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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

-- Note by the Delegation of Turkey --

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1. Introduction

1. Environmental regulations have become one of the chief policy areas for states as a consequence of rapidly arising environmental problems, particularly from the beginning of the 20th century. Environmental regulations call for solutions of environmental problems by assigning responsibilities to various actors in the society ranging from final consumers to firms and to the state. Since fulfillment of the requirements of the environmental regulations in most cases entail collaboration between different actors, the number of agreements concluded on environmental affairs has increased in parallel to the increase in the number of these regulations. Agreements in environmental context¹ can take various forms: they may come into being as a result of specific obligations in the regulations or they may be concluded voluntarily. These agreements may also differ in terms of the parties involved. They can be concluded between firms, or between firms and non-governmental organizations, or between firms and public authorities. More specifically, the agreements between firms can take either horizontal or vertical structure. To put it in another way, as a result of environmental regulations firms operating at the same or at different economic levels may conclude agreements.

2. Agreements concluded between producers of particular products can be considered to constitute a certain type of horizontal agreements in environmental context. In European Union and in most of the Organization for Economic Cooperation and Development (OECD) countries, certain waste streams are taken under control by specific regulations so as to minimize their negative environmental effects. These regulations in general rely on the principle of (extended) producer responsibility. The producer responsibility principle refers to the extension of the responsibilities of producers to the post-consumer stage of products' life cycles². According to this principle, producers have the responsibility to cover all or part of waste management costs and to realize actual physical waste management operations³. By assigning financial and physical responsibilities in terms of waste management, this principle aims to create an incentive for producers to reduce waste management costs. As the producers are able to interfere in the production processes and produce or design more environment friendly products in terms of waste volume,

¹ In the "Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements" (OJ C 3/2, 6.1.2001) the European Commission refers to these kinds of agreements as "environmental agreements" and defines them as "agreements by which the parties undertake to achieve pollution abatement as defined in environmental law or environmental objectives, in particular, those set out in Article 174 of the Treaty" (paragraph 179).

² OECD 1996, "Pollution Prevention and Control Extended Producer Responsibility in the OECD Area" Phase 1 Report OCDE/GD(96)48. Page 15.

³ ROSSEM, V., N. TOJO, T. LINDHQUIST 2006, "Extended Producer Responsibility: An Examination of its impact on Innovation and Greening Products". Lund, Sweden: International Institute for Industrial Environmental Economics. Pages 2-3.
http://www.foeeurope.org/publications/2006/Extended_Producer_Responsibility.pdf

toxicity and recyclability, they are held as obliged parties⁴. In this regard, the principle of producer responsibility fundamentally aims to find a solution to the waste problem at its source.

3. As a response to the environmental regulations based on the producer responsibility principle, in most of the countries individual producers have collectively organized to determine the least costly ways to meet all of their responsibilities with regard to the waste management operations. OECD conceptualizes “the collective entity created and governed by producers to manage collectively their individual responsibilities in relationship to extended producer performance objectives” as a “producer responsibility organization”⁵. These organizations are also recognized by the European Commission as “comprehensive systems” in which all concerned producers participate⁶. Turkish environmental policy is also based on the principle of producer responsibility. Accordingly, in various industries in Turkey, similar entities are also formed and they are defined as “authorized bodies/entities”, under which the concerned producers pool and share their responsibilities with respect to the environmental regulations⁷.

4. Although the establishment of these organizations is based on the requirements of environmental regulations, both the OECD and European Commission advise that competition authorities be vigilant about the activities and decisions of the producer responsibility organizations. It is argued that these organizations may easily turn into platforms for anti-competitive conduct among the participating firms because they rely on the cooperation between producers which are in fact competitors in the product market. In this regard, the OECD asserts that if firms in an industry cooperate to jointly arrange a producer responsibility organization on their own, there is the potential that they will collude on other things as well⁸. Similarly for European Commission, the cooperation may be abused by the participants to exchange sensitive information or to fix or align prices⁹. Therefore, these organizations, which can be regarded as horizontal agreements between producers,¹⁰ have to be examined critically like other horizontal agreements which may give rise to certain competition concerns.

⁴ OECD 2005, “Working Group on Waste Prevention and Recycling: EPR Policies and Product Design: Economic Theory and Selected Case Studies” ENV/EPOC/WGWPR(2005)9/FINAL. Page 7.

⁵ OECD 1997, “Extended and Shared Producer Responsibility” Phase 2 Framework Report ENV/EPOC/PPC(97)20/REV2. Page 52.

⁶ European Commission, “Concerning Issues of Competition in Waste Management Systems” DG Competition Paper 2005. Page.6, <http://ec.europa.eu/competition/antitrust/others/waste.pdf>.

