International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name:
Date:

Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

A refusal to deal (RTD) may be a possible violation of Turkish Competition Act (the Act)[1], as Art. 6 of the Act prohibits abuse of dominant position. Turkish Competition Board (TCB), which is the decision making body of Turkish Competition Authority (TCA), has enforced Art. 6 of the Act to the extent that it covers RTDs as abuse of dominant position.

In the Turkish practice, refusal is not directly defined. However, from the experience on the basis of the specific cases decided by the TCB, refusal can be classified as an outright refusal which takes place in the form of an explicit rejection to deal with a particular competitor and as an indirect or constructive refusal which takes place in the form of unfair trading conditions like unreasonably high prices, provision of low quality goods/services and price squeeze (See, A. 13 for detailed explanations for constructive RTD). Thus, for a practice to be regarded as a refusal, it does not have to be an outright refusal. Other types of conduct which produce similar results can also be regarded as refusal and can be abusive practice under Art. 6 of the Act.

Apart from the definition above, in one case, the TCB considered an RTD to non-rival firms (some of its existing distributors) as a unilateral conduct leading to anticompetitive concerns.[2]

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

The main legal framework to deal with RTDs by dominant undertakings is Art. 6 of the Act, which is mainly modeled on Art. 82 of EC Treaty. Art. 6 prohibits abuse of dominant position and contains a non-exhaustive list of abusive practices:

> *"Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.*
>
> *Abusive cases are, in particular, as follows:*
>
> *a)Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,*
>
> *b)Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,*
>
> *c)Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing*

[1] The Act on the Protection of Competition No: 4054 (Date of adoption: 7.12.1994).
[2] *Sanofi* case (20.04.2009; 09-16/374-88)

limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

d)Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,

e)Restricting production, marketing or technical development to the prejudice of consumers."

As can be seen, RTD or any specific form of RTD is not directly addressed in Art. 6 as an example of abusive conduct. However, as the list is not exhaustive, it is possible for the TCB to prohibit such practices under Art. 6 of the Act. On the other hand, it should be stated that as the list in Art. 6 counts the abusive examples in broad and general terms, it can be seen that the TCB assesses RTDs under one or more subparagraphs of Art. 6 in practice.

3. Do the relevant provisions apply only to dominant firms or also to other firms?

Relevant provisions apply only to dominant firms. However, it must be underlined that, in exceptional circumstances, more than one firm can also be subject to Art. 6 of the Act, if two or more firms hold joint dominance in the relevant market.[3] On the other hand, the TCB can define an aftermarket as a distinct market and find the firm concerned as having dominance in this aftermarket regardless of whether it is dominant or not in the primary market.[4]

4. Is a refusal to deal a civil and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

The Act does not set out criminal sanctions for violations. Therefore, RTD is a civil (administrative) violation that the Act gives power to the TCB to impose administrative fines on violators (Art. 16 of the Act). The Act also provides that parties injured by the conduct violating the Act may sue the violators in civil courts in order to compensate their damages (Art. 57 of the Act).

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

During the past ten years the TCB has conducted nine investigations which can be classified[5] as (unilateral and unconditional) RTD with a rival.

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

[3] For example, *Ulusal Dolaşım* case.
[4] For example, *HP* case (08.05.2001; 01-22/192-50).
[5] It should be stated that, although reasoned decisions of some cases were not clearly articulated the violation as RTD by the TCB, these cases were classified as RTD for the purpose of the questionnaire.

In seven out of these nine cases, the TCB found violation of Art. 6 of the Act. There is no RTD case among these cases which can be clearly classified as an RTD case concerning IP licensing (See, A. 10 below.). Although there are some difficulties in classifying these cases into the groups like essential facilities, margin squeeze etc., those can be classified as follows:

Types of RTDs	**Number of Cases**	**Cases**
Essential Facilities Doctrine (EFD)	2	*Ulusal Dolaşım, ÇEAŞ*
Margin Squeeze	2	*Türk Telekom/Tissad, TTNet*
Traditional RTD (ceasing existing supply relation)	1	*Teleon*
Unclassified	2	*Bilsa* (refusal to supply encryption), *Kablo TV* (*de novo* RTD analysis neglecting EFD)

Cases[6] (The anticompetitive effect and the circumstances that led to finding of unlawful conduct):

Teleon

In this case, the TCB examined whether the conduct of Teleon, a pay-tv company with a contract based monopoly over broadcasting and filming of super league football matches in Turkey, restricted competition in the free to air TV broadcasting market.

Taking into account that the conduct of Teleon had the potential to extend its monopoly in pay-tv (decoded broadcasting) market towards free to air TV broadcasting market in terms of sport programs, the TCB found that Teleon abused its dominant position by demanding unfair conditions to supply three-minute highlights from the matches to rival television stations.

Türk Telekom/Tissad

In this case main competitive concern was that Türk Telekom, which was the incumbent fixed line operator in Turkey, used its dominance in the wholesale markets to restrict competition in the relevant retail markets.

