

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

**Working Party No. 2 on Competition and Regulation**

**EXCESSIVE PRICES**

-- Turkey --

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1. This contribution handles the following issues with respect to the practices of the Turkish Competition Authority (TCA):

- Excessive pricing as a means of abuse of dominance,
- Relevant case law.

## **1. The Legal Framework**

2. Act on the Protection of Competition No. 4054 (the Competition Act) sets the basic framework in terms of antitrust rules. The provisions of the Competition Act are generally compatible with Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) and Merger Regulation of the EU as part of Turkey's aim and commitments towards becoming a member of the EU. Moreover, the principles contained in the case-law of the European Commission, General Court (former Court of First Instance) and the European Court of Justice are taken into account as precedent in the decisions of the Competition Board, the decision making body of the TCA.

3. Within this framework, Article 102(a) of the TFEU explicitly prohibits a dominant firm from directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Although the Competition Act does not overtly cite unfair prices as a form of abuse, as indicated below it is considered that excessive price is a form of abuse in the decisions of the Competition Board, the decision making body of the TCA.

4. Excessive price actions by the TCA have been relatively rare; the case law of the TCA below has shown that the TCA prefers not to visit the concept; it has preferred to use competition advocacy instead.

## **2. Abuse of Dominance**

5. The term dominance is defined in the Competition Act as “the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers.” Article 6 of the Competition Act entitled “Abuse of Dominant Position” does not prohibit dominance because it is desirable for an undertaking to gain dominant position as a result of its growth through its own internal dynamics. However, the abuse of a dominant position is prohibited when a dominant undertaking abuses its dominant position if the object or the effect of its behaviour is to prevent, restrict or distort competition. The object of the dominant undertaking is overtly mentioned apart from effect in the reasoning of Article 6, therefore intent of the dominant undertakings can also be decisive in the analysis of abusive behaviour. Article 6 of the Competition Act cites some non-exhaustive abusive practices as complicating the activities of competitors in the market or preventing new entry; discrimination; tying; distorting competition in another market by abusing dominance in a certain market and restricting production, marketing or technological development to the prejudice of consumers. The Competition Act does not openly refer to “excessive pricing” as abuse under Article 6. However, as the list of practices considered as abuse under Article 6 is not exhaustive; excessive pricing is considered as a form of abuse by the Competition Board.

6. As the reasoning of Article 6 implies, any conduct by a dominant firm as a result of its internal dynamics will not be prohibited even if the competitors in the markets face difficulties in remaining in the market or they are obliged to exit the market. To determine whether a conduct is caused by internal dynamics of a dominant firm or by anticompetitive object or effect is a delicate matter and requires sensitive analysis of the market conditions in each case. However, while determining abuse, in principle, it is accepted that dominant undertakings have a special responsibility not to impair competition in the

market and this causes some conduct to be deemed abusive when pursued by a dominant firm, whereas it is not regarded so when conducted by a non-dominant one.

### 3. Case Law of the TCA

#### 3.1. *BELKO*<sup>1</sup> – a milestone case

7. The *Belko* decision is the first ever decision of the Competition Board regarding violation of the Competition Act through excessive pricing. Thus, it has been clarified in this case that excessive pricing can be assessed under the Competition Act. *Belko* decision is also the first example of imposition of a fine on a public enterprise for the infringement of competition rules.

8. *Belko* is the public enterprise which has been granted a monopoly right to operate as the sole retailer of coal -consumed for house-heating- in Ankara. It was alleged that the prices it charged were excessive and therefore constituted abusive practice in violation of Article 6 of the Competition Act. The investigation has proven the fact that the prices charged by *Belko* were on average 50 to 60% higher than the prices in the competitive markets. In the course of the investigation, cost analysis and market comparisons have been the two main streams reaching the conclusion towards the finding of excessive pricing.

9. The Competition Board took into account as the most important criterion the prices (charged by the dominant enterprise, that is *Belko*) and compared them with the prices of identical or equivalent products in other geographical markets, that were relatively more competitive but otherwise had comparable market characteristics to establish monopolistic price. The Competition Board also analysed cost-price relationship and ruled that “ ... while, along with high prices, a large margin between the sale price and the total cost (excessive profit) could be considered a sign of excessive pricing, monopolistic pricing is also possible in situations where the profit margin turns out low or even negative due to establishment of real or fictitious costs in excessively large magnitudes (along with prices set at relatively high levels).”