⁷ These organizations are called authorized bodies since the Ministry of Environment and Forestry officially recognizes them as entities performing duties related to waste management operations on behalf of their member producers. In fact, they are established and managed solely by private sector agents, mainly producers.

⁸ OECD 2005, “Working Group on Waste Prevention and Recycling: EPR Policies and Product Design: Economic Theory and Selected Case Studies” ENV/EPOC/WGWPR(2005)9/FINAL. Page 11.

⁹ European Commission, “Concerning Issues of Competition in Waste Management Systems” DG Competition Paper 2005. Page.14.

¹⁰ OECD conceptualizes the firm-“Duales System Deutschland AG” (DSD)- which was set up to meet the requirements of the German Packaging Ordinance by the producers concerned in Germany as a producer responsibility organization (Working Group on Waste Prevention and Recycling: EPR Policies and Product Design: Economic Theory and Selected Case Studies ENV/EPOC/WGWPR(2005)9/FINAL. Page 33) and European Commission in its *DSD* decision (Commission Decision of 17 September 2001, *DSD*, OJ 2001 L 319/1. Paragraph 80) defines the Constitution of DSD as an agreement between undertakings. In addition to that, from the European Commission statements as: “Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character.” (Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal

5. This contribution aims to introduce the approach of the Turkish Competition Authority (TCA) towards these kinds of horizontal agreements through *Accumulator* decision¹¹ of the Competition Board, which is the decision making body of the TCA. The *Accumulator* decision is primarily concerned with an authorized body established by the accumulator producers in Turkey. The decision is important both to identify the possible competition concerns that may arise from those kinds of horizontal agreements and to show the TCA's approach towards the agreements concluded to comply with the environmental regulations.

2. The *Accumulator* Decision

6. The *Accumulator* decision was adopted after an investigation on AKUDER (Accumulator and Recovery Industrialist Association). The case was focused on the markets related to waste accumulators. As is known, issues concerning accumulators and waste accumulators, from production to final disposal, are regulated under the Directive 2006/66/EC¹² in the European Union countries. This Directive repeals and replaces the Directive 91/157/EC¹³ which was the primary Community legislation on waste accumulators.

7. As a candidate country, Turkey is in the process of harmonizing its legislation with the EU Acquis. Several laws and secondary legislation have been adopted and/or changed in this process. With regard to the field of environment and waste management, many new legal arrangements have been put into force. Particularly after the opening of the chapter on environment to negotiations, under the supervision of the Turkish Ministry of Environment and Forestry, work is underway for the adoption of the remaining ones.

8. One of the regulations that were introduced during this process is the "Used Batteries and Accumulators Control Regulation" dated 31 August 2004 and numbered 25569 (the Regulation). The Regulation is mainly based on the Directive 91/157/EC¹⁴. Likewise the Directive 91/157/EC, the purpose of the Regulation is to arrange the legal and technical principles to:

- ensure the production of batteries and accumulators according to certain criteria,
- prevent the production, import, export or sale of batteries and accumulators containing harmful substances,
- establish a collecting system for the recovery and disposal of used batteries and accumulators, and to create a management plan.

9. The Regulation relies on the principle of producer responsibility and thus designates the producers as the responsible parties for compliance. In this regard, the producers are obligated to either develop a general collection and recycling system or to ensure the collection, recovery and disposal of used

Cooperation Agreements. Paragraph.181), it is understood that the agreements concluded between the producers to set up a comprehensive systems can be considered as horizontal agreements.

¹¹ The decision is dated 20.05.2008 and numbered 08-34/456-161

¹² Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC OJ L 266, 6.9.2006 p.1-14.

¹³ Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances OJ L 78, 26.3.1991, p. 38-41

¹⁴ The studies are going on to harmonize the Regulation with the Directive 2006/66/EC.

accumulators by participating in a certain system. An accumulator “producer” is defined as a real or legal person who produces, manufactures accumulators and introduces itself as a producer by putting its name, trademark or distinguishing mark on the product or an importer if the producer is outside Turkey. Under the Regulation, producers must ensure the collection, recovery and disposal of a specified minimum amount of used/waste accumulators each year. This amount is calculated on the basis of the net sales/import figures of the previous year. The minimum requirement is 70% for the first year following the effective date of the Regulation, 80% for the second year, and 90% for the third year¹⁵. Due to this responsibility, producers complete and submit documents and information about the type, production and sales quantities of accumulators produced or imported to the Ministry of Environment and Forestry. They also submit documents evidencing that the collection, recovery and disposal targets have been achieved.