In that context, the TCB found that Türk Telekom's infrastructure was an essential facility and Türk Telekom abused its dominant position in the network market for broadband internet access for corporate customers by determining the tariffs for the access to network so high that rivals could not compete in the relevant market while determining the tariffs for the internet access so low. Although the TCB did not explicitly state in the decision, the violation in this case may be considered as a constructive RTD (a price squeeze).

[6] Please see detailed information for each case in the ANNEX.

Ulusal Dolaşım *(National Roaming)*

The key concern of the TCB in this case was that the refusal of newly licensed mobile operator, İS-TIM, by two incumbent mobile operators, Turkcell and Telsim, to use their mobile infrastructure would complicate the activities of the new entrant in the market and reinforce their market positions vis-à-vis the new operator.

The TCB found that the two incumbent operators had collective dominance in the mobile infrastructure market and their refusals of the new operator to access to the infrastructure in order to ensure national coverage (*national roaming*) amounted to abuse by taking into account the following factors:

a) access to the infrastructure was essential to provide services in the market,
b) it was impossible and irrational to duplicate the relevant infrastructure for the new entrant,
c) undertakings concerned refused to provide national roaming in different ways (like, by demanding excessive pricing, claiming technical difficulties and delaying negotiation process).
d) there were no objective and valid grounds for the denial.

ÇEAŞ

The key concern of the TCB in this case was that the refusal by ÇEAŞ, which was active in electricity production, transmission, distribution and had concession on transmission and distribution in one region of the country, to transmit and buy the electricity produced by Toros and Enerjisa would restrict competition in electricity production market. In other words, ÇEAŞ wanted to monopolize in the upstream production market by using its power in downstream transmission and distribution markets.

The TCB decided, in line with the *Ulusal Dolaşım,* that ÇEAŞ

a) possessed the essential facility and had dominant position in the electricity transmission market in the assigned region,
b) prevented the complainants from having access to the infrastructure,
c) lacked to set forth any legal and technical justification for the prevention,
d) prevented actual and potential competition in the upstream market (electricity production market) by using its dominant position in the downstream market (electricity transmission market)

and therefore abused its dominant position.

Kablo TV *(Cable TV)*

In *Kablo TV*, main competitive concern of the TCB was that Türk Telekom, who had necessary infrastructures (both cable and PSTN) for the provision of retail broadband internet services, would monopolize retail broadband internet services market by refusing to open its cable network to rival internet service providers (ISPs), who were active in retail broadband internet services market.

In this case, by considering that the only rational explanation of Türk Telekom's conduct was to exclude rivals from retail broadband internet services market, as alleged conduct was neither a result of technical necessities nor had it any reasonable objective justification, the TCB decided that Türk Telekom abused its dominant position in order to monopolize retail broadband internet services market.

Bilsa

In this case, it was claimed that Bilsa, a software company dominant in school software systems, used an encryption which prevented rival companies from reaching students' data that had been previously entered into the school automation system. The claim also stated that through the encryption, it was not possible to transfer data to rival systems which resulted in schools being dependent on Bilsa and not being able to switch to competing suppliers. According to complainants, Bilsa either explicitly refused to decode or demanded excessive price from companies requesting the abolishment of the encryption. Considering that there was no objective justification for the refusal, the TCB found that Bilsa abused its dominant position.

TTNet

In this case main competitive concern was that pricing practices of Türk Telekom and its subsidiary TTNet, which together held dominant position in both wholesale and retail broadband internet access services market as a single economic unit, complicated the activities of rival ISPs in retail broadband internet market. It should be stated that although Türk Telekom had an obligation to supply wholesale broadband services to rival ISPs at regulated terms and tariffs, there was no regulation on its retail tariffs.

In this case, considering the pricing and costs of Türk Telekom and TTNet, the TCB analyzed the existence of (i) vertical integration, (ii) dominance, (iii) lack of substitutability of the input, (iv) unprofitable margins, (v) impediment to competition and (vi) justifications of the undertaking, and found that the entity consisting of Türk Telekom and TTNet abused its dominant position through price squeeze.

> For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

Turkish Competition Act sets out an administrative system that the TCB decides whether undertakings or associations of undertakings violate the provisions of the Act. Appeals against the TCB's final decisions may be made to the Council of State, the supreme administrative court in Turkey.

Before answering the question, it should be mentioned that, in the first years of enforcement, having generally focused on procedural issues and annulled or suspended the TCB's final decisions mostly on procedural grounds, the Council of State has reviewed the TCB's decisions on substantive grounds in a few cases so far. Following the correction of procedural problems, the TCB accepted the same facts and took the same decision for the most of the cases annulled on procedural grounds. On the other hand, some decisions on RTD are very recent and possible appeal procedures are going to take time. Therefore, it can be stated that appeal procedures for most of the TCB's decisions are still pending.

In that context, six out of seven RTD decisions, in which the TCB found violation, were challenged in the Council of State. Only in one case (*Ulusal Dolaşım*), the Council of State

annulled the decision on substantive grounds. Appeal procedures are pending in the remaining five cases.

