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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE ON REFUSALS TO DEAL

-- Note by Turkey --

This note is submitted by the Delegation of Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 17-18 october 2007.

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1. Legal Framework and General Consideration

1. The main legal framework to deal with refusal to deal (RTD) by dominant undertakings is the Article 6 of the Turkish Competition Law (TCL) which is Act on Protection of Competition No:4054. Article 6 prohibits abuse of dominant position and contains a non-exhaustive list of abusive practices. Though RTD is not directly counted by the Article 6 as an example, as the list is not exhaustive, then it is possible to prohibit such practices under Article 6.

2. The most important concern in RTD cases is the exclusion/foreclosure which would result from refusal conduct.

3. Generally dominant undertakings are considered to have a special responsibility not to impair competition in the market where due to its dominant position competition is already been restricted. This responsibility is of great importance for RTD cases in particular. In line with the special responsibility, dominant undertaking is assumed to be under a general obligation to deal with its long-time customers. This general approach is also applied by the Turkish Competition Authority (TCA).

4. Considering the practice of the TCA, the following conditions are generally sought for an analysis of a traditional RTD case:

- whether the undertaking is dominant or not,
- whether there is any refusal conduct or not (while supplying for some customer/competitors, stopping to deal with some other),
- whether there is any history of relation or not,
- whether there is any objective justification or not,
- whether there is any objective to restrict competition and/or any negative impact on competition.

5. However, in practice the examination of above conditions in particular the very last two conditions (justification and objective/impact) are required to be examined carefully. Otherwise, it might be the case that a successful competitor who as a result of its higher efficiency and dynamism holds a market power, can be punished due to an over jealous enforcement of competition rules. If the objective behind the idea of competition is to force companies to be the best, then that objective should be respected when the companies are in the position of being the better or the best.

2. Defining refusal

6. In the Turkish practice, refusal is not directly defined. However, from experience on the basis of the specific cases dealt with by the TCA, refusal conduct can be classified as a direct refusal which takes place in the form of an explicit rejection to trade to a particular customer/competitor and as an indirect refusal which takes place in the form of either unreasonably excessively high pricing in compare to production cost, provision of low quality goods/services which would damage the trading partners.

7. Thus for a practice to be regarded as a refusal, it is not needed to be a direct refusal. Other types of conducts which produce a similar result can also be regarded as a refusal and can be an abusive practice under competition law.

3. Customer/Competitor

8. The TCL does not explicitly mention RTD an abuse example and therefore it does not make any direct distinction between a RTD with a customer and RTD with a competitors. Considering the practice of the TCA it is possible to argue that a RTD with a competitor is more harmful in terms of competition and therefore such practice is needed to be examined more carefully. However, examination of an RTD with a competitor requires a competition agency to be also careful in differing between a competitive reaction and abusive reaction. Correspondingly, as it can be seen from the cases examined for the purposes of this contribution, in cases where RDT takes place with respect to customer, the TCA does not consider the conduct as an abusive practice, however in cases where RTD takes place with respect to a competitor, the TCA has a more strict approach and may find such conduct as an abusive practice.

4. Harmful RTD from Efficient Ones

9. In the Turkish practice, it is possible to argue that the objective of enforcement of competition rules is basically to protect the competitive process as a result of which the social welfare could be increased. In this regard, the main idea and purpose behind the enforcement of competition rules in the area of RTDs, is to protect competition rather than a particular competitor.

10. However, in practice it is not an easy work to observe this objective, as in many cases, exclusion of particular competitor could well coincide with restriction of competition in the market.

11. The following cases (Anadolu Cam/Mercan Solmaz Case and Aysan/Elkamet Case)

are important in demonstrating the approach of the TCA in this respect.

4.1 Anadolu Cam/Mercan Solmaz Case (date: 05.06.2007 and no: 07-47/506-181)

12. In Anadolu Cam/Mercan Solmaz case, the TCA did not consider the RTD by Anadolu Cam to its customer Mercan Solmaz an abuse.

13. In this case, the TCA defined two relevant markets which are respectively “glass home product market” and “glass package market”.

