framework (direct intervention of the regulator) which provides for an effective and less-time consuming solution. Last but not least, particularly in cases involving abuse of dominant position, it should be noted that the TCA and the sectoral regulator may have different objectives or priorities like competition vs. security of supply.

2.2 Telecommunications sector

15. The terms of competition, regulation and deregulation are relatively new topics for the Turkish legislation environment. Thus, the interaction between regulatory agencies and the competition authority is not entirely cleared up in mindset of the stakeholders. The TCA began to operate in 1997 and it has been followed by the establishment of Telecommunications Authority (TA) in August 2000 with law No. 4502. Though these developments are in line with the EU *acquis*, none of the legislation (the Competition Act, Laws No. 2813 and 4502) provided a clear cut procedure on handling competition cases in the telecommunications sector.

16. The Electronic Communications Law (Law No. 5809), which came into effect recently (10.11.2008), also did not solve the problematic situation with respect to the competition investigations. Article 7⁵ of Electronic Communications Law preserves the jurisdiction of the TA on competition cases with some improvements while explicitly acknowledging the TCA’s role in the sector at the same time.

⁵ *Provision of competition*

ARTICLE 7- (1) Without prejudice to the provisions of the Competition Act, the TA is entitled to perform examination and investigation of any action conducted against competition in electronic communications sector, on its own initiative or upon complaint; to take measures it deems necessary for the establishment of competition and to request information and documents within the scope of its tasks.

17. The TCA's experience in the telecommunications sector can be discussed in two stages⁶. In the beginning, the TCA was more eager to pursue investigations in this sector, while as a new entity TA was trying to construct its legal presence and stance in the industry and most of its secondary legislations were yet to be made.

18. During this transitional period, the TCA handled a couple of important cases. One of them and the first one was an investigation involving Turkcell (the leading GSM operator in Turkey) for its exclusive contracts with handset distributors. The TCA decided that Turkcell, by abusing its dominant position in the market via exclusive contracts which were imposed on distributors, raised its rival's (Telsim at that time, Vodafone later) costs by making it harder to find handset distributors to work with⁷.

19. Another important decision in TCA's history is the Turk Telekom Inc. (incumbent operator in the fixed line telecommunications market: TTAŞ) investigation. The process started with a complaint from the Association of Internet Service Providers alleging that TTAŞ abused its dominant position by refusing to provide or by providing necessary network elements for rival Internet Service Providers (ISPs) and raising their lease tariffs in favor of its internet service provider brand, TNet. The TCA started an investigation and this was followed by TA which started its own investigation based on some clauses and articles on Law No. 4502 and indicated that infringement of competition also fell within its jurisdiction. The TCA continued its investigation and found that TTAŞ violated the Competition Act by keeping tariffs charged to both residential and corporate users of internet services below the tariff of lines it was leasing to ISPs⁸.

20. One of the most controversial decisions⁹ given by the TCA was the national roaming case. After winning the auction for the GSM license, İŞ-TİM (İşbank – Telecom İtalia Joint Venture) entered into the Turkish mobile market. After signing the concession agreement, the TA issued a regulation regarding national roaming. The regulation was aimed to allow newcomers to use existing operators' network (Turkcell and Telsim) under certain conditions since newcomers had little or no coverage at that time to effectively compete with incumbents. No sooner than the regulation issued, incumbents took the regulation to the International Court of Arbitration (ICC), a strategic action which stalled all of the TA's regulations and enforcement practices concerning national roaming. Since the ICC's process takes considerable time, İŞ-TİM also brought the case to the TCA claiming that Turkcell and Telsim were abusing their dominant position by jointly refusing to provide national roaming. After considering that the regulation issued by the TA has been stalled, the TCA started an investigation and found that Turkcell and Telsim violated the Competition Act. The TCA decided that Turkcell and Telsim, abused their collective dominant position in the market by denying access to an essential facility. The fine was high for both companies, \$15 million for

(2) The TCA while performing examinations and supervisions and while making any decisions on electronic communications sector, including decisions about merges and acquisitions, takes into consideration primarily the TA's view and the regulatory procedures of the TA.

(3) The TA may identify the operators with significant market power in the relevant markets as a result of conducting market analyses. The TA may also impose obligations on operators with significant market power with the aim of ensuring and promoting an effective competition environment. Differentiating may be performed among the operators with significant market power in the same and/or different markets, in terms of the obligations in question.