10. On the other hand, monopolistic price was defined in *Belko* decision as “the price set above competitive prices as a consequence of the use of one’s market power” while stating that there does not exist a rule for determining what level of the price should be qualified to be excessive and therefore it should be assessed on a case-by-case basis and many factors like the degree of barriers to entry; positions of other enterprises; and prices of relevant products in different geographical markets should come into play.

11. Cost analysis in this case focused on the comparisons between the price and cost figures of the last 5 years. The short-coming of this comparison was that the costs were inflated by irrelevant activities and ineffective operation of *Belko* which was owned by Ankara municipality. A considerable amount of capital transfer to the subsidiaries and losses from irrelevant activities were being reflected to the cost figures. On the other hand, a 50 to 60% price gap was determined between the close geographical markets and Ankara. The Competition Board has made the assessment that the 50 to 60% higher price charged by *Belko* for the coal sales due to increased costs resulting from inefficient management as abuse of dominance under the Competition Act. The point to be underlined is that the prices fixed by companies can be assessed as excessive pricing though the situation is one where benefit or profit obtained is not excessive, and even the companies suffer from losses.

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<sup>1</sup> *Belko*, dated 6.4.2001 and numbered 01-17/150-39.

12. The Competition Board in this case mentioned that a firm in a dominant position had special responsibilities and cited prudent and efficient management as the leading one. In contrast to that special responsibility, the state of affairs surrounding the case, especially the concession granted to Belko to sell coal in Ankara without necessary legal checks against abuses in the form of pricing, led to lack of maximum care and diligence in protecting Belko's interests in making purchases; overstaffing; costs higher than what they should have been, due to ineffective style of management; and finally high prices. Therefore, the high levels of the costs incurred by Belko stemmed to a large extent from failure to act with care and diligence in coal purchases and from company operations other than the coal trade. As a result, it has been established that Belko's sale prices have been set at levels 50 to 60% higher on average, relative to prices for the same or equivalent coal being sold in other geographic markets that were open to competition and the undertaking was held responsible for abusing its dominant position. The Competition Board dismissed the theory that monopolistic prices would attract new entry in the long run and therefore they should not be condemned as abusive due to the fact that there was absolute barrier to entry to the coal market in Ankara in the form of legal concession.

13. In preventing excessive pricing, the Competition Board presumed that there would be improvement in income distribution as well as allocative efficiencies that could contribute to betterment of social welfare. The practice of monopolistic pricing was seen as within the scope of the Competition Act due to its exploitative character especially at consumer level while not directly harming the competitive environment in the relevant market.

14. The Competition Board, in this case, accepted that the special responsibility of the dominant firms obliges them to avoid cost-increasing practices and that excessive profits that might come as a result of efficient management and effective cost control along with price levels that could be considered normal as not incompatible with the Competition Act. Moreover, prices charged by dominant firms 50-60% higher than those in comparable competitive markets are excessive enough to be abusive when the peculiarities of the case is taken into consideration.

15. The Competition Board has notified to the relevant public authorities the opinion that it could not be a fair basis to grant an exclusive right and the same aim could be reached by an effective detection policy. The exclusive right granted to Belko was removed and the market was opened to competition in line with the opinion of the Competition Board.

### **3.2. *BOTAŞ-EGO-İZGAZ-İGDAŞ*<sup>2</sup>**

16. In this decision, the TCA concluded that 66-67% profit could not be taken as an indicator of excessive pricing. As for EGO, İZGAZ and İGDAS the Competition Board concluded that since the lower and upper limits of the prices exercised by the distribution companies were regulated by the Ministry of Energy and Natural Resources, the said companies never had the freedom to set the prices they charged. Thus, the companies covered by the regulation could not be charged with excessive pricing claims.

17. With this decision, the Competition Board openly preferred not to evaluate excessive prices when the pricing conduct was subject to a particular regulation. It is possible to depict that the Competition Board was looking for a "freedom of pricing" criterion for the companies which could be subject to excessive pricing analysis.

18. The Competition Board followed a similar approach in another excessive pricing complaint related to gas distribution companies<sup>3</sup>. In the complaint, it was alleged that two gas distribution companies

<sup>2</sup> *BOTAŞ-EGO-İZGAZ-İGDAŞ*, dated 8.3.2001 and numbered 02-13/127-54.

<sup>3</sup> *Amity Oil & Trakya Gazdaş*, dated 29.6.2006 and numbered 06-46/601-172.

were abusing their dominant position strengthened by a recent merger. In its preliminary decision, the Competition Board said that since the prices applied to independent consumers by distribution companies were subject to the (energy) regulation, there was no need to open up a further competition case.

