



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

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ROUNDTABLE ON REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES

-- Note by Turkey --

This note is submitted by the Turkish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 8-9 June 2006. This roundtable will take place on Thursday 8 June, afternoon.

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1. According to Article 9 of the Law on Protection of Competition No 4054 (Law No 4054); Turkish Competition Board (the Board) is empowered to notify the undertaking and associations of undertakings a decision including behaviour to be fulfilled or avoided to establish competition and maintain the situation before infringement. It is obvious that the Board is able to order undertakings and associations of undertakings to act in a certain way or it may prohibit them from performing certain acts. However, while doing so, the orders would be confined to the boundaries of establishing competition and maintaining the situation before the infringement.

2. Moreover, where the occurrence of serious and irreparable damages is likely until the final decision, the Board may take interim measures which have a nature of maintaining the situation before the infringement. The reasoning of the article provides that interim measures can be taken if there are strong indications that there will be serious and irreparable damages. However, the suffering parties can not be placed in a better or worse position than they were before the abusive practice, as a consequence of the Board's orders.

3. Furthermore, the Board has to impose a fine up to 10% of the annual gross revenue for anti-competitive agreements and abuses according to Article 16 of the Law No 4054.

4. With respect to mergers and acquisitions, the Board, upon notification of mergers and acquisitions exceeding certain thresholds, is obliged to permit the merger or acquisition transaction as a result of the preliminary examination to be performed by it within fifteen days, or if it decides to deal with this transaction under final examination, it is obliged to duly notify, with its preliminary objection letter, those concerned of the fact that the merger or acquisition transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it. Moreover, where a merger and acquisition transaction whose notification to the Board is compulsory is not notified to the Board, the Board shall deal with the merger or acquisition under examination on its own initiative, when it is informed about the transaction anyway. After the examination; in case it decides that the merger or acquisition creates or strengthens a dominant position as a result of which competition is significantly decreased, it decides that the merger or acquisition transaction be terminated, together with fines; all de facto situations committed contrary to the law be eliminated; any shares or assets seized be returned, if possible, to their former owners, whose terms and duration shall be determined by the Board, or if not possible, these be assigned and transferred to third parties; the acquiring persons may by no means participate in the management of undertakings acquired during the period until these are assigned to their former owners or third parties, and that other measures deemed necessary by it be taken.

5. To understand how provisions of especially Article 9 implemented in practice, some examples will be mentioned below.

6. In *BIRYAY*¹ case, two undertakings (BBD and YAYSAT) operating in the market for the distribution of newspapers and journals created a joint venture (BİRİYAY) to jointly distribute newspapers and journals. BBD and YAYSAT were owned by two separate groups publishing newspapers and journals. The undertakings and their joint venture were considered as jointly dominant in the relevant market for distribution of newspapers and journals as their combined market share in the last five years was 100%. BBD and YAYSAT created JV in order to distribute rival newspapers and journals under different conditions than publications belonging to their groups and force publishing houses to conclude contracts with BİRİYAY.

7. In the market for distribution of newspapers and journals, entry to the market and ability to exist in the market require two elements of critical importance that are setting up sale points the number of

¹ 17.07.2000; 00-26/292-162.

which is sufficient enough to present the publications to the readers and feeding the sale points with publications in sufficient numbers and varieties. As a result, it has been considered that the requirement to set up sale points in excess of ten thousand the existing ones of which are hard and economically irrational to substitute is a serious barrier to market entry. Moreover, this barrier to entry was caused by the conduct of distribution firms who had concluded exclusive agreements with sale points prohibiting rivals to use those sale points to sell their publications.

8. In this case, BBD and YAYSAT complicated activities of rival publishers and distorted the conditions of competition in the market of newspaper and journal publication by forcing rival publishers to sign contracts with BİRİYAY, refusing to distribute publications by rival publishers who refused to sign contracts, imposing new commission rates. The publishing houses unwilling to sign contracts were exposed to the risk of not having their publications distributed and not receiving their payment. Therefore, the abusive conduct in the market of newspapers and journals distribution aimed to distort competitive conditions in another market, market of newspapers and journals publication.