⁶ For detailed information on this subject: Ardiyok,S.,& Oguz, F.Competition law and regulation in the Turkish telecommunications industry: Friends or foes? Telecommunications Policy (2009), doi:10.1016/j.telpol.2009.10.002.

⁷ Decision of the TCA is dated 29.12.2005 and numbered 05-88/1221-353.

⁸ Decision of the TCA is dated 05.01.2006 and numbered 06-02/47-8.

⁹ Decision of the TCA is dated 09.06.2003 and numbered 03-40/432-186.

Turkcell and \$6 million for Telsim. However, the decision was cancelled by the Council of State, the high administrative court due to procedural reasons.

21. The TCA also conducted an investigation on Cable TV infrastructure market. In 2005 the TCA investigated the effect of TTAŞ's behaviors on independent ISPs who wanted to provide internet services over the cable TV network due to complaints from ISPs. The same complaints also received by TA and it started another investigation on the same topic. The TCA clearly declared its presence with this investigation as an ex-post regulator. The TCA indicated that since TA's regulation covered access issues in the Cable TV Network it might not include anticompetitive behaviors and damages resulting from actions by TTAŞ. The TCA decided that TTAŞ did abuse its dominant position, but did not charge a fine or penalty since TTAŞ was found to be working with the TA with the purpose to open up the cable TV network to ISPs.¹⁰

22. With the enhancement of TA's secondary legislation and the enactment of the new Electronic Communications Law (Law No. 5809), the TCA looks like it has assumed a more submissive role in the sector. In this second stage, the TCA usually sends the cases to the TA if it sees that the market segment is regulated by TA. Since most of the industry is under the TA's regulations and supervisions now, the TCA was left with a little room to maneuver. Even if the complaints are about the issues concerning the infringement of competition, the TCA asks for the opinion of the TA (as required by Article 7/2 of the Electronic Communications Law) and if the area is/will be under regulation of the TA, it lets the TA take action for the relevant matter in order not to duplicate the procedures in the market.

23. In 2004, the TCA rejected a complaint from one of the ISPs regarding the allocation of the ADSL ports among the TNet and rival ISPs. In its decision¹¹ the TCA stated that TA already issued a regulation for the subject and both the TTAŞ and the TA was working on the matter and it therefore decided that no further action by itself was necessary at that time. Similarly in 2005, the TCA rejected another file which alleged that TTAŞ metro Ethernet service violated the Competition Act. Following the preliminary findings regarding the issue, the TCA decided that necessary regulations were in progress in TA and there was no need to intervene.¹²

24. In that historical perspective Naked ADSL decision¹³ by the TCA holds a different characteristic that stands alone. In this case, TTAŞ stipulated ADSL users to buy a fixed line from it if they wanted to become subscribers. Technical findings showed that buying fixed line was not required for the ADSL service and two services could be separated from each other with little or no cost at all. Based on these facts, the TCA declared that this kind of tying might be considered as an abuse of dominant position by the TTAŞ in the market and without opening an investigation it required TTAŞ (according to Article 9/3 of the Competition Act) to apply TA for separation of those services.

25. Even though the TCA seems to maintain a low profile in the sector, in the absence of regulation the TCA continues to intervene in the market. On 8.2.2007 the TCA initiated an investigation to analyze TTAŞ and TNet Inc's operations in the broadband Internet access services market. TTAŞ claimed that the area, which TCA was investigating, was regulated by the TA and therefore the TCA had no jurisdiction at all. Having had TA's opinion in hand, the TCA found that broadband Internet access services was regulated at the wholesale level but not regulated at the retail level. Following the TA's official view on the

¹⁰ Decision of the TCA is dated 10.02.2005 and numbered 05-10/81-30.

¹¹ Decision of the TCA is dated 02.09.2004 and numbered 04-57/796-199.

¹² Decision of the TCA is dated 28.06.2005 and numbered 05-41/583-150.

¹³ Decision of the TCA is dated 18.02.2009 and numbered 09-07/127-38.

case, the TCA decided that TTAŞ abused its dominant position on the wholesale market by creating a margin squeeze in the retail market and imposed a fine.¹⁴

26. In brief, for the practices and experiences of the TCA in telecommunications sector, it can be argued that, while keeping some reserves, the TCA lately lies outside of the picture if the issue is related with a market under the regulation of the TA . The TCA still holds its authority in the industry since there is no sectoral exception involving immunity from the competition law, but it may choose to remain behind if the relevant market is subject to regulation and let the TA handle the case in order to prevent forum-shopping by the market players and not to cause a duality.