10. According to the Article 29 of the Regulation, producers are allowed to come together under the coordination of the Ministry of Environment and Forestry and to establish a non-profit legal entity to fulfill the obligations for the collection, recovery and disposal of waste accumulators and to cover the incurred costs. In line with this article, two associations were established to comply with the Regulation in Turkey, namely AKUDER which was founded mainly by the accumulator producers in Turkey and TUMAKUDER (Accumulator Importers and Producers Association) which was founded by importers.

2.1 The System of AKUDER

11. AKUDER was established by five accumulator producers and three recovery firms. The producers’ market share reaches approximately 90% in the accumulator market. Three of them are the main accumulator producers in Turkey which have almost 80% market share. Two of these producers have recovery facilities as their subsidiaries. These recovery firms are also the members of AKUDER. In addition to founding members, AKUDER has fifty one producers and six recovery firms as members.

12. The member producers have well-developed distribution and sale chains composed of hundreds of dealers and distributors all over Turkey. Their dealers and distributors provide accumulators to the firms operating vehicle maintenance and repair works. Therefore, the dealers and distributors are in close relationships with the places where the waste accumulators are brought by the final consumers while buying new accumulators. According to the AKUDER’s plan, waste accumulators accumulated in these areas are to be transferred to the dealers. In the next step, the distributors take the waste accumulators from the dealers. Finally, AKUDER collects the waste accumulators from distributors through AKUCEV (Waste Accumulator Collection Incorporated) which is a firm that was established by the founding members of AKUDER. AKUCEV organizes and performs the tasks of collecting and delivering the waste accumulators to the recovery firms on behalf of AKUDER’s members.

13. The relationships between AKUDER and distributors/dealers are governed by standard agreements. These agreements require that dealers and distributors are to sell their waste accumulators according to the conditions and prices set by AKUCEV. Not only the prices at which the dealers sell their waste accumulators to the distributors but also the prices at which the distributors sell waste accumulators to AKUCEV are determined by AKUCEV regularly. These agreements also require that the dealers and distributors of the member producers are not to give the waste accumulators to collectors other than AKUCEV.

14. According to AKUDER’s plan, waste accumulators can only be transferred to the member recovery firms. Waste accumulators are distributed among the member recovery firms with respect to their shares in AKUCEV. AKUCEV do not sell the waste accumulators to non-member recovery firms. On the other hand, member recovery firms are not allowed to take waste accumulators from the collectors other

¹⁵ From the year 2007, the target is 90%.

than AKUCEV. The price of the waste accumulators at which AKUCEV sell them to the recovery firms is determined by the Board of Directors' decisions of AKUCEV regularly.

15. As stated previously, to fulfill the requirements of the Regulation, accumulator importers also established an association named TUMAKUDER. To fulfill the obligations of its fifty-five members, TUMAKUDER concludes contracts with collector firms to collect and deliver the waste to the recovery firms. The contracts provide that the collectors are free to choose the recovery firms to deliver their waste accumulators. Moreover, the sale price of waste accumulators is also determined under free market conditions between collectors and recovery firms. Under TUMAKUDER system, the collectors are only required to supply TUMAKUDER with the documents showing the progress of the waste from collection to the recovery. At the time of the TCA's investigation, nine recovery firms out of thirteen licensed recovery firms were also members of AKUDER and AKUCEV. Since these firms were not allowed to purchase waste accumulators from other collectors, the collectors acting on behalf of TUMAKUDER could only bring their waste to the remaining four recovery firms.

2.2 *The practice of the Turkish Competition Authority with regard to AKUDER*

16. The TCA took no action against AKUDER as long as it served the purposes of the Regulation. However, a proceeding was initiated against AKUCEV for violating cartel ban on the grounds that the market for waste collection and recovery would be seriously affected.

17. AKUCEV, by its Board of Directors' decisions, was fixing the prices each and every stage of the transactions of waste accumulators. The quantity of waste accumulators to be sold to the recovery firms was also determined by AKUCEV beforehand. However, a waste accumulator is a product that has a positive market price and thus it is used to be collected and recovered even before the enforcement of the Regulation. Through the recycling treatments, substantial amount of lead is obtained from a waste accumulator. This lead is used as a raw material in the production of new accumulators. In fact, the lead is the main component of an accumulator. Since there are no lead ores in Turkey, importing lead and recycling the waste accumulators are the only alternatives to obtain lead. Thus, collecting waste accumulators and their recovery have already been highly profitable markets in Turkey. In such a context, both the price and the quantities of waste accumulators to be sold or purchased between the concerned actors used to be determined under the market conditions. However under AKUCEV's system, all the concerned actors were prevented from exploiting the waste accumulators commercially themselves. Neither the dealers nor the distributors nor the recovery firms were able to determine or negotiate the prices at which they wished to sell or purchase the waste accumulators. In addition to that, they were also restricted in their relations with third parties. The dealers and distributors were not allowed to sell their waste accumulators to collectors other than AKUCEV despite the fact that under the Regulation's requirements they can deliver the waste accumulators to any licensed collectors or to any licensed recovery firms directly. The member recovery firms were prevented from purchasing waste accumulators from collectors other than AKUCEV (the collectors acting on behalf of TUMAKUDER) although their sole obligation under the Regulation is not to accept waste accumulators brought by unlicensed collectors.

