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The Turkish Competition Board fines an electricity distributor and its subsidiary for abuse of dominance (*Akdeniz Elektrik*)

UNILATERAL PRACTICES, ABUSE OF DOMINANCE, ENERGY, UTILITIES, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT, ELECTRICITY

Turkish Competition Board, Akdeniz Elektrik / CK Akdeniz / AK DEN / 2M Enerji / Fina Elektrik / İpragaz, Decision No: 18-06/101-52, 20 February 2018

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Upon a number of complaints, the Turkish Competition Board (the “**Board**”) opened an in-depth investigation against Akdeniz Elektrik Dağıtım A.Ş. (“**Akdeniz Elektrik**”), CK Akdeniz Elektrik Perakende Satış A.Ş. (“**CK Akdeniz**”) and AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri (“**AK DEN**”), which were all part of a single economic entity. The complainants alleged that these companies had abused their dominant position in the relevant market by foreclosing the market to competitors. The Board found that Akdeniz Elektrik, CK Akdeniz and AK DEN had violated Article 6 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”), which is akin to Article 102 of the TFEU, and thus imposed fines on Akdeniz Elektrik and CK Akdeniz in the amount of 1.5% of their 2016 turnover [TRY 11,814,184.76 (approximately EUR 2.5 million) and TRY 26,341,333.17 (approximately EUR 5.6 million), respectively]. [1] The Board decided not to fine AK DEN on the grounds that it had only been used as an agent to carry out the anticompetitive foreclosure.

Background

Akdeniz Elektrik is an electric distribution company that is active exclusively in certain cities in Turkey, namely Antalya, Isparta and Burdur. Electric distribution companies in Turkey are natural monopolies due to the structure of the market and the excessive costs of new entries, which prevent the service from being offered by more than one company in a specific region. Furthermore, Article 9 of the Law No. 6446 on the Electricity Market (“**Law No. 6446**”) provides that electric distribution companies must operate in a given region on an exclusive basis. CK Akdeniz is an incumbent company that is authorized to supply electricity exclusively for customers in the non-contestable part of the market according to the Law No. 6446. AK DEN provides consultancy services to technical, financial, and data-processing companies, and is also active in industrial and commercial investments. Akdeniz Elektrik, CK Akdeniz and AK DEN are part of the same economic unit despite having separate legal entities.

The allegations put forth by the complainants focused on the following points: (i) Akdeniz Elektrik had provided competitive advantages to CK Akdeniz in the market for retail sales of electricity in the Akdeniz electricity distribution region, (ii) Akdeniz Elektrik had granted CK Akdeniz access to certain competitively sensitive customer information that it possessed, (iii) CK Akdeniz had compelled consumers to enter into bilateral agreements (which were automatically renewed), and (iv) Akdeniz Elektrik and CK Akdeniz had abused their dominant position by obtaining financial advantages and distorting the competition for the benefit of CK Akdeniz, and thus both companies had abused their dominance in the relevant market.

Relevant Product and Geographic Markets

The Board found that the distribution chain of the electricity market consisted of five elements, namely: (i) production, (ii) transmission, (iii) wholesale, (iv) distribution, and (v) retail. The Board analysed two relevant product markets for the purposes of investigating the allegations against Akdeniz Elektrik, CK Akdeniz and AK DEN: (i) distribution of electricity, and (ii) retail of electricity.

Pursuant to the applicable regulations, consumers in the electricity retail market in Turkey are categorized under two segments: (i) consumers above the free consumer limit (free consumer), and (ii) consumers below the free consumer limit. Unrestricted/free consumers have the right to choose their own electricity provider if (i) their electricity consumption exceeds the limits set by the Energy Market Regulatory Authority (“EPDK”), or (ii) they are directly connected to the electricity distribution system, or (iii) they qualify as an organised industrial zone. Consumers whose electricity demand/consumption is below the free consumer limit constitute the “non-contestable” (*i.e.*, exclusive) part of the electricity retail market, in which prices are regulated. Electricity for this non-contestable market is supplied only by “assigned suppliers,” whereas free consumers can choose to purchase electricity from (i) assigned suppliers, (ii) independent suppliers, or (iii) directly from producers. Electricity prices for free consumers are determined via agreements between the supplier and the consumer. In light of this market segmentation, the Board defined separate markets for the retail of electricity based on the consumers’ demand for electricity, namely (i) the market for consumers whose purchases are below the free consumer limits, and (ii) the market for consumers whose purchases exceed the free consumer limits.