9. Moreover, it was seen that for purposes of rendering difficult the activities of DostBD, the competitor distributor, BBD and YAYSAT attempted to eliminate DostBD sale points by turning them into "BBD and YAYSAT group" dealership, and to push new DBD sale points towards outskirts, that dealership was offered to DostBD sale points in return for not selling publications distributed by DostBD, and that sale points were made to sign backdated contracts in order to prevent DostBD from using the existing sale points for newspapers and journals, and within this framework, it was decided that BBD and YAYSAT jointly abused their dominant position by means of "committing practices which aim at making difficult the activities of their competitors in the market".

10. After the determination of abuse, in addition to monetary fine, the basic remedy imposed by the Competition Board was removal of two provisions from the contracts between BBD and YAYSAT and the sale points. First clause to be removed included prohibition of display and sale of publications of another distribution firm or publishing house and the second included requirement on the sale points not to supply publications for sale to another person or establishment around its address.

11. Moreover, the Competition Board decided to notify the decision to municipalities that established or leased to third persons sale points (kiosks) located in main arteries and public squares to do the necessary regulations for sale of all newspapers and journals regardless of the identity of the distribution firm because of their important sales potential due to their location and their limited number.

12. It is obvious that the remedy in this case is more important than the fine and it proved to be an effective instrument because the complaints terminated after removal of the clauses in the relevant contracts and municipalities' compliance with the Board's notification by carrying out regulations for sale of publications irrespective of the source in kiosks.

13. In *Turkcell*² decision, one of the main issues was the complaint about campaigns organised by Turkcell, the dominant GSM operator in the market for GSM services, with mobile phone distributors in which Turkcell subsidised mobile phones and did not charge fees for the line and the sim card on the condition that the distributors did not work with the other operator. The Board decided that Turkcell, by working exclusively with mobile phone distributors under such campaigns, prevented these distributors from holding similar campaigns with competing operators, and consequently prevented mobile phone devices belonging to these distributors from being sold with the line of the competing operator. Moreover, Turkcell, by means of working exclusively with the mobile phone sale points (dealers and the activation

² 20.7.2001; 01-35/347-95.

centres and subscription points), complicated the market activities of the competing operator as a joint consequence of the facts that the activation centres and subscription points were at the same time the mobile phone dealers of distributors and almost all of these distributors were exclusively working with Turkcell and made dependent on it. These acts were regarded as abusive as such practices complicated the activities of the rival GSM operator. In addition to fines, the Board decided that in case Turkcell's dealers were the dealers of mobile phone distributors at the same time, the condition of exclusive operation could not be introduced, as it was not possible for competing operators to acquire dealers of the same nature and thus competition in the relevant market would be significantly restricted. Therefore, the Board required that provisions related to exclusivity with Turkcell Activation Centres which were the dealers of the distributors of mobile phones at the same time be deleted within 60 days and it be notified to the Turkish Competition Board.

14. Another issue in this case was sale of mobile phones with sim lock as part of the campaign organised by Turkcell that prevented the customers to use their mobile phones with the line of the rival operator. As to this conduct, the Board decided to send the following Opinion to the Telecommunications Authority:

- SIM lock shall not be applied to the devices which are not included within the scope of the promotion, that is, part of the price is not covered by a GSM operator depending on the condition of subscription for a certain period of time;
- in case that devices with SIM lock are sold/given within the scope of the promotion;
- the consumer shall be informed that the SIM locked device is sold/given to him/her, that the SIM lock will be released following the expiry of the lock obligation period and upon the demand of the consumer prior to such expiry date, or, about the advantages to be provided to the consumer in case that he/she remains as subscriber following the expiry of such date;
- the consumer shall be informed that the owner of the device shall be free to release the lock prior to the expiry of SIM lock period, and on how much promotion shall be returned to the owner of the device for how much period remained to the operator which performs the promotion in case that the lock is released prior to its period.

15. These remedies made it possible for the rival operators to organise campaigns with any distributor of the mobile phones and also for the customers to use any mobile phone with the sim card of any GSM operator.