14. Anadolu Cam is a dominant company operating in glass package market. Mercan Solmaz is a company operating in glass home products market and it purchases certain intermediary products produced by Anadolu Cam as glass package products such as bottle, cups etc. Mercan Solmaz makes such intermediary products to be subject to certain production processes and finalize them as glass home products. On the other hand, Paşabahce, an affiliate of Anadolu Cam operates in Glass Home Products market in competition with Mercan Solmaz.

15. Mercan Solmaz claimed that Anadolu Cam refused to supply glass package products and did aim at driving Mercan Solmaz out of Glass Home Products Market.

16. The TCA investigated the practice whether it is an abuse of not under Article 6 of the TCL. The TCA did examine the RTD by Anadolu Cam on the basis of following criteria:

- whether Anadolu Cam is dominant or not,
- whether there is a refusal to deal or not (considering also the history of relation),
- whether there is any objective justification or not,
- whether competition is restricted or not.

17. The TCA evaluated the allegation on the basis of the above criteria. Considering first three criteria the TCA did have the following findings:

- Anadolu Cam holds a dominant position in the relevant market,
- There is an explicit refusal conduct by Anadolu Cam,
- Anadolu Cam does not have sufficient objective justification.

18. However, the TCA did not suffice with these three conditions and additionally sought to find out whether the RTD had a negative effect or not on competition in the market where Solmaz Mercan operates.

19. The findings of investigation demonstrated that the refusal did not create any negative effect on competition and thereby did not restrict competition. In reaching at this conclusion the TCA basically examined how the refusal conduct affected the competitive conditions in the market.

20. During the period where the refusal conduct did take place, it was seen that Solmaz Mercan could find two alternatives, import and Marmara Cam, a competitor of Anadolu Cam. However these two alternatives were less convenient in compare to Anadolu Cam. The TCA did not regard that fact of less convenience as an important evidence to conclude that the competition was impaired.

21. Significantly the TCA examined the market parameters such as price, quality and quantity in the market where Solmaz Mercan operated and concluded that despite the fact that Solmaz Mercan was influenced by the refusal conduct, it did not significantly affect competition in the market.

4.2 In Aysan/Elkamet Case (date: 22.3.2007 and no: 07-27/248-83)

22. In this case Aysan complained that Elkamet had terminated the dealer relationship in between Aysan and Elkamet and Elkamet had signed a dealer agreement with another company (Selden) and importantly it had forced Aysan to deal with Selden.

23. In this case, the TCA examined the following conditions to conclude for an abuse:

- the company should hold a dominant position,
- the dominant company should cease to supply a sufficiently long-contracted customer without any objective justification,
- While the dominant undertaking supplies to certain customer it does stop to supply some other customers,

- whether the dominant company has any purpose to restrict competition or not or alternatively the conduct has any restrictive effect,

24. Analysis of the case under those conditions it was concluded that there is no long term relations in between the complainant customer and supplier, additionally even if the customer was refused to be supplied, then this refusal did not result in any restriction of competition as the refused customer was shown another resource to purchase its needs as well as such refusal did not drive out of market any company. In this regard, the TCA mainly examined whether the conduct restricts the competition or not, and it did not find it sufficient the fact that a particular customer's interest was damaged.

5. Same Conduct/Different Analysis

25. For an analysis of an RTD, it does not matter whether it is a direct refusal to deal or an indirect one for example in the form of excessively high pricing in terms of its implications. What matters in terms of implication is whether the conduct produce any exclusionary effect the conduct may produce. For example in *Teleon case* and *National Roaming* case to be examined below, excessively high pricing was regarded as an RTD.

26. On the other hand, the conduct can be analyzed via different methods if it is a direct refusal or it is an indirect one.

6. History of Dealing

27. History of dealing is an important factor in particular for traditional RTD cases. In such cases, the market conditions are determined to a certain extent by the existence of dealing relation in between the supplier and customer/competitor and therefore, generally if there is no objective justification for a RTD where there is a history of dealing, then the conduct can easily be regarded as an abuse.

28. In the TCA's practice whether there is a history of dealing is always sought as a criterion in assessing in RTD. In this regard, almost in all cases examined and mentioned in this contribution, history of dealing is an important criterion.

