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Competition in Energy Markets – Note by Türkiye

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More documents related to this discussion can be found at www.oecd.org/competition/competition-in-energy-markets.htm

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Türkiye

1. Introduction

1. This contribution intends to provide information on the fundamental competition problems faced in the energy markets in Türkiye, the effect of the regulation of energy markets on competition, and the opinions submitted by the Competition Authority (Authority) to other regulatory authorities to ensure a more competitive market. In that framework, it will include assessments concerning the Turkish fuel market.

2. An overview of the previous Competition Board (Board) decisions shows that two types of infringements are prominent in the Turkish fuel market. These are joint price setting, which is a type of horizontal infringement, and resale price maintenance, which is a type of vertical infringement. In this context, the contribution will first examine the recent "*Fuel*" decision of the Board on resale price maintenance. Afterwards the "*Burdur LPG*" decision will be mentioned, which involves joint price setting. Then, the contribution will list some of the regulations that restrict competition in the energy market, and the suggestions made by the Authority. Lastly, the contribution will touch upon the potential negative effects of over-regulation in the fuel sector on competition in the market.

2. Fuel Decision[1]

3. The relevant investigation was launched in response to the claims that BP, OPET, POAŞ, SHELL and TOTAL, some of the prominent fuel distributors in Türkiye, intervened in the pump prices of their dealers, forcing them to sell fuel at the maximum prices notified. The file examined the documents acquired during the on-site inspections and analysed the sales prices implemented by the dealers of each distribution company. This analysis was limited to the provinces of Ankara, Bursa, İstanbul, İzmir and Mersin where the highest amount of fuel and LPG autogas is sold, between the dates of January 2015 and January 2019. The analysis compared the daily recommended (maximum) sale prices (RP) notified by distributors to their dealers and the minimum pump sale prices (MPP) implemented each day by the dealers, for the gasoline product specifically. Accordingly, the first step was to determine where MPP was higher than or equal to RP.

4. Documents collected during on-site inspections at BP, SHELL and POAŞ showed that the undertakings engaged in conduct intended to intervene with the prices of their dealers for the gasoline, diesel and LPG autogas products, and when the documents were evaluated in conjunction with the price analysis, it was concluded that the undertakings acted in violation of the competition rules by fixing the resale prices of their dealers for the aforementioned products. The on-site inspection conducted at TOTAL's premises did not reveal any documents suggesting that the undertaking fixed the resale prices of its dealers. Additionally, since the price analysis showed that the MPP and RP were significantly different, it was concluded that resale price maintenance did not occur. The decision noted that no documents were found at OPET that could be significant in terms of the investigation. However, OPET dealers' high compliance with the recommended maximum sale prices was evaluated as an evidence for resale price maintenance by OPET. In that framework, it was noted that the near complete compliance of the OPET dealers with the

[1] Board Decision dated 12.03.2020 and numbered 20-14/192-98.

maximum price was significantly similar to the compliance of BP, SHELL and POAŞ dealers, where the inspection did find infringements.

5. As a result, it was decided that BP, POAŞ, SHELL and OPET violated Article 4 of the Act no 4054 on the Protection of Competition (Act no 4054) by fixing the resale prices of their dealers. However, the parties resorted to judicial review in order to have the Board decision annulled. The court of first instance dismissed the suits filed by BP, SHELL and POAŞ. On the other hand, the court of first instance found in favour of the claimant in the suit filed by OPET, and annulled the relevant Board decision. The judicial processes are currently ongoing for the undertakings concerned.

3. Burdur LPG Decision [2]

6. The Board launched an examination in response to the claim that undertakings selling LPG autogas in the central district of Burdur jointly set prices by collusion, and the on-site inspections determined that the undertakings concerned shared competitively sensitive information in the Whatsapp group in which they participated. The messages in the Whatsapp group concerned showed that, in particular, the undertakings agreed to comply with the maximum/recommended prices notified to them by the distributors, and not to go below those prices. Additionally, examination of the pricing behaviour of the undertakings concerning fuel products revealed that the sale prices of a large majority of them were the same as the maximum/recommended sale prices notified by their distributors. This showed that the undertakings implemented the joint decision they took to sell at the maximum/recommended prices and not to implement discounts, which was already clearly established by the Whatsapp group messages As a result, the Board took all of the information, documents and analyses collected under the file and decided that ten undertakings in the province of Burdur jointly set the sale prices for LPG autogas and fuel (gasoline, gasoline with additives, diesel and diesel with additives), and thus violated Article 4 of the Act no 4054.