The Board further broke down the market for free consumers on the basis of consumer types, as the volume of demand and the cost of supplying electricity differed among various consumer groups. Accordingly, the Board defined separate markets for retail of electricity provided to (i) industrial customers connected to the supply system through transmission, (ii) industrial customers connected to the supply system through distribution, (iii) business customers, and (iv) residential customers.

As regards the relevant geographic market, the Board concluded that Antalya, Isparta and Burdur together constituted the relevant geographic market for all the relevant product markets specified above, except for the market for retail of electricity provided to industrial customers connected to the supply system through transmission. For the latter, the relevant geographic market was defined as Turkey.

Assessment of Dominance

Akdeniz Elektrik is a natural monopoly with a legal privilege and license to operate exclusively in Antalya, Isparta and Burdur for the distribution of electricity. Thus, no competitor can enter the specified electricity market due to the relevant regulations. The Board therefore found that Akdeniz Elektrik was dominant in the electric distribution market in these cities.

With respect to CK Akdeniz, the Board first analysed the respective market shares of this company and its competitors in the retail market on the basis of the electricity meter readings and consumption volume. In its analysis, the Board also took into account those consumers exceeding free consumer limits, who nevertheless purchased electricity on the basis of the electric tariffs set forth by the EPDK (in other words, consumers who did not effectively take advantage of their free consumer status).

In its assessment of CK Akdeniz's alleged dominance, the Board considered that CK Akdeniz's vertically integrated structure with Akdeniz Elektrik granted the company a significant competitive advantage in the retail market, as well as allowing it to benefit from the consumer portfolio (and the know-how concerning these consumers' preferences) that it could access through Akdeniz Elektrik. The Board ultimately found that, due to its organic relationship with Akdeniz Elektrik, CK Akdeniz had gained access to the customer database for consumers who were expected to exceed free consumer limits in the short term (and who would therefore move to the contestable/non-exclusive part of the market). Additionally, the Board declared that CK Akdeniz had taken advantage of its consumers' brand loyalties, given that CK Akdeniz had been widely known as an electricity retailer in the relevant market since before the privatisation of this market. The Board found that no buyer in the relevant market was sufficiently large to exert pressure upon CK Akdeniz to counterbalance its competitive advantage. In light of all these factors, the Board found that CK Akdeniz was dominant in the markets for retail of electricity provided to: (i) industrial customers connected to the supply system through distribution, (ii) business customers, and (iii) residential customers.

The Board's Assessment on Abuse of Dominance Allegations

I. Granting CK Akdeniz access to competitively sensitive information

In its investigation, the Board found evidence indicating that, due to the organic links between these two companies (which had not been effectively removed during the privatisation of this industry), Akdeniz Elektrik did not operate at arm's length with regards to CK Akdeniz. The Board decided that Akdeniz Elektrik had provided CK Akdeniz with access to confidential customer information, which granted CK Akdeniz a significant advantage against other retailers, and thus excluded CK Akdeniz's competitors from the relevant retail markets. This competitively sensitive information included the customers' personal data (*e.g.*, name and contact details) and other critically important information (including information about which customers were likely to exceed the free consumer limit, their locations and their consumption volumes), which no other retailer could have obtained independently from the market. The Board further held that, but for an organic relationship with the distributor in the upstream market, retailers could not have received such information in the normal course of their operations.

Despite the parties' claim that such an exchange of information did not fall within Article 6 of the Law No. 4054 as these two companies constituted a single economic unit, the Board dismissed this argument on the grounds that, so long as vertically integrated companies restrict competition by abuse of dominance, such conduct will infringe Article 6 of the Law No. 4054. The Board also held that, for the electricity sector to be opened to competition and successfully liberalized; distribution and retail services in this sector should be separated not only legally but also functionally, so that distributors will not be able to discriminate against retailers and thereby foreclose the market.