7. Reasonable Justification

29. The existence of reasonable justification is quite important in concluding that a particular refusal conduct is not an abuse under the TCL. Considering the special responsibility of a dominant undertaking in cases where it is under a general obligation to deal with its customer with a sufficiently long history of trading, any possible reasonable justification should be regarded and examined carefully in order to come to a true conclusion about the conduct. Depending on the characteristics of the market in question, the undertakings can put forward different justifications which are objective in order to avoid from a possible accusation under competition rules.

30. In the cases examined below the TCA accepted different reasons as objective justification and did not find RTD as an abuse.

7.1 Dog-Al Gübre-Ulusal Tarım Case (date: 19.10.2004 and no: 4-66/946-224)

31. In this case, Ulusal Tarım among other claims did allege that Doğ-Al Gübre (fertilizer producing company) did refuse to supply the fertilizer to Ulusal Tarım and thereby did drive it out of market. Doğ-Al Gübre is a company which produces and sells fertilizer through Ulusal Tarım, which is the exclusive distributor of Doğ-Al Gübre in Turkish fertilizer market. In this regard, Doğ-Al Gübre did have a exclusive dealing agreement with Ulusal Tarım. The exclusive dealing agreement envisages the marketing and

promotion of Doğ-Al Gübre by Ulusal Tarım and it also prohibits the marketing of competing brands by Ulusal Tarım.

32. The TCA examined whether the refusal constitutes a true abusive practice or not. For this purpose, the exclusive dealing agreement was examined. The agreements envisages rights to terminate the agreements in case that parties fail to abide by their responsibilities such as timely payment, respect for marketing and promotion responsibilities etc.

33. The TCA held that for such a practice to constitute an abusive behaviour then it should result in the exclusion of competition appreciably. In particular, the TCA held that the practice can be regarded as an abuse it the dominant undertaking does not have any objective justification and the competitors/customers should be badly influenced in a manner to impede competition in the market.

34. The TCA mentioned for example the risky conducts and failure to abide by responsibilities envisaged for their commercial relations by their customers/competitors as a possible justification for an RTD

35. In this specific case of Dog-Al Gübre-Ulusal Tarım, the TCA found that Doğ-Al Gübre did refuse to supply to Ulusal because Ulusal Tarım failed to respect for its responsibilities arising from the dealer agreement in between them. Considering this reasoning as an objective justification, the TCA did not find the conduct as an infringement

7.2 Türkiye Taşkömürü İşletmeleri (Turkish Coal Enterprise) (date: 19.10.2004 and no: 04-66/949-227)

36. Türkiye Taşkömürü İşletmeleri (Turkish Coal Enterprise-TKI), State-Owned Enterprise organized a tender to create a new-dealer system in order to distribute its products in Konya City. As a result of this tender, TKI stopped to supply coal to its pre-tender customers in Konya. Those customers of TKI who were refused complained TKI to the TCA.

37. The TCA examined the complaint whether the refusal is an abuse or not. In this case, the following criteria are sought to assess the case:

- whether the company is dominant or not,
- whether the dominant company refuse to deal with some customer while continuing to deal with other,
- whether the refused customers are a sufficiently old or not,
- whether there is any objective justification or not,
- whether there is any purpose to restrict competition or not.

38. The TCA concluded that the TKI is a dominant position in coal market and it stopped to supply coal with those companies with a sufficiently long history of doing business with TKI. On the other hand, in terms of objective justification, the TCA founded out that TKI demolished the old system of distribution and wanted to introduce a new system of distribution based on tendering. By introducing this new distribution system, TKI wanted to establish a more efficient and productive distribution system. The TCA accepted this reasoning of the TKI as an objective justification for refusal conduct and therefore concluded

that TKI had no objective of restricting competition and the refusal did not constitute an abuse under Article 6 of the TCL.

7.3 Gölcük Belediyesi/Batıçim (date: 14.12.2006 and no: 06-90/1142-338)

39. In this case, Izmir Governorship did claim that Batıçim did refuse to supply ready-mixed concrete to those construction fields located in Gölcük Municipality, a town in Izmir without any objective justification.