3. Laws conflicting with the Competition Act

27. The TCA had some cases where the alleged violation was based on an authority resulting from a specific law.

28. In the case on Union of Bar Association,¹⁵ the TCA examined fixing of minimum fees by the Union of Bar Association. Attorneyship Law grants Union of Bar Associations of Turkey the right to determine the minimum level of fees¹⁶. Although the TCA mentioned that this has the effect of restricting competition and the provisions of Attorneyship Law conflicts with those of the Competition Act, the TCA decided to use its advocacy powers before the National Assembly, Prime Ministry and the relevant ministry to demand amendment in the Attorneyship Law upon a complaint regarding fixing of minimum level of fees by the Union of Bar Associations of Turkey.

29. In this decision, the TCA also mentioned that although the Union of Bar Associations of Turkey exceeded its powers granted by Attorneyship Law to fix minimum level of fees by fixing monthly fees to be paid to attorneys working on a contractual basis, actually the powers granted to the Union of Bar Associations of Turkey to fix the minimum level of fees were contrary to the Competition Act, and advocacy powers should be used before the National Assembly, Prime Ministry and the relevant ministry for the amendment in the Attorneyship Law. According to the TCA, following amendments in the relevant laws, demands by the professional associations to fix minimum level of fees may be assessed under the exemption provisions of the Competition Act.

30. In sum, the TCA can not use its enforcement powers against conduct by professional associations like that of the Union of Bar Associations of Turkey that is authorized by another law such as Attorneyship Law and it employs its advocacy powers to amend the relevant provisions of such laws.

31. The case on TEB¹⁷ is also relevant as to whether the practices resulting from a specific law can fall within the scope of the Competition Act¹⁸. In this case the TCA initiated an investigation concerning decisions and practices by Turkish Pharmacists' Association (TEB) and related chambers of pharmacists to fix discount rates while selling medicines to governmental and private authorities and establishments.

¹⁴ Decision of the TCA is dated 19.11.2008 and numbered 08-65/1055-411.

¹⁵ Decision of the TCA is dated 13.11.2003 and numbered 03-73/876 (a)-374.

¹⁶ Discussed also in the contribution for the Roundtable on "Competition in the Legal Professions", June 2007.

¹⁷ Decision of the TCA is dated 4.11.2004 and numbered 04-70/1012-247.

¹⁸ Discussed also in the contribution for the Roundtable on "Public Procurement - The Role of Antitrust Agencies in Promoting Competition", June 2007.

32. TEB is a public professional organization established by law and it, like other professional organizations, has its roots in the Turkish Constitution.¹⁹ According to the law establishing TEB, TEB can conclude agreements such as protocols with the relevant public and private authorities and establishments on behalf of pharmacists. It should be mentioned that decisions of TEB and such protocols are binding on the pharmacists according to the law establishing TEB and TEB monitors whether pharmacists comply with the decisions and imposes fines on those failing to comply. However, it should be mentioned that in case no such protocol exists, conditions of sale can be determined by the pharmacies and the relevant authorities and establishments independently of TEB.

33. As TEB represents the pharmacists and has a legal authority to sign agreements with public as well as private authorities and establishments, it signs a protocol with the Ministry of Finance representing various governmental authorities each year whereby conditions of sale of medicines to employees of the public authorities and establishments are regulated. The discount rate for medicines had been fixed in the protocol at 5% in 2001 whereas it decreased to 2.5% in 2002 and 2003 meaning that pharmacists had to make a discount of the fixed rate over the value of the prescription.

34. The TCA, in this case, imposed fines on TEB due to its decisions and practices fixing discount rates. It should be mentioned that the TCA could impose fines in this case as TEB tried to extend the practice of fixing the discount rates to be followed by pharmacists regarding their sale of medicines within the context of procurement by public (and private) authorities and establishments that were not subject to the above-mentioned protocol.

35. However, the TCA, being aware of the negative effects of the Protocol on competition in the public procurement of medicines, has decided to send its Opinion including its findings on regulations and practices affecting competitive conditions for the sale of medicines to the Ministry of Finance and Ministry of Health as part of its advocacy role.

36. The decision of the TCA was taken to the Council of State. The Council of State held the following decision:

“ the Turkish Pharmacists’ Association (TEB) was established by Turkish Pharmacists’ Association Act No. 6643 and regulates the duties and powers of the Association and member chambers of pharmacists. The decisions and practices of TEB considered to be anticompetitive by the TCA, depend on Article 39, subparagraph (j) of the Act No. 6643.