19. In another preliminary decision<sup>4</sup>, responding to a complaint made against the pricing system of a (dominant) telecommunications company (Türk Telekom), the Competition Board decided that an investigation based on excessive pricing of a dominant firm wasn't necessary relying on the fact that Türk Telekom's pricing schemes were approved by the Board of the then Telecommunications Authority, the sector regulator; in other words, since the prices of the undertaking were regulated.

20. However, there have been some cases based on excessive pricing by a dominant undertaking although the prices set by undertaking in question were approved by a state body. In *Ataköy Marina*<sup>5</sup> case, the Competition Board deciding upon a comparative prices scheme of two marinas concluded that since there was no dominance, excessive prices were not the issue. What was interesting in this specific case was that an in-depth comparative prices analysis was made although there was no dominance.

### 3.3. *ASKI II*<sup>6</sup>

21. In this specific case, the Competition Board preferred to use "competition advocacy" and went through a detailed analysis of prices which were concluded to be excessive. Responding to a complaint based on excessive pricing of a legal water monopoly company run by Ankara municipality, a due diligence was carried out in relation to cost-price, comparative prices in various cities and financial tables. Especially relying upon the price comparisons of big cities, it was found that Ankara municipality was exercising very high prices. Nevertheless, there was a specific provision in the relevant legislation enabling the relevant undertaking to profit no less than 10%. This provision was found to be inappropriate for the markets which had legal and natural monopolies. According to the findings:

*"...in these types of markets in order to ensure a cost-based pricing, it is expected that a pricing formulation based on "the most" profit should be preferred to "the least" profit share. In markets where no competition exists, setting prices of services on a cost-base plays a crucial role to overcome the consequences which would be to the detriment of consumers."*

22. Although the preliminary inquiry report was insistent on taking the case to a further step, the Competition Board was reluctant to use "excessive pricing". An opinion was sent to the state authorities pointing out that pricing mechanism of the undertaking should be redesigned to overhaul the excessive price levels and to ensure consumer benefit.

23. In its *Bereket Jeotermal*<sup>7</sup> decision, the Competition Board changed its "hands off" attitude towards excessive pricing. Up until to this case, the Competition Board adopted in principle that in markets where there were no price regulations but excessive prices were likely to occur, solutions should be sought by competition advocacy. However in this case, commenting on the findings of the case, the Competition Board preferred a different remedy instead of using competition advocacy. Although the analysis relevant to the excessive pricing was found to be inadequate, it was decided that since there was the "risk" of a potential excessive pricing, the market in question should be monitored for 5 years.

<sup>4</sup> *Türk Telekom*, dated 20.6.2007 and numbered 07-53/571-187.

<sup>5</sup> *Ataköy Marina*, dated 24.4.2008 and numbered 08-30/373-123.

<sup>6</sup> *ASKI II*, dated 20.12.2006 and numbered 06-92/1176-354.

<sup>7</sup> *Bereket Jeotermal*, dated 14.2.2008 and numbered 08-15/146-49.

24. In the subsequent case, *Izmir Jeotermal*<sup>8</sup>, the Competition Board changed its attitude into “competition advocacy” again. Stressing the risk of a potential excessive pricing, the Competition Board sent its opinion to the Prime Ministry and to the Ministry of Energy and Natural Resources in order that they would take steps to regulate the sector.

#### 4. Conclusion

25. As seen from the abovementioned case law of the TCA, “excessive pricing by a dominant firm” is a very seldom used concept. Indeed, to date there has only been one investigation, *Belko*, based on the concept. Most of the excessive pricing cases have been closed at the preliminary inquiry stage. Still in principle, the TCA considers the excessive pricing and the excessive pricing stemming from cost inefficiency (even though it does not result in excessive profits) as a way of abuse of a dominant position. Nevertheless in markets where there is competition, it refrains from intervention and limits itself to markets where there are natural or legal monopolies or to markets where there is no price regulation. In its milestone *Belko* decision, the Competition Board, while deciding on the excessive pricing, refrained from suggesting the appropriate price level and stated that the prices should be lowered to a level “comparable to prices in competitive markets”. Since the ambiguity of competitive price levels created further problems, the Competition Board chose not to take the cases to further step of investigation and suggested alternative ways via its opinions which would eliminate the causes of high prices.

26. As for the sectors where there exists price regulation, the TCA generally prefers not to interfere at all. To sum up, the TCA’s intervention in excessive pricing has been rare and in cases where it decides there is excessive pricing, it never tells what the competitive level should be.

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<sup>8</sup> *Izmir Jeotermal*, dated 15.7.2009 and numbered 09-33/739-176.