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Working Party No. 2 on Competition and Regulation

COMPETITIVE EFFECTS OF REGULATIONS OF REAL PROPERTY

-- Turkey --

18 February 2008

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 18 February 2008.

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COMPETITIVE EFFECTS OF REGULATIONS OF REAL PROPERTY

1. There may be restrictions on land use in its broadest meaning which might have repercussions on competition in the market. This contribution intends to respond various aspects on this issue to be discussed in Working Party No. 2 on Competition and Regulation by citing certain legislation as well as attempts to enact legislation on land use, and attitude of the Turkish Competition Authority (TCA) to the possible extent.

1. The Initiatives on Large Stores

2. Governments sometimes try to impose certain restrictions on large stores upon calls by several stakeholders affected by increasing number of such stores. Such legislative attempts in Turkey aiming at moving large stores to remote areas outside the cities or require authorisation for or restrict their establishment met objections in the past by the TCA as part of its advocacy role.[1] Against these legislative attempts, the TCA argued that such restrictions to be imposed were to create legal barrier to new entry, prevent expansion of larges stores, affect new investments and inflow of foreign capital, and would increase consumer prices with a negative impact on consumer welfare. The TCA also tried to draw attention to possible increase in mergers and acquisitions in case establishment of new large stores was not authorised and the fact that this might lead to increasing concentration levels and buying power and resulting negative effects on competition in the market. Fortunately, legislative attempts including restrictions on such stores currently lay dormant.

3. Regarding mergers and acquisitions in the retail market, the TCA takes into account availability of land for commercial activities and whether it takes long time to secure necessary legal permissions. Although in a study[2] published in 2005 it is cited that land/store availability is an important barrier for further growth of the organised retail sector, development of urban areas without a proper implementation of well-designed city planning in Turkey has the most adverse effect in retail sector and difficulties in finding a convenient place for large stores in city centres leads to high rents and prices for suitable places and areas, the TCA, in one of the most important merger cases involving retail stores, considered that it was easy to find suitable land or buildings in certain towns in question and it normally took only three months to obtain legal permissions necessary to operate a store and as a result it was considered that new entry would be timely.[3] Similarly, the study mentioned also provides in the conclusion part that there are no legal restrictions on entry in the retail market.

2. Liquid Fuel and LPG stations

4. A provision in the Petroleum Market Law provides an explicit restriction on trade regarding liquid fuel and LPG stations and requires that distances between liquid fuel and LPG stations on the same direction shall be no less than 10 kilometres on highways and 1 kilometre within the city. It can be

1 See Annual Reports of the TCA in 2001, 2003, 2004 and 2005 for further details.

2 The study entitled "Fast Moving Consumer Goods Competitive Conditions and Policies" is available at http://www.tepav.org.tr/eng/index.php?type=policypapers .

3 *Migros/Tansaş* (31.10.2005; 05-76/1030-287).

mentioned that there is no indication that such a provision has significant impact on competition in the market.

3. Base Stations

5. Construction of base stations has been taken into account among other factors in the past by the TCA while deciding on whether existing GSM infrastructure constituted essential facilities for the new GSM operators entering the market.[4] It was considered that constructing base stations involved technical difficulties, economic difficulties, and legal difficulties such as renting the necessary buildings where the base stations would be constructed (complications in finding place due to awareness that base stations may be harmful for public health, increasing trend of rents, revenue seeking attitude of the municipalities), supplying energy and obtaining construction permits.[5] However, in order to abolish the complications caused by necessary construction permits from municipalities, the relevant law, namely Telegram and Telephone Law, was amended to include in 2004 a clause removing the necessity to obtain construction permits regarding all types of movable and immovable property and equipments used to establish infrastructure for electronic communication such as masts, towers, antennas, energy transmission lines, facilities in the form of infrastructure etc.

4. Rights of Way regarding Telecommunications Services

6. The rules on the rights of way regarding telecommunications services have been regulated by a secondary regulation adopted by the Telecommunications Authority, the sectoral regulator. The secondary regulation aims to regulate methods and bases of rights of way necessary for the operators in telecommunication sector to establish and utilise infrastructural facilities and provides certain principles that should be taken into account during the implementation of rights of way such as;

- Efficient and productive utilization of the country resources,
- Provision of an effective and sustainable competition environment,
- The utilization of the rights of way being primarily dependent on the mutual agreement of the parties,
- Ensuring that the rights of way application be technically possible and economically proportional and reasonable,
- In case a telecommunication infrastructure exists on the immovable to be utilized in the scope of the rights of way and the Telecommunications Authority decided for common settlement and facility sharing on this infrastructure; giving priority to common settlement and facility sharing before way of right demand of the operator,

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4 *National Roaming* (9.6.2003; 03-40/432-186)

5 Such difficulties when combined with other circumstances surrounding the case complicated the activities of the new comers to construct the necessary infrastructure and the refusal to provide access to GSM infrastructures by the owners of the existing collectively dominant GSM operators with no objective justifications were regarded as amounting to abuse of dominant position. The TCA only imposed fines as it was the duty of the Telecommunications Authority to determine the conditions of access. Later on, the issue lost its importance as the new comers merged and access to rival undertakings' infrastructure lost its significance.