16. *Digitürk*³, another case where the Board imposed behavioural remedies, concerned broadcasting rights for the matches in the Turkish Football Federation (TFF). TFF transferred the broadcasting rights to Digitürk and Atlas after a tender process and they became the sole broadcaster. Digitürk and Atlas offered to sell the images of the 9 football matches played in a week to the broadcasting organisations as a package lasting 3 minutes and refused demands for such images under different conditions such as images of one or a few matches rather than the whole package or images lasting less than 3 minutes. This was regarded as an abuse of its dominant position in the market for recorded images of matches in the Turkish Premier Professional Football League in another market, i.e. the market for free television broadcasting. They also applied discriminatory conditions in favour of a certain broadcasting organisation they had close relations against others and this was also regarded as an abusive practice. The Board, upon the demand of the complainants, took interim measures before reaching its final decision that required Digitürk and Atlas, upon the request of any broadcasting organisation related with any match played, give images within 45

³ 28.08.2002, 02-50/636-258.

minutes at the latest from the end of the match, which would be prepared to involve the goals, if any, of the match it belonged to and the other important positions, would have a broadcastable quality, would last for 1-3 minutes, would be of standard lengths (that might be determined as a result of the market survey to be made by the broadcaster), in return for a charge to be paid in cash within the limit stated in the contract referred to and without putting forward any other conditions about the provision of images, provided that they had the same content and they were delivered to the representatives of all broadcasting organisations simultaneously, and practices which resulted in discrimination in favour of any broadcasting organisation be avoided. The Board reminded these conditions in its final decision in addition to fines imposed. The Board aimed to establish competition in the market for free broadcasts by allowing the broadcasting organisations to prepare sport programs including the highlights and it was quite successful in doing so as the relevant images were supplied accordingly.

17. In *ISS v. Türk Telekom (TTAŞ)*⁴ case, the Board initiated an investigation against the incumbent fixed line telecommunications operator and (then) monopolist, TTAŞ, after considering the following alleged conduct in internet service providers markets as serious:

- Preventing directly or indirectly another undertaking from entering into the area of commercial activity, or carrying out actions aimed at complicating the activities of competitors in the market via tariffs and refusal to provide an opportunity to ISPs to offer a dial up internet access service without the local network users' need to subscribe.
- Distorting competitive conditions in the internet services market via offering internet access below cost to internet users.
- Non-provision of Primary Rate Interface (PRI) lines demanded by ISPs to offer services to subscribers using local telephone network, obliging ISPs to use TNet's⁵ infrastructure, tying discount system in leased lines for ISPs to the condition to conclude 3-7 years-long contracts, and restricting production, marketing or technical development to the prejudice of consumers by preventing development of rival new networks in this way.
- Providing no response on time to applications by ISPs for lines, tying fulfilment of the demand for lines to the grant of the equipment to be used, denying ISPs other than revenue sharing partners and TNet the opportunity to offer internet access through cable TV network, thereby putting forward different terms to ISPs with equal status for the same and equal rights, obligations and acts.
- Demanding from the ISPs information that have the nature of trade secrets and using them in favour of its own internet service, allowing return of maximum 10% of VPOPs (Virtual Point of Presence), obliging the ISPs, leasing basic telecommunications facility from TTAŞ, to use products of certain firms in these facilities, and thereby carrying out actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market.

18. During the investigation process In *ISS* case, the Board took interim measures against TTAŞ that was dominant in the market for internet infrastructure services and decided that:

⁴ 2.10.2002; 02-60/755-305.

⁵ TNet is the name of both internet backbone owned by TTAŞ and its internet service providing unit.

- The prices of services it offered under the name of TTNNet in the internet services market and tariffs and practices towards internet service providers (ISPs) which were obliged, in order to operate in the same market, to use the infrastructure services that were essential facilities offered by TTAŞ be redetermined to avoid cross-subsidisation in terms of the internet services it offered under the name of TTNNet, and competition infringements.
- It would end the practices compelling ISPs to lease only Virtual Point of Presence (VPOP) to offer internet access, and it would ensure ISPs to use, upon their request, technologies that could be used for internet access (ISDN-PRI, ISDN-BRI, No.7 E1 etc) to the possible extent and without leading to discrimination.
- It would open xDSL internet access opportunity and internet access through cable TV network with the facilities that it employed in TTNNet services, and under reasonable and technically possible conditions without leading to discrimination.
- It would terminate the practice of demanding the information from ISPs that would provide itself a competitive advantage (user identity, name, address, phone number etc.) except for those that were technically necessary.
- It would inform the ISPs in writing about the termination of the practices mentioned above and the necessary regulations on this matter within 15 days from the communication of the decision, and it would notify these transactions to the Competition Authority.

