

## Turkish Electricity Market: An Overview of 2015 from Competition Law Perspective

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In early 2015, the Turkish Competition Authority ("**Authority**") published a comprehensive research report considering the wholesale and retail electricity markets ("**Sector Report**"). The Sector Report separately considered the privatization process and competition-related issues arising at each market level. Decisions by the Turkish Competition Board ("**Board**") mainly focus on the retail segment of the electricity market.

The number of competition-related complaints about the electricity market is rising and the Authority's approach is developing accordingly. This article considers the Authority's changing approach, including examination of the most recent Board decisions, as well as possible consequences of this evolving approach.

### Electricity Market Structure

Privatization of electricity distribution companies is now complete in Turkey. Before privatization, a vertically-integrated market structure existed, with wholesale and retail electricity distribution carried out exclusively by a single state-owned company.

The privatization process helped to pave the way to separation of companies distributing electricity ("**Distributors**") companies involved in retail sale of electricity. A privatized undertaking is currently operating at the wholesale level, while the marketization and liberalization of the retail sale level is gaining momentum. Accordingly, at retail level authorized supply companies ("**Localized Suppliers1**") and "**Independent Suppliers2**" have been incorporated in each territory to conduct retail sales.

The Energy Market Regulatory Authority ("**EPDK**") is the electricity market's regulatory authority, authorized to maintain healthy market functioning. The EPDK sets a threshold for annual electricity consumption. Consumers who exceed the threshold ("**Independent Consumers**") are eligible to purchase electricity from either Localized Suppliers or Independent Suppliers. Consumers who do not exceed the EPDK's threshold are only allowed to purchase electricity from Localized Suppliers.

Therefore, Localized Suppliers hold a legal privilege due to being exclusively authorized to conduct electricity sales to the customers that have a consumption which is below the Independent Customer limit. The EPDK has consistently decreased the consumption threshold and the number of independent consumers constantly rises.

The separation between Distributors and Localized Suppliers only requires separation of their legal personalities. Therefore, Distributors and Localized Suppliers actually can still belong to the same economic unit, keeping their former ownership structures and ultimate control. Thus, Localized Suppliers are in a better position to conclude agreements with most independent consumers within their territories. These factors might give rise to competition concerns, particularly at the resale level between Localized Suppliers and

Independent Suppliers.

Independent Suppliers can technically sell electricity to Independent Consumers. However, Localized Suppliers usually cooperate with Distributors due to their economic links and common economic interests.

In reality, most new Independent Consumers are unaware of their right to purchase electricity from Independent Suppliers. Accordingly, they do not tend to change from their Localized Suppliers.

Competition should exist between Independent Suppliers and Localized Suppliers in the retail sale segment of the electricity market. Therefore, actions by Localized Suppliers and the interaction between Distributors and Localized Suppliers must be closely examined.

## Recent Developments in the Application of Turkish Competition Law to the Electricity Market

The Competition Authority received a number of complaints immediately after the privatization process was complete. According to the Sector Report, complaints and competition-related problems mainly arose from the behavior of Localized Suppliers and Distributors. In general, complaints can be classified under two main topics: (i) obstruction of Independent Suppliers' activities, and (ii) complication of supplier change for consumers.

Examples of complaints about the interaction between Distributors and Localized Suppliers include claims that allegedly:

- Distributors discriminated in favor of Localized Suppliers by presenting legislatively required services as being special services which are exclusive offered to Localized Suppliers.
- Distributors published deficient information on independent consumers despite being legislatively obliged to publish complete and correct information.
- Localized Suppliers made the supplier transition complicated for Independent Consumers by increasing costs during the transition period.

During the first phase of the liberalization and privatization process, the Board refused to proceed with full-fledged investigations into these complaints. The Board considered EPDK to be the primary authority in the electricity sector, tasked with the role of maintaining regulatory compliance in the market. The Board noted its concerns about the complaints and discovered serious evidence of infringements, but it did not decide to proceed with any full-fledged investigations.

However, the Board's approach to these complaints is evolving. In the last year, the Competition Authority has received a number of complaints from different undertakings (or association of undertakings) in the electricity market about violations of the Act on the Protection of Competition numbered 4054, dated 7 December 1994 ("**Competition Law**"). Although the Board has not proceeded with full-fledged investigations, the Board made serious findings indicating violations and sent warning letters to the related undertakings. However, the number of Board members who voted in favor of proceeding with full-fledged investigations in this context is increasing. Similarly, the approach and report recommendations by case handlers who examine complaints before the Board is occasionally conflicting with the Board's ultimate decision. Case handlers are recommending the Board should proceed with full-fledged investigations. The Sector Report and education given to the case handlers have likely been influential in this.

The Board's consideration of applications falling into the two main categories of complaint is described below.