II. Increasing customers' switching costs and obstructing the process of switching retailers through contracts

In its investigation, the Board found that, Akdeniz Elektrik did inaccurate meter readings or avoided conducting such meter readings at all for consumers who had switched to other retailers. Akdeniz Elektrik engaged in such conduct in order to incentivise and persuade such customers to return to CK Akdeniz. Additionally, the Board held

that, even though CK Akdeniz should have managed its own income and costs regarding bilateral agreements, Akdeniz Elektrik had entered into agreements with consumers on behalf of CK Akdeniz, which reduced certain operational costs of the latter.

The Board also found that CK Akdeniz had abused its dominance in the market for consumers whose consumption is below the free consumer limit by restricting competition in the market for retail of electricity to free consumers. The Board's assessment focused on CK Akdeniz's various practices including, *inter alia*, (i) adding consumers to CK Akdeniz's free consumer portfolio without informing those consumers, (ii) making consumers enter into agreements simultaneously for both services below the free consumer limit and for services above the free consumer limit by taking advantage of consumers' lack of sufficient information regarding the privatisation process of the retail market, (iii) forcing consumers who were about to exceed the free consumer limit to enter into free consumer agreements with CK Akdeniz by closing the bill payment channels for their current services, and (iv) imposing contractual obligations on its current consumers (such as termination fees or automatic renewal clauses) that prevented such consumers from switching to other retailers.

As regards the question of whether Akdeniz Elektrik and CK Akdeniz had intended to exclude competitors from the relevant market and/or whether their conduct had the potential for such exclusion, the Board referred to its 2014 decision regarding the same companies. In 2014, pursuant to its findings in the pre-investigation phase, the Board ordered these companies to terminate certain conduct which could restrict competition, and this prohibited conduct was similar to the practices at issue in the current investigation. Accordingly, the Board held that this vertically integrated entity was conscious that its conduct could exclude competitors, foreclose the market and limit consumer choice. With reference to its decisional practice in previous investigations, [2] the Board further held that abuse of dominance "by object" or "potential for exclusionary effect" would suffice for finding an infringement of Article 6.

Procedural Highlights

Another noteworthy aspect of the Akdeniz Elektrik decision is the Board's assessment of CK Akdeniz's request for a non-public oral hearing, as the company claimed that its presentation included commercially sensitive information. The Board partially accepted this request with respect to certain parts of CK Akdeniz's oral hearing presentation, which concerned the steps CK Akdeniz had taken to eliminate competitive concerns.

Conclusion

The Board decided that Akdeniz Elektrik and CK Akdeniz had violated Article 6 of the Law No. 4054 and imposed administrative monetary fines in the amounts of 11.814.184,76 Turkish Liras and 26.341.333,17 Turkish Liras (approximately EUR 2.5 million and EUR 5.6 million) respectively. These fines corresponded to 1.5% of these companies' gross income (*i.e.*, turnovers) for 2016. The Board also found that AK DEN had not directly participated in the infringement, but had rather been used as a facilitator of Akdeniz Elektrik's and CK Akdeniz's conduct. Therefore, the Board chose not to fine AK DEN separately, but held that it too must terminate its practices which had been used for the purposes of the other two companies' illegal conduct.

Akdeniz Elektrik is a particularly important decision as it confirmed that being part of a single economic entity does not justify granting an unfair advantage to a company in a downstream market. This decision also demonstrates the Board's view that merely being part of a single economic entity does not justify granting access to confidential

customer information that should not be obtained by the companies in the downstream market. Additionally, the Board strongly emphasized that, for abuse of dominant position, the Board only needs to prove “by object” infringement or ascertain the investigated conduct’s potential to foreclose the relevant market.

[1] The Euro amount was calculated on the basis of the EUR/TRY average exchange rate on the date of the judgment (*i.e.*, 20.02.2018), which was 4.65.

[2] See e.g., *Anadolu Cam*, dated 05.06.2007 and numbered 07-47/506-181; *TDI*, dated 24.01.2006 and numbered 06-03/51-11; *Doğın Yayın*, dated 30.03.2011 and numbered 11-18/341-103.