Within this framework, it is argued that the decisions and practices of TEB, which are found to be within the scope of the Competition Act, depend on the application of a legal provision on an issue that is under its sphere of duty. Therefore, as it is necessary that the said decisions and practices be evaluated under the Act No. 6643, which is under the Association’s sphere of duty, and be found whether they are in compliance with the legislation and law, the TCA does not have powers to make inquiries and take decisions on that matter.

In this case, the TCA’s decision imposing administrative fines due to the infringement of Article 4 of the Competition Act, concerning a decision taken by TEB depending on Article 39(j) of the Act No. 6643 was found not to be in compliance with law.”

¹⁹ According to Turkish Constitution; “Public professional organisations and their higher organisations are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public ...”.

37. Thus as seen from the above-mentioned decision, the Council of State concluded that the practices of TEB which are regarded anticompetitive by the TCA are based on an authority resulting from the Act No: 6643 and there is no ground for them to fall within the scope of the Competition Act as an infringement.

4. Regulated conduct defense and horizontal issues

38. The TCA initiated an investigation against the milk producers participating in a tender for school milk campaign of the Government. In this case²⁰ it was found that there was bid rigging by the participants to equally share the amount and value of a sealed-bid tender for milk organized by the Fund for the Encouragement of Social Assistance and Solidarity under Prime Ministry²¹. The tender involved provision and distribution of 1 million packed milk to primary schools. Such an amount exceeded the capacity of any milk producer in Turkey. 8 milk producers joined the tender. The TCA obtained enough evidence indicating that the milk producers held several meetings and shared the amount and the value of the tender equally. However, milk producers alleged that the outcome of the tender was influenced by guidance of the relevant Ministry and therefore it was out of their volition. Moreover, the participants also alleged that the tender specifications permitted the participants to form joint ventures with different undertakings for different regions which enabled the participants to learn the price for the regions in which the tender was related and the tender would not be realized successfully if the participants did not share equally the amount foreseen in the tender.

39. The TCA mentioned that tender design permitted sharing the amount equally only if all the participants acted in agreement. Refusal to join the agreement even by a single milk producer makes who would be awarded the tender in what region unclear and disallows a clear-cut market sharing.

40. As to allegations of intervention by the Ministry, the TCA argued that despite attempts by the Ministry to influence the bids to be made by milk producers, the correspondence sent from the Ministry did not designate that outcome of the tender was fixed by the Ministry. Moreover, given the existence of various laws prohibiting such instances, even an instruction by the Minister would be far from binding legally. However, the TCA agreed that the several attempts by the Ministry had an impact on milk producers and regarded them as mitigating circumstances.

41. Regarding the allegations that tender specifications permitting the participants to form joint ventures with different undertakings for different regions enabled the participants to learn the price in the region in which the tender was related, the TCA argued that the tender specifications enabled undertakings to join the tender alone or by a joint venture. The TCA argued that the fact that the tender design was wrong could not justify bid-rigging and the resulting equal sharing of the outcome. Moreover, tender specifications forbade bidding by both the milk producer and the JV it involved for the same region. Finally, the TCA argued that it could not be said that a sealed-bid tender was so falsely designed that it enabled equal sharing of the outcome in terms of the amount and value. At the end of the case, milk producers were imposed fines.

42. As seen from the case, the TCA did not accept the involvement of the relevant Ministry that was claimed to lead bid-rigging among the milk producers.

²⁰ Decision of the TCA is dated 26.05.2006 and numbered 06-36/464-126.

²¹ Discussed also in the contribution for the Roundtable on "Competition in Bidding Markets", October 2006.

43. Another significant decision that should be discussed under the “Regulatory Conduct Defence” topic is TCA’s accumulator decision.²² The decision was adopted after an investigation on AKUDER (Accumulator and Recovery Industrialist Association)²³.

44. The case was focused on the markets related to waste accumulators. As is known, issues concerning accumulators and waste accumulators, from production to final disposal, are regulated under the Directive 2006/66/EC in the European Union countries. This Directive repeals and replaces the Directive 91/157/EC which was the primary Community legislation on waste accumulators.

45. Since Turkey is in the process of harmonizing its legislation with the EU Acquis, several laws and secondary legislation have been adopted and/or changed in this process. With regard to the field of environment and waste management, “Used Batteries and Accumulators Control Regulation” was introduced on 31 August 2004 (the Regulation). The Regulation is mainly based on the Directive 91/157/EC. Likewise the Directive 91/157/EC, the purpose of the Regulation is to arrange the legal and technical principles to:

- ensure the production of batteries and accumulators according to certain criteria,
- prevent the production, import, export or sale of batteries and accumulators containing harmful substances,
- establish a collecting system for the recovery and disposal of used batteries and accumulators, and to create a management plan.