19. At the end of the investigation, in addition to imposing fines, the Board, in order to be able to establish a healthy competitive environment in the relevant markets, decided to notify TTAŞ that it should not, directly or indirectly, subsidise internet access service tariffs for end users with the revenue obtained from the activities in those markets where it had a dominant position and by redetermining its tariffs without leading to cross subsidisation in the market for internet access service, it should terminate its abuse of dominance in the markets including the infrastructure necessary for offering broadband internet access service to corporate users and narrow band internet access service to local users, which complicated the activities of complainants and other undertakings, operating in the markets for broadband internet access service to corporate users and narrow band internet access service to local users. In general, the decision has been successful to a large extent in limiting the abusive and exclusionary practices of TTAŞ in the ISP markets.

20. One decision to mention where the Board did not employ behavioural remedies is *National Roaming*⁶ decision. In the GSM infrastructure services market, two undertakings, namely Turkcell and Telsim, were operating and they reached 90 percent coverage area at that time. Two other undertakings (İş-TIM and Aycell), having recently obtained licenses and thus newly entering the GSM services market at that time, did not have networks covering the entire territory of Turkey and a coverage sufficient to be able to compete in the GSM services market could not be achieved due to geographical and topographical difficulties, legal restrictions, natural monopoly circumstances, formation of bottlenecks, need for public support for building the facilities, technological limitations, and economic limitations that could be grouped under the headings of technical difficulties, legal difficulties and economic difficulties and as a result they could not register subscribers and realise investments with revenues coming from these subscribers. Accordingly, the Competition Board regarded the infrastructures of Turkcell and Telsim as “essential facilities” until a sufficient coverage area was achieved by the new entrants. Therefore, the Competition Board ruled that incumbent operators’ (Turkcell and Telsim) setting access prices far above

⁶ 9.6.2003; 03-40/432-186.

their costs resulting in an artificial rise in rivals' costs created a serious barrier to entry of newly arriving operators, İŞ-TİM and Aycell.

21. In the end, the Competition Board has imposed administrative fines on Turkcell and Telsim amounting to 1% of their net sales for the year 2001, for abusing their dominant position in the telecommunications market via refusing to comply with their obligation to make roaming agreements with İŞ-TİM, the third leading Turkish mobile operator. The amount of fine imposed on both operators was nearly TL 30 trillion (USD 21.5 million). This penalty amount was a record fine imposed by the Competition Board since its foundation in 1997.

22. The Board did not impose any behavioural remedy itself in order to end the violation after taking into account the likelihood of changes in the market conditions and the change in the need of the new entrants for national roaming in the period between the start of the investigation of the Competition Board and its final decision and it thought it would be proper to refer the matter to the Telecommunications Authority, that was responsible to make necessary regulations in the telecommunications sector and had the most recent information about the market as well as the status of its legislation that was challenged in courts that stayed execution of some of them, to determine how to impose national roaming obligation under market conditions at that time while deciding how to terminate the infringement and the conduct required and to be avoided to re-establish competition in the relevant market.

23. The Competition Authority has tried to delimit the exclusionary effects of network externalities in the GSM mobile phone markets in Turkey. However, apart from the fact that the fines imposed by the Board could not affect the conduct of violators, Turkcell and Telsim, as the Council of State, the supreme administrative court, stayed the execution of the decision, it was further argued that *“The Competition Board’s decision on roaming arrangements will have little effect on the development of competition in the mobile telephone services market. With the merger of Aria⁷ and Aycell, roaming has become a non-issue and it will remain a non-issue until further new entry, which is not likely to take place in the near future.”*⁸

⁷ Aria was İŞ-TİM’s trademark used for its mobile phone services.

⁸ See Working Paper Series of Economic Policy Research Institute, “Competition and Regulation in the Turkish Telecommunications Industry” by Izak Atiyas, July 2005, p. 28 available at [http://www.tepav.org.tr/tur/admin/dosyabul/upload/Turkish%20Telecoms%20nc%20\(2\).pdf](http://www.tepav.org.tr/tur/admin/dosyabul/upload/Turkish%20Telecoms%20nc%20(2).pdf)