- Evaluation of applications containing rights of way to be done without admitting any delay and acting transparent without differentiation between the operators at similar conditions by Way of Rights Supplier Public Institutions and Establishments,

- Seeking the special conditions resulting from environmental protection, city and country planning.

7. The secondary regulation provides that the parties are free to make any agreements related to the rights of way provided that they abide by the related legislation, authorisation and concession agreement, telecommunication licences, general authorisation, and arrangements by the Telecommunications Authority. Moreover, the parties can freely determine the price for rights of way in a way that it does not lead to abusing of this right. In case parties can not reach an agreement, settlement is to be provided by the courts.

8. Istanbul Metropolitan Municipality has issued a tariff schedule regarding rights of way by taking into account the secondary regulation adopted by the Telecommunications Authority. According to the tariff, the price for right of way is fixed at 0.25 ytl (around 14 eurocent) for 2007. It is suggested that Istanbul Metropolitan Municipality, by charging minimal price for rights of way, aims to ensure widespread availability of broadband access services.

5. Access Requirements

9. First of all, in Petroleum Market Law there are certain provisions regarding access to transmission facilities and licensed storage facilities. According to the relevant article, transmission and storage licensees with spare capacity in their facilities are obliged to meet transmission and storage demands. However, such demands should satisfy certain requirements such as complying with the tariff[6] of the licensee, being appropriate for the capacity of the relevant facility, not having deteriorating or risk increasing negative effects on the licensee's facilities, operational rules and conditions and the petroleum transmitted or stored by the licensee, and conforming with the quality of the facility, transmitted or stored petroleum, and be at the minimum quantity determined in the tariff of the licensee. According to the Law, licensees are obliged to meet demands on non-discriminatory basis except for the capacity restrictions on transmission and storage.

10. It should also be mentioned that in both Electricity Market Law and Natural Gas Market Law which requires licenses to be obtained from the Energy Market Regulatory Board in order to operate in the market, cites, among provisions that must be included in the license, provisions regarding the conditions in relation to the utilization by other persons of the facility and/or facilities owned or operated by the license holder in accordance with the purposes of the license, when deemed necessary. In addition, licenses should also include provisions obligating the holder of a distribution or transmission license to provide non-discriminatory system access and use of system rights to all real persons and legal entities.

11. Regarding access to port services, it should be mentioned that during the privatization of certain ports via long-term concession contracts for the transfer of operating rights, certain clauses were inserted by the Privatization Administration into, for instance, the concession contract for the transfer of operating rights of Mersin port in southern Turkey, to avoid discriminatory practices following the conclusion of the privatization. The reason for this was the competitive concerns mainly resulting from absence of full substitute for the port in the relevant geographic region, articulated in the Opinion sent by the TCA to the

[6] Tariffs for transportation and licensed storage activities within the facilities connected to these lines under the scope of transmission licenses shall be prepared by the licensees and implemented pursuant to the approval of the Energy Market Regulatory Board.

Privatization Administration before the announcement of the tender conditions.[7] Therefore, it can be mentioned that access to port services to be offered for instance in Mersin port should be made available on a non-discriminatory basis according to the relevant concession contract. Regarding concerns whether such clauses inserted into the concession contract may deter investments to be made, it should be mentioned that the concession contract also includes requirements for investments in order to increase the capacity for the first five years and performance criteria to be satisfied in that period in order to ensure continuity of services provided in the port.