7. The pricing data and the analyses conducted showed that the undertakings under investigation were compliant with the maximum/recommended prices notified to them by their distributors, even before they set up the Whatsapp group. However, since the investigation could not establish whether this compliance was due to an anti-competitive agreement between the undertakings or to the individual decisions of the undertakings, it was decided that the behaviour of the undertakings before the collected documents did not constitute an infringement.

4. Opinions Submitted by the Authority on Improving Competitiveness in the Fuel Market

8. This section will include some of the opinions submitted by the Authority to the bodies with the power to regulate the energy market in Türkiye to establish the effective functioning of the competitive process in the Turkish fuel market.

9. Within the framework of the investigation[3] conducted on the pricing behaviour of Tüpraş, which is a refinery company based in Türkiye, it was established that TÜPRAŞ held dominant position in Türkiye for the wholesale markets of unleaded gasoline, diesel and black petroleum products. As a result of the investigation, the Authority submitted an

[2] Board Decision dated 09.01.2020 and numbered 20-03/28-12.

[3] Board Decision dated 17.01.2014 and numbered 14-03/60-24.

opinion to the Ministry of Energy and Natural Resources and the Energy Market Regulatory Authority (EMRA), making the following points: TÜPRAŞ took Platts Italy CIF Med prices as reference in its "Fuel Maximum Price Methodology" for its "Fuel Maximum Price Tariffs," leading to the formation of the domestic fuel prices above the competitive level to the disadvantage of the consumers; CIF prices included insurance and freight rates in addition to the product prices; TÜPRAŞ ex-refinery prices were determined by adding certain rates/profit margins to the reference CIF prices, reflecting the freight and insurance rates in the product prices, despite the fact that these costs were not incurred if there was no imports involved. Thus, the opinion noted that the current tariffs allowed TÜPRAŞ to act as an importer when pricing the fuel products they manufacture, providing it with the opportunity to account for the costs it would have incurred if it had imported the relevant products from abroad instead of manufacturing them itself and to add a certain profit margin on them, which led to the prices in Türkiye going above the global free market prices in accordance with the current legal regulations and the tariffs used when calculating the refinery sales prices. Consequently, the Authority emphasized that it could be more suitable for TÜPRAŞ to reference FOB prices as in its Fuel Maximum Price Tariffs instead of the CIF prices when setting refinery sales prices for the products it directly manufactures.

10. Another opinion of the Authority with relation to the fuel market is the Authority opinion submitted in 2013 concerning the Draft Law Amending the Petroleum Market Law no 5015 and Other Laws. Some of the points made in the opinion were also included in the Fuel Sector Report published by the Authority in 2008, such as the suggestion to adopt regulations regarding the necessity to allow the building of independent stations, and the suggestion to set the limits of the minimum sales obligations placed on the dealers by the distributors due to the drawbacks they might pose. As well, the opinion suggested removing refinery tariffs from being subject to notification and requiring EMRA authorization for them instead. Moreover, it was also noted that the provisions of the Petroleum Market Law no 5015 concerning the "notification of maximum prices to dealers" should be amended since these provisions were found to lead to significant coordinating effects on price competition at the distribution and retail levels. In that context, it was proposed that distributors should not introduce maximum/recommended prices for their dealers and that the circumstances under which distributors would be allowed to notify maximum/recommended prices to their dealers should be set out separately.

5. The Effect of Regulation in the Fuel Sector on Competition

11. Fuel distribution companies operating in Türkiye can procure petroleum products from the refineries or through imports and trade between distributors. As such, especially for those distributors who do not have any storage facilities, procuring products through trade between distributors is critical.

12. An amendment made to the Petroleum Market Law no 5015 on 29.04.2021 introduced a provision prohibiting distributors from selling the fuel they purchased from one distributor to another distributor. As the justification for the provision concerned, it was explained that some financial irregularities were occurring in invoicing as a result of the difficulties in effectively monitoring the market stemming from the product changing hands multiple times, and that trading the same product many times also increased the costs. During the work on the Fuel Sector Report that is currently being prepared by the Board, it is found that the restriction of trade between the distributors could pose a risk of direct intervention in the functioning of the market and competition. In that framework, it is noted that financial irregularities could be better eliminated through supervision mechanisms and sanctions that do not restrict competition. On the other hand, the Report also notes that

undertakings should take their commercial decisions on their own, and as part of that, if they cannot provide competitive prices due to an increase in their costs, then they are expected to set different commercial policies or be unable to remain operating in the market for long. As a result, it is indicated that the legal arrangement in question, which restricts trade between the distributors, could potentially harm the functioning of competition in the market.