## 1. An interaction between Distributors and Localized Suppliers

**Gediz-Aydem decision** (14-47/860-390, 3 December 2014): The Board held that Distributors had published deficient information about Independent Consumers, despite being legislatively obliged to publish correct and complete information. In this way, Distributors prevented Independent Suppliers from accessing information about Independent Consumers, thus restricting competition between Independent Suppliers and Localized Suppliers. The Board discovered that Distributor employees were assigned to work for Localized Suppliers. The Board held this to be a sign of coordination between distribution and retail sale activities, which might inappropriately restrict competition in the retail market. The Board stated that in a competitive market, Distributors and Localized Suppliers should have separate financial/cost policies.

**Boğaziçi-CLK decision** (14-42/762-338, 22 October 2014): A Distributor introduced its regular services to consumers as if these services were exclusive offered to consumers which entered a contract with a particular supplier. The Board deemed the introductions misleading, since legislation requires Distributors to provide these services to all Suppliers.

## 2. Complicating the Transition Period for Consumers

The Board considered complaints involving a range of methods used to unnecessarily complicate the transition period for Consumers.

**Automatic transfer of consumers:** Localized Suppliers automatically transferred agreements with consumers who exceed the electricity consumption threshold (becoming Independent Consumers) to their portfolio of Independent Consumers, without obtaining consumer approval. In some cases, consumers were transferred collectively to the portfolio of Independent Consumers. The Board expressed its concerns about collective transfers in the İstanbul Anadolu Yakası decision (14-42/761-337, 22 October 2014).

**Refusal to transfer consumers:** Distributors and Localized Suppliers would simply refuse to make transfers in order to prevent consumers moving to other Suppliers. For instance, in the Boğaziçi-CLK decision, the Board discovered high refusal rates of 63.2% and 52.4% in the related territories. The Board stated that these refusal ratios are not acceptable for the ordinary course of business within a competitive market. It emphasized that the rates cannot be based on justifiable reasons.

**Consumer agreements with long term undertakings:** Localized Suppliers executed consumer agreements involving long-term undertakings. For instance in the Gediz-Aydem decision, the Board discovered the Localized Suppliers had tied consumers with long-term undertakings, before these consumers became Independent Customers. The Board noted that the agreements prevented the Consumers from transferring to Independent Suppliers when they became eligible, which might lead to foreclosure of the market for Independent Suppliers.

## Consequences of these Applications and the Board's Approach

The Board considered the complaints noted against the Competition Law's abuse of dominance provisions (Article 6). These state that it is illegal and prohibited for one or more undertakings to abuse a dominant market position for goods or services within the whole or a part of the country, either on their own, through agreements with others, or through concerted practices.

Since Distributors and Localized Suppliers both hold dominant positions in their territory, abuse of their positions is deemed to be a violation of competition laws. The Board identified significant indications of competition law violations, as in the examples above. However, the Board chose not to proceed with full-fledged investigations into these allegations. Rather, it preferred to warn the undertakings involved and inform the EPDK of its findings (as per Article 9 of the Competition Law).

The main reason for not proceeding with full-fledged investigations is that the electricity market is a regulated sector. The Board stated that the EPDK is the legislatively authorized institution, empowered to oversee and regulate the sector. The Board gave weight to the fact that the EPDK was currently considering the examinations.

However, the Board's decisions were not made unanimously. For instance, in the Gediz-Aydem decision, one Board member voted against the decision to refuse the complaints, noting that:

- If an abuse of dominance is found, the Board is authorized and obliged to proceed with full-fledged investigations into complaints, even if they involve a regulated market.
- A Council of State decision (2008/13184, 13 February 2012) clearly states the Board is authorized to decide on complaints arising from actions by undertakings which are operating in a regulated sector.
- The Board can proceed with a full-fledged investigation if it is empowered in the circumstances to warn the undertakings examined, as per Article 9 of the Competition Law.

In the Boğaziçi-CLK decision, the Board decided not to proceed with full-fledged investigation due to the same regulated market reasoning noted above. Another dissenting Board member cited the reasons outlined above, further noting:

- Preliminary investigations had occurred previously in similar circumstances, but the undertakings had not "taken lessons" from the preliminary investigations.
- The electricity market's liberalization process is very new and the Board must respond to violations in due time.
- Precedents by the Council of State indicate that the Board:
  - Is authorized to consider regulated sectors.
  - Can still proceed with full-fledged investigations even if:
  - The regulatory authority approves an undertaking's actions which are also subject to competition law rules.
  - Sector-specific regulations permit some compromise procedures for the violation.

Accordingly, the number of dissenting votes is increasing in Board decisions to not proceed with full-fledged investigations. In particular, case handlers employed by the Board tend to recommend proceeding with full-fledged investigations against complaints. It seems the Board's approach is evolving. Therefore, companies operating in the electricity market should act carefully since it will not be a surprise if the Board decides to proceed with a full-fledged investigation in the near future.

1. Localized suppliers are retailers which are required by law to supply electricity to the customers that have a consumption which is below the Independent Customer limit. They also compete with the Independent Suppliers in their retail activities to supply the customers that have a consumption which is above the Independent Customer limit.

2. Independent Suppliers operate at the retail level and serve only the customers that have a consumption which is above the Independent Customer limit.

## Related Practices

- Antitrust and Competition
- Commercial Contracts
- Distribution, Franchising and Agency Agreements