18. As mentioned before, the biggest accumulator producers have subsidiary firms performing recovery. These recovery firms were also the members of AKUCEV. In this regard, TCA decided that the relevant provisions of agreements concluded with distributors and recovery firms helped the founders of AKUCEV take the flow of waste accumulators under their own control. On the other hand, by determining the price of waste accumulators, these producers were in fact deciding on the price of the inputs used in their own production processes. It is important to note here that the fact that the lead is the main component of an accumulator makes the collection and recovery of waste accumulators much more important markets for accumulator producers in Turkey. From these facts, the TCA reached the conclusion

that AKUCEV was used by the founding members as a means to secure the supply of the waste accumulators at the prices determined by themselves.

19. Regarding the decision taken by AKUCEV which prohibited the member recovery firms from purchasing waste accumulators from other collectors, the TCA concluded that it had the effect of restricting the activities of both collectors and importers at the same time. On the one hand, it impeded the activities of TUMAKUDER's collectors by restricting the number of alternative recovery firms to which they could sell their waste accumulators. On the other hand, it indirectly restricted the competition in the accumulator market by restricting the activities of TUMAKUDER which was established to perform the tasks assigned by the Regulation. In the case that the collectors with which TUMAKUDER concludes contracts have difficulty in bringing the waste to the recovery firms, TUMAKUDER and, thus, its members may fail to meet the requirements of the Regulation. In such a case, the members of TUMAKUDER have to participate in another authorized body or perform the waste management operations individually since it is mandatory for importers to reach the targets specified in the Regulation. Therefore, TCA concluded that this practice of AKUCEV also had the potential to put the importers at a competitive disadvantage in the accumulator market against the producers.

20. Having examined all the findings of the investigation, the TCA decided that AKUCEV violated the ban of Article 4 of the Turkish Competition Act¹⁶ by,

- fixing the sale price of the waste accumulators of dealers and distributors,
- preventing the distributors and dealers from selling waste accumulators to other licensed collectors, and
- preventing the recovery firms from purchasing waste accumulators from other licensed collectors.

21. In the TCA's view, all of the findings clearly indicated that AKUCEV was formulated as a platform where the parties coordinate their behaviors to restrict the competition in the market. Therefore, the TCA arrived at the conclusion that the founding agreement (charter) of AKUCEV and the resulting activities listed below was unlawful which had the object or effect the prevention, restriction or distortion of competition and, prohibited under the Article 4 of the Turkish Competition Act.

22. Under Article 5 of the Turkish Competition Act, Competition Board may exempt agreements or practices when they;

- a) contribute to new developments and progress or technical or economic improvement in production or distribution of goods and in providing services,
- b) allow consumers to get a share from the resulting benefit and
- c) do not eliminate competition in a substantial part of the relevant market,
- d) do not induce a restraint on competition that is more than essential for the attainment of the objectives set out in paragraphs (a) and (b).

¹⁶ According to Article 4 of the Turkish Competition Act "Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited".

23. In the exemption analysis, the TCA qualified environmental benefits derived from the agreement in question as a “technical or economical progress” on the grounds that AKUCEV organized a system of collection of waste accumulators on a regular and reliable basis which may not be easily provided by individual accumulator producers. In the view of the TCA, the agreement was made in response to an environmental regulation and therefore served the attainment of environmental protection. Based on the fact that the protection of environment is beneficial for the society as a whole, the TCA decided that individual consumers had a positive return from the agreement and the agreement allowed a faire share of the resulting benefit.

24. From the point of the indispensability criterion under subparagraph (d) of Article 5, the agreement was analyzed in terms of the provisions and objectives of the Regulation. The analysis was supported with the explanatory documents and information received from the Ministry of Environment and Forestry about relevant articles in particular as well as the goals of the Regulation in general. The TCA’s analysis showed that while the Regulation put some targets for the producers and importers in terms of the management of waste accumulators, it had no provisions regarding the price or business activities of the firms. On this account, the TCA put forward that the activities and decisions of AKUCEV neither emanated from requirements of the Regulation nor served the realization of environmental goals behind the Regulation. For the TCA, the agreement could not be exempted from the prohibition under Article 4, since it eliminated the competition in collection and recovery markets and had the potential to negatively affect the competition in the product market, between the producers and importers.

