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The Turkish Competition Board finds abuse of dominant positions in the electricity sector and so imposes fines (*Enerjisa*)

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Turkish Competition Authority, Enerjisa, 18-27/461-224, 8 August 2018

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This case note analyses the Turkish Competition Board's ("Board") recently published *Enerjisa* decision of 8 August 2018 numbered 18-27/461-224 in which the Board assessed whether Enerjisa and its subsidiaries, all active in the electricity sector in Turkey, violated Article 6 of Law No. 4054 through various practices such as concluding illegal bilateral agreements with consumers, preventing consumers from switching to the independent supply companies ("ISCs") and impeding market transparency through incorrect meter readings in order to mislead the consumers who are already eligible to supply from ISCs.

Enerjisa is engaged in four main businesses in the electricity sector which are production, distribution, trade, and sales. Enerjisa is a roof company which conducts its activities in Turkey through its wholly-owned subsidiaries namely Ayedaş, Başkent Edaş, Toroslar Edaş, Ayesaş, Başkent, and Toroslar.

Electricity Sector in Turkey

The decision contains extensive information on the electricity sector in Turkey. In this regard, the Board first stated that the sector had been characterised by a vertically-integrated market structure as a public monopoly until the 1980s. The Board then referred to the transformation process of the sector through liberalisation, where this vertically-integrated structure shifted to a competitive one. Accordingly, the Board noted that the sub-segments of the electricity market, namely the wholesale, retail and production markets are now open to competition in Turkey.

In this regard, the Board stated that there are two major steps for establishing a competitive structure in the retail electricity market in Turkey namely (i) entitling consumers whose electricity consumption is over the free consumer limit –as set by the Energy Market Regulatory Authority ("EMRA") annually– ('free consumers'), to

choose their suppliers and accordingly (ii) allowing new players other than incumbent firms to enter into this market. Accordingly, the Board stated that the retail electricity market in Turkey can be classified into two groups based on the free consumer limit and that a competition exists in relation to the consumers whose consumption is above the free consumer limit. In this regard, the Board held that those consumers, whose electricity consumption is below the free consumer limit supply electricity from the authorized supply companies (“ASCs”), which are the exclusive suppliers in the relevant regions, based on the tariffs determined by the EMRA (‘non-free consumers’ which are subject to regulated tariffs).

Relevant Product Market Definition

In its evaluation on the relevant product market definition, the Board conducted its analysis in terms of distribution and retail of electricity given the investigated undertakings’ activities in these areas.

As for the electricity distribution activities, the Board defined the market as “electricity distribution service” in view of the fact that the market is closed to competition and is subject to monopolistic regulations. The Board defined the relevant geographic market as each region where Başkent Edaş, Toroslar Edaş and Ayedaş are exclusively authorized in Turkey in terms of the relevant distribution service.

As for the retail sale of electricity services, the Board analysed the market in terms of (i) consumers whose consumptions are below the free consumer limit (free consumers) and (ii) consumers whose consumptions are above the free consumer limit (non-free consumers). To that end, the Board defined a separate relevant product market for “retail sale of electricity to consumers below the free consumer limit”. To that end, the provinces where Başkent, Toroslar and Ayedaş act as the authorized supplier are defined as the relevant geographic markets by the Board.

In terms of the free consumers, the Board first provided information on the different customer groups supplying electricity under this category such as household, commercial and industrial groups. In this regard, the Board provided extensive information on the consumption patterns of these customer groups and stated that they all have different demand characteristics. Additionally, the Board deemed it appropriate to divide the industrial customer group into two additional sub-segments considering the different connection levels to the system. Consequently, based on the above considerations, the Board defined the relevant product markets as the markets for (i) “retail sale of electricity to industrial customers connected to the system at the transmission level”, (ii) “retail sale of electricity to industrial customers connected to the system at the distribution level”, (iii) “retail sale of electricity to commercial customers”, and (iv) “retail sale of electricity to residential customers”.

The Board’s Substantive Assessment

Before evaluating whether the investigated undertakings violated Article 6 of Law No. 4054, the Board first provided detailed explanations on the evidences collected during the on-site inspections which can mainly be categorized as follows: (i) evidences related to illegal bilateral agreements, (ii) evidences related to the sharing competitively sensitive information (e.g. on competitors) between distribution companies and ASCs, (iii) evidences related to the automatic renewal provisions set forth in the agreements concluded with free consumers, (iv) evidences related to reading meters and (v) evidences related to exercising market power arising from Enerjisa’s ASC position.

Since most of the evidences collected throughout the investigation phase relate to the relationship between electricity distribution and retail sale activities, the Board first highlighted the regulatory framework regarding these activities in Turkey. To that end, the Board particularly provided explanations regarding the unbundling requirements

in the electricity sector and stated that distribution and retail sale activities were legally unbundled in Turkey in 2013 and carried out by separate legal entities. The Board also stated that while non-free consumers supply electricity solely from ASCs, free consumers may procure electricity from any supplier without encountering any regional restriction. In this regard, the Board also provided explanations on the regulations governing the switching between suppliers in the electricity sector in Turkey.

In its assessment within the scope of Article 6 of Law No. 4054, the Board first concluded its assessment on the dominant position of the investigated undertakings and then evaluated the investigated undertakings' practices under the following categories: (i) practices related to the sharing of competitively sensitive information held between distribution companies and ASCs and providing competitive advantages to ASCs, (ii) practices tending to obstruct the supplier change process and (iii) discriminatory practices of the distribution companies through the meter readings.

In this regard, the Board stated that there is no finding showing the existence of exchange of competitively sensitive information (e.g. on competitors) between the investigated undertakings and ASCs. On the other hand, by referring to the evidences collected within the scope of the investigation, the Board determined that Ayedaş' staff was assigned to distribute the brochures of retail companies to free consumers. The Board also stated that the relevant staff was also in charge of sending notifications to customers when necessary. Based on this, the Board concluded that despite the unbundling requirements, the distribution company having a dominant position creates competitive advantage in favour of ASCs, which it considers as an abuse of dominant position.

The Board also found that Enerjisa engaged in practices through various strategies which made it difficult for free consumers to switch to other ISCs. Moreover, the Board concluded that Enerjisa abused its dominant position in the market for retail sale of electricity to industrial group by using its monopoly position in terms of the non-free customers. The Board also conducted assessment on Enerjisa's regulated and bilateral agreements concluded with consumers in terms of the supply of electricity. In this regard, the Board found that automatic renewal provisions placed in the bilateral agreements concluded with individual customers in 2015 and 2016 led to abuse of dominant position by foreclosing the market to competitors. As for the improper meter readings, it was noted by the Board that Ayedaş, Başkent Edaş, and Toroslar Edaş did not engage in discriminatory practices in favour of ASCs in the market.

Consequently, the Board decided unanimously that Ayesaş, Ayedaş, Başkent and Toros abused their dominant position through various practices impeding and foreclosing free competition in the market and imposed an administrative monetary fine amounting to approximately TL 143 million (approx. EUR 25 million) on these Enerjisa entities.

The Board's decision is important as it provides detailed explanations on the electricity market in Turkey. The decision also provides detailed explanations on the liberalization process in this market and its effects on the competition law assessments.