46. In line with this regulation, two associations were established to comply with the Regulation in Turkey, namely AKUDER which was founded mainly by the accumulator producers in Turkey and TUMAKUDER (Accumulator Importers and Producers Association) which was founded by importers.

47. AKUDER was established by five accumulator producers and three recovery firms. The producers’ market share reaches approximately 90% in the accumulator market. Three of them are the main accumulator producers in Turkey which have almost 80% market share. Two of these producers have recovery facilities as their subsidiaries.

48. AKUDER collects the waste accumulators from distributors through AKUCEV (Waste Accumulator Collection Incorporated) which is a firm that was established by the founding members of AKUDER. AKUCEV organizes and performs the tasks of collecting and delivering the waste accumulators to the recovery firms on behalf of AKUDER’s members. According to AKUDER’s plan, waste accumulators can only be transferred to the member recovery firms. Waste accumulators are distributed among the member recovery firms with respect to their shares in AKUCEV. AKUCEV do not sell the waste accumulators to non-member recovery firms. On the other hand, member recovery firms are not allowed to take waste accumulators from the collectors other than AKUCEV. The price of the waste accumulators at which AKUCEV sell them to the recovery firms is determined by the Board of Directors’ decisions of AKUCEV regularly.

49. AKUCEV, by its Board of Directors’ decisions, was fixing the prices each and every stage of the transactions of waste accumulators. The quantity of waste accumulators to be sold to the recovery firms was also determined by AKUCEV beforehand. Under this system, all the concerned actors were prevented

²² The decision of the TCA is dated 20.05.2008 and numbered 08-34/456-161.

²³ Discussed also in the contribution for the Roundtable On “Horizontal Agreements In The Environmental Context”, October 2010.

from exploiting the waste accumulators commercially themselves. Neither the dealers nor the distributors nor the recovery firms were able to determine or negotiate the prices at which they wished to sell or purchase the waste accumulators. In addition to that, they were also restricted in their relations with third parties. The dealers and distributors were not allowed to sell their waste accumulators to collectors other than AKUCEV despite the fact that under the Regulation's requirements they can deliver the waste accumulators to any licensed collectors or to any licensed recovery firms directly. The member recovery firms were prevented from purchasing waste accumulators from collectors other than AKUCEV although their sole obligation under the Regulation is not to accept waste accumulators brought by unlicensed collectors.

50. Having examined all the findings of the investigation, the TCA decided that AKUCEV violated the ban of Article 4 of the Competition Act by fixing the sale price of the waste accumulators of dealers and distributors, preventing the distributors and dealers from selling waste accumulators to other licensed collectors, and preventing the recovery firms from purchasing waste accumulators from other licensed collectors.

51. The TCA's analysis showed that while the regulation put some targets for the producers and importers in terms of the management of waste accumulators, it had no provisions regarding the price or business activities of the firms. On this account, the TCA put forward that the activities and decisions of AKUCEV neither emanated from requirements of the Regulation nor served the realization of environmental goals behind the Regulation.

5. Conclusion

52. Regulated conduct defense has been used in different contexts in competition law and policy enforcement in Turkey. With respect to regulated markets, the TCA has adopted an approach to do its best to enforce the competition rules where there is no clear regulatory legislation with respect to the case in question. However, the TCA may refrain from enforcing the competition rules if there is a clear regulatory rule that may justify or authorize a specific conduct which is otherwise a competition infringement. In general the TCA has been in the opinion that the sectoral regulators should be focusing on economic and technical regulations with a view to enhancing, protecting and improving competition in the regulated sectors. Thus it is important to see that sectoral regulators should be careful about competition issues and refrain from authorizing an otherwise anticompetitive conduct.

53. With respect to the laws that allow room for regulated conduct defense, the TCA takes the position of enforcing competition rules where the specific law is not clear enough to authorize a conduct as in the case of TEB. However, the TCA may refrain from enforcing competition rules where the specific law clearly authorizes the conduct in question as in the case of decision on Union of Bar Association.

54. With respect to horizontal competition issues that may result from a specific regulation and/or administrative action, the TCA has an approach of enforcing competition rules effectively. In such cases, existence of such a regulation and/or administrative action could only be regarded as an alleviating factor in the calculation of fines to be imposed.