25. On the basis of these facts, the TCA called for the termination of the infringement by making necessary amendments in the founding agreement (charter) of AKUCEV or the dissolution of AKUCEV. Accordingly, the TCA asked AKUDER to make necessary amendments in its waste management plan and to notify Competition Board. It also imposed administrative penalties on the founding member firms of AKUCEV.

3. Conclusion

26. It is accepted as a general principle that horizontal agreements may give rise to certain concerns about competition. On the other hand, they may lead to substantial economic benefits. Therefore, they have to be carefully analyzed in terms of their potential efficiency gains and anti-competitive effects.

27. Environmental regulations have led to an increasing variety and use of horizontal cooperation. While assessing the horizontal agreements in environmental context, it is important to bear in mind that, in most cases, they are made in response to environmental regulations. That is, they are fundamentally concluded to realize the environmental policy goals. In this regard, the examination of horizontal agreements relating to environmental aims should be conducted in view of the environmental gains. This contribution aims to show the attitude of the TCA towards horizontal agreements relating to environmental objectives through the *Accumulator* decision of the Competition Board.

28. The *Accumulator* decision shows that the TCA does not take a negative stance on the agreements concluded between the firms operating at the same level of a market to fulfill their responsibilities with respect to environmental regulations. In fact, the TCA decided on no prohibition about AKUDER itself. However, the TCA maintains that the cooperation under environmental regulations may be abused by the participants to restrict the competition in the relevant markets. Therefore, it closely monitors and scrutinizes the operations of such cooperations. In this context, despite the fact that AKUDER was set up in accordance with the Regulation, TCA examined the legality of its activities and decisions under competition rules.

29. With respect to horizontal agreements in environmental context, the TCA employs an exemption analysis with an environmental dimension. Accordingly, it weighs the restrictions of competition arising out of the agreement against the environmental objectives of the agreement. Accordingly, the restrictive effects of an agreement relating to environmental aims can only be accepted provided that environmental benefits outweigh its negative effects on competition and the restrictive effects are essential to achieving its environmental benefits. Within this framework, improvement of the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress and as a factor which allows consumers to get a share from the resulting benefit¹⁷. The TCA takes the requirements of environmental regulations into account and aims to ensure that goals of environmental policy are achieved without unnecessary restrictions of competition. In this sense, the TCA makes its assessment on a case-by-case basis and approve an agreement as long as the environmental objectives are achieved by the least restrictive ways in terms of competition and as long as the agreement does not eliminate competition in a substantial part of the relevant market.

30. The TCA stands firm against the agreements that do not truly concern environmental objectives and that involve price fixing. The practice of price fixing is presumed to have negative market effects. In the decision, therefore, the actual effects of the practice of price fixing were not examined. On the other hand, waste accumulators' positive market value was emphasized in the decision as a factor that could contribute to a positive environmental performance in terms of the collection and recovery activities. In fact, a positive market price can create an incentive for firms to collect or to recover the waste in accordance with regulatory requirements. Therefore, this incentive provided by the market mechanism should be left intact as much as possible.

31. The TCA attempts to determine the most efficient market tools in a context where the environmental policy goals are fully achieved. Therefore, in the *Accumulator* decision, the requirements of the Regulation and the environmental policy goals behind the Regulation were comprehensively taken into consideration. As it was revealed that the operations of the cooperation in question were not due to the requirements of the Regulation or were not helping the realization of environmental policy objectives behind the Regulation, they were terminated so as to provide the competition in the markets. In such a context, not only the environmental gains aimed by the Regulation but also the benefits of competition could be obtained. On the other hand, the practice of the TCA in fact contributed to the environmental policy objectives of the Regulation since the smooth functioning of the collection and recovery markets would also serve the realization of the Regulation's targets.

¹⁷ The TCA's line of reasoning is indeed quite the same with European Commission's approach as the Commission has confirmed in several of its Competition Reports (Commission, XXVth. Competition Report (1995), paragraph 85; XXVIIIth. Competition Report (1998), paragraph 129) and in its decisions (the following decisions can be given as examples: Commission Decision of 18 May 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty, 94/322/EC, IV/ 33.640-*Exxon/Shell*; Commission Decision of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty 94/986/EC, IV/ 34.252-*Philips/Osram*; Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case IV.F.1/36.718. *CECED*, OJ L 187/47).