40. The TCA did examine four conditions to conclude whether the refusal is an abuse of not:

- the company should hold a dominant position,
- the dominant company should cease to supply a sufficiently long-time customer without any objective justification,
- While the dominant undertaking supplies to certain customer it does stop to supply some other customers,
- whether the dominant company has any purpose to restrict competition or not or else alternatively the conduct has any restrictive effect.

41. In this case, the TCA considered Batıçim hypothetically dominant and examined other conditions.

42. It was found out that while Batıçim did supply 2005 to meet the demand from the relevant region, however it ceased to supply the demanded product in the year 2006 considering the fact that transportation time needed is longer than it should be for the product to be used properly.

43. Additionally, the TCA did examine whether there is any objective justification or not. In this case, Batıçim did argue that the time needed to transport from the production plant to construction fields in Gölcük, is not sufficient to keep the product usable considering the sui-generis characteristics of the product.

44. It was argued that after loading the product into the Lorries, the product should be transported where there is a demand in due time (two hours after production) and if such timing is not respected then the product becomes un-useable.

Thus Batıçim did put forward a very economic and technical justification for its refusal. The TCA did accept this justification and did not see any other purpose to restrict competition in the market.

8. Agency's Experience

45. The key in evaluating a RTD is whether it excludes competitor or not from the market where the refusing undertaking has a possibility to monopolise or to have a market power. Such cases should be regarded as the most harmful RTDs and a strict set of standards should be exploited in order to evaluate the conduct under competition law.

46. The TCA examined carefully RTD in the following cases of *Ulusal Basın/BBD/YAYSAT and Teleon* and found that the RTD would significantly exclude competition from the relevant market thereby creating conditions which would facilitate the monopolisation in the market.

8.1 Ulusal Basın/BBD/YAYSAT Case (date: 14.12.2000 and no: 00-49/529-291)

47. In this case, Ulusal Basın was the distributor of Star Daily. Ulusal Basın argued that BBD and YAYSAT had wanted to drive Star Daily out of newspaper market by forcing newspaper sale agents to not sell Star Daily distributed by Ulusal Basın.

48. According to findings of investigation, the newspaper agents constituted sort of facility without access to which in individual newspaper could not survive.

49. In particular considering the particular characteristics of newspaper market, it was seen that all newspaper regardless of who publishes them, should be available at newspaper agents at the same time. In this regard, the establishment of an alternative system of newspaper agents is not economically feasible and, even if it is possible to establish such system it is not sustainable as it is not profitable for a newspaper agent to sell only a particular brand as well as it is not preferable for the customers who want to see all newspaper at the same place.

50. Taking into consideration of those features of the newspaper market, the TCA considered that all newspaper agents should be accessible for Star Daily for its survival.

51. The investigations demonstrated that BBD and YAYSAT held a collective dominant position in newspaper distribution market and they refused to deal with newspaper agents who sold Star Daily. Such RTD did influence the decisions of many newspaper agents not to sell Star Daily.

52. Thus it was seen that the main purpose behind such refusal was to exclude a new newspaper brand (Star Daily) from the market and thereby such refusal constituted an abuse under Article 6 of the TCL.

8.2 Teleon Decision (first decision date: 06.02.2001 and no: 01-07/62-19; second decision date: 26.09.2005 and no: 05-61/900-243 taken after the annulment of Council of State)

53. In Teleon decision, the TCA examined the conduct of requesting a guarantee letter of 2 million USD to provide three minutes highlights from the matches by Teleon, a pay-tv company with a contract based monopoly over broadcasting and filming of football matches in Turkey. As a result of the investigation it was found out that a guarantee letter of 2 million USD did work as a deterrent factor over the requested television companies and thereby it did result in the fact that those television companies could not buy the needed three minutes highlights of football matches.

54. Thus such request for a guarantee letter of 2 million USD constituted an indirect refusal to deal and importantly this conduct had the potential to extent the monopoly of Teleon in pay-tv (decoded broadcasting) market towards general TV broadcasting markets in terms of sport programs. Considering these facts the TCA concluded that RTD by Teleon constituted an abuse under Article 6 of the TCL.