12. In another case[8] concerning privatisation of TÜPRAŞ (Turkish Petroleum Refineries Co.), the TCA sought whether its acquisition was compatible with merger control provisions of the Competition Act. TÜPRAŞ and a company, namely AYGAZ, belonging to acquiring party realised 58% of total LPG imports into Turkey. When production of TÜPRAŞ was taken into account, the share rose to 65%. Although there were around 50 LPG distributors, share of the biggest five LPG distributors amounted to 98.7% and the remaining ones depended on either production by TÜPRAŞ or imports. As the acquiring AYGAZ had 32% share in distribution whereas 31% in imports, production and importation of LPG by TÜPRAŞ was still important for the distribution companies despite decrease in its share in imports. Therefore, although TÜPRAŞ's share in imports was decreasing, because the acquiring AYGAZ was the market leader in distribution and the biggest importer of LPG it was obvious that importance of the ability to import would increase and as a result there was the need for additional safeguards to remove negative effects of the concentration in supply of LPG following the acquisition. Consequently, the TCA decided that facilities in one of the refineries of TÜPRAŞ in western Turkey which the LPG distributors heavily depended on should enable access to LPG distributors for direct imports.[9] The access requirement was limited to three years as there were investments in the region by other LPG distributors for the importation of LPG.

6. Environmental Impact Assessment Report

13. In Turkey, it is compulsory to prepare an environmental impact assessment report regarding certain projects such as refineries, nuclear power plants, certain iron and steel facilities, certain chemical facilities, airports, ports, cement factories etc as listed in the Implementing Regulation on Environmental Impact Assessment prepared by the Ministry of Environment and Forestry (the Ministry). A Commission is established with the participation of representatives of the relevant authorities and institutions, authorised personnel of the Ministry and project owner and/or his representatives in order to examine and assess the environmental impact assessment report. The Ministry, where it deems necessary, may invite representatives from universities, institutes, research and expert establishments, professional chambers, trade unions, and non-governmental organisations as members for the meetings of the Commission by taking into account the subject and type of the project and its place. Participation of the public is ensured via meetings in the place where the project is to be realised with the aim of informing the public about the investment and gathering their opinions and recommendations. Moreover, when the environment impact assessment report is prepared and submitted to the Ministry, it is announced by the Ministry and the relevant governorship that the report is available for the examination of the public in order to enable them to forward their opinions. The opinions gathered are to be taken into account by the Commission. Moreover, the Commission, while examining and assessing the environmental impact assessment report,

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7 See *Privatisation of Mersin port* (15.9.2005; 05-58/855-231).

8 *Privatisation of TÜPRAŞ* (21.10.2005; 05-71/981-270).

9 The investment cost for these facilities were paid by LPG distributors according to a protocol between TÜPRAŞ and these firms in 1992 and TÜPRAŞ imported and supplied LPG to those LPG distributors since 1995. The Protocol was still in force and LPG distributors operated through their purchases of LPG imported by TÜPRAŞ in the region.

considers whether meeting with the public has been done according to the relevant procedures and topics discussed during the meeting have been adequately addressed. Finally, the Ministry takes into account the works of the Commission on the report and decides either the environmental impact assessment is in the affirmative or negative. The Ministry is also authorised to decide whether environmental impact assessment is necessary or not regarding some other projects that are also listed in the Implementing Regulation on Environmental Impact Assessment. However, the Ministry, when it deems necessary, may delegate this authority to governorships provided that it delineates its boundaries.

14. The TCA considers that it is hard to get an environmental impact assessment report and this constitutes a legal barrier to market entry. However, the fact that it is not easy to obtain the report does not necessarily prevent new entry to the market. For instance, although such a report should also be obtained regarding cement factories, there are many investments in this sector made not only by local undertakings but also foreign ones.[10]

7. Private Restrictions on Land Use

15. Private restrictions on land use such as the ones agreed on in merger context may violate competition rules. Generally, non-competition clauses imposed on the vendor for a transitional period of time[11] in merger agreements are regarded as ancillary restraints and assessed together with the transaction if they are directly related with and necessary for the merger, restrictive only for the parties and proportionate. Such clauses aim to enable the purchaser to obtain the full value of the assets transferred and therefore the purchaser is granted some protection from the vendor via these clauses. However, non-competition clauses imposed on purchasers may not be given the same treatment like those imposed on vendors. This might be the case where the non-competition clause imposed on the purchaser leads to market sharing and complicates new entry as exemplified in a decision[12] by the TCA involving acquisition of a ro-ro ship where the purchaser was prohibited from using it between a particular Turkish port in Black Sea region and Russian ports for an unlimited period of time. The non-competition clause imposed on the purchaser in this case was not regarded as an ancillary restraint, assessed separate from the merger and considered as anti-competitive and the parties were imposed fines. Although this merger case does not involve restrictions on land use, it will not be wrong to state that the principle is applicable to such instances as well.

10 See *Cement* (01.02.2002; 02-06/51-24).

11 Non-competition clauses are justified for two years if the transfer involves goodwill and three years when the transfer includes know-how in addition to goodwill.

12 *Karadeniz Ro-Ro* (19.10.2005; 05-69/959-260)