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55. On the other hand, in the Turkish practice, if the dominant undertaking simply refuses a customer to which it does not have any competitor relation, and then such refusal can be evaluated under relatively relax set of standards. In particular, if the supplier would like to change its distributor and/or distribution system, then it may have to refuse to deal its one/more of its existing customer and that refusal conduct should be approached flexibly and should not be regarded as an abuse. Or in cases where dominant undertaking has a problem of limited capacity, then such refusal, which results from lack of capacity, should also not be regarded as an abuse.

56. This situation is the case in the above-mentioned cases mentioned under the title of reasonable justification. In particular in TKI case, the RTD is basically a result of re-organisation of its distribution system by the TKI in Konya city and therefore the TCA considered RTD not as an abuse under the TCL.

9. Influence of Essential Facilities Doctrine

57. Essential facility is generally defined as a facility without access to which a competitor cannot survive. Under Essential Facility Doctrine (EFD), undertaking which control a so-called essential facility is under a general obligation to deal where a refusal would result in restriction of competition.

58. Generally, if the controlling undertaking does not have a sufficiently convincing justification, then it is to be under an obligation to deal with its customer as well as competitor.

59. What generally makes EFD different from tradition RDTs is the fact that under EFD a new customer should also be granted access to the needed facility/goods/services. Therefore, EFD brings an additional discipline on the dominant undertaking. In other words, the scope of obligation to deal is widened by the application of EFD. Under EFD, once any facility/goods/services are registered as an essential facility, then almost an automatic obligation to deal emerges.

60. A key concern about the enforcement of EFD is the fear that an over-jealous application of such doctrine can damage and lessen the incentive to innovate by the undertakings if their R&D based innovations are easily regarded as an essential facility.

61. National roaming case which is examined below is an important case explicitly based on EFD and in which the TCA imposed a record level of fine on the undertakings that refused to deal with a new operator in the Turkish GSM market.

9.1 National Roaming Case (date: 09.06.2003 and no: 03-40/432-186)

62. In national roaming case, the TCA concluded that Turkcell and Telsim hold a collective dominant position in GSM infrastructure and they refused to deal with Avea a new comer into the GSM market. In this case, Turkcell and Telsim were the first operators in the Turkish GSM market in 1994. They were granted a GSM 900 license to operate in GSM market.

63. Almost 6 years later Avea and Aycell were granted a GSM1800 license to operate in GSM market. However, in this period of 6-year time, Turkcell and Telsim could well establish sufficiently country-wide coverage infrastructure in order to meet the demand from the whole country.

64. On the other hand, according to relevant telecommunication legal framework, the existing operators are required to share their infrastructure with the newly entering operators until they could establish a sufficient level of coverage infrastructure. However, Turkcell did apply to Council of State in order to suspend the execution of relevant legal framework which required them to share its infrastructure.

65. Due to suspension decision of the Council of State, the relevant regulatory framework did not work properly in order to endorse and improve competitive conditions in the GSM market.

66. Under these circumstances, Turkcell and Telsim asked excessively high fee for roaming agreement with Avea which means an indirect RTD. Avea brought the case before the TCA arguing that Turkcell and Telsim refused to deal and abused their collective dominant position in a manner to exclude Avea from the market.

67. The TCA opened an investigation against Turkcell and Telsim. The TCA did significantly consider the regulatory failure which resulted from the suspension decision of the Council of State. As result of investigation, the TCA considered the coverage infrastructures of Turkcell and Telsim as an essential facility without access to which new competitors could not survive in the market properly and thereby prone to be driven out of market.

68. The key concern of the TCA was that the relevant regulatory framework did not work properly and thereby created a failure that favoured the incumbents in the market against the newly entering competitors. The TCA considered that the existing operators did benefit from this regulatory failure and refused to deal with Avea in a manner that would reinforce their market position vis-à-vis the new operators.

69. Thus the TCA did regard refusal to allow for access of Avea to their infrastructure by Turkcell and Telsim as a significant restriction of competition which unfairly reinforced the market positions of Turkcell and Telsim against the new operators. And the TCA imposed a record fine on these undertakings and importantly the TCA ordered the investigated companies to deal with Avea in order to terminate the anticompetitive conduct.