On the other hand, one decision of the TCB, in which refusal was found legal, was also challenged in the Council of State. In that case (*Anadolu Cam*), the Council of State suspended the TCB's decision on substantive grounds.

In conclusion, in two out of nine RTD in-depth investigations, the Council of State has overturned the TCB's decisions on substantive grounds so far. In two cases, decisions of the TCB were not challenged in court. Appeal procedures in other cases are still pending.

Please state whether any of these cases were brought using criminal antitrust authority.

NA

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

English summaries of the leading cases are provided in ANNEX attached to the questionnaire.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

Yes. As mentioned in A.4 above, private parties injured by the conduct violating the Act may sue the violators in civil courts in order to compensate their damages. However, there is an uncertainty in the case law whether the courts will arrive at a decision without waiting the decision of the TCB. Furthermore, because of the fact that private enforcement of competition law in Turkey is not yet well-developed, there is not any systematic knowledge about the cases decided especially in lower courts. Therefore, the TCA has not got knowledge to report any private case especially related to RTDs.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

    a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

    b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

    c. Does intent play a role, and if so what role and how is it demonstrated?

    d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

    e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its

product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

In Turkish jurisdiction, all firms, including dominant ones are in principle free to deal with whom they wish. However, in limited circumstances, dominant firms may be required to deal with third parties with whom they do not wish to enter into or continue contractual relations. There is no doubt that this duty is highly controversial, since it interferes with freedom of contract and basic property rights, which are indispensable to free market economy. It is therefore applied in extraordinary circumstances and is not a general duty to assist competitors.

When decisional practice of the TCB is examined, it can be seen that, despite some exceptional cases, a duty to deal is generally invoked where the RTD would cause appreciable harm to competition in the downstream market for which the input is of great importance. In this vein, it can be said that the main competitive concern of the TCB regarding RTD is the exclusion of downstream rivals of vertically integrated dominant firms. A duty to deal becomes especially critical in the cases where there are high entry barriers and limited competition in the markets, particularly in the downstream market, either because of network externalities or economies of scale and scope.

As mentioned above, the Act does not explicitly mention RTD as a distinct abuse. However, Art. 6 of the Act brings a general prohibition on abuse of dominant position and gives a non-exhaustive list of abusive practices. Therefore, the criteria for evaluation of RTD are mainly shaped by decisional practice of the TCB and the Council of State. Nevertheless, the text and the preamble of the Act provide some important clues -though on normative grounds- about the evaluation of RTD cases.

When the text of Art. 6 of the Act is examined, the only clause that expressly mentions harm to consumers is subparagraph (e) of Art. 6. which prohibits *"restricting production, marketing or technical development to the prejudice of consumers"* as an abuse. However, this should not be interpreted as there is little room for "consumer harm" in the application of Art. 6. On the contrary, when the purpose of the Act is examined, it can be understood that "consumer harm" should be the decisive concern in evaluating the RTD cases. According to Art. 1, the purpose of the Act is to prevent anticompetitive conduct and to ensure protection of competition. The reasoning of this article concerning the purpose foresees that aim of the Act is "*to protect competition because competition is the driving force for efficient use of resources, decrease in prices of rival products, use of new technology by the undertakings, increase in the quality of the products, continuous and balanced growth of the economy and achievement of social benefit*…". On the other hand, according to the general preamble of the Act, *"competition is a process which leads firms to be more efficient and to produce more products with better quality and lower cost…As a result of the protection of competitive process, resources of the country will be distributed according to the wills of the public and also together with the increased efficiency, social welfare will increase. Besides, competition among trading firms will on the one hand bring more efficient production and management, less consumption of resources, production with lower costs, on the other hand it will promote emergence of technological innovations and developments. This will eventually, provide the opportunity of buying goods and services with cheaper prices and thus result with the welfare increase of both the consumers and the whole society."* These statements expressly reveal that the ultimate purpose of the Act is maximization of the consumer welfare through the protection of competition. Therefore, it can be stated that in Turkish competition law, demonstration of consumer harm should be necessary to consider RTD as abuse.

When the decisional practice of the TCB is examined, it can be said that there is a consistent approach about the purpose of the Act, which is the maximization of consumer surplus via protection of competition. However, as regards the demonstration of consumer harm and thus evaluation criteria in RTD cases, the picture is not so clear and it is difficult to draw clear conclusions about the practice due to the controversial decisions both on the TCB side and the court side. Nevertheless, focusing on the general tendency, following observations can be made below.

In order for an unlawful RTD to emerge, the product in question should be an indispensable input for the production of the final product. If it is not indispensable for the final product, a refusal of supply by the dominant company will not have an appreciable effect in the downstream market[7]. Similarly, an RTD with a reseller does not constitute an abuse if that reseller does not use that product as an input in production of a final product. In *Eti Bor*[8] case, depending on the fact that the complainant requested the essential input to sell it to downstream firms, the TCB refused the complainant's arguments and did not find an abuse in dominant firm's conduct.

Although there is a general acceptance in the decisions of the TCB that the ultimate purpose of the Act is maximization of the consumer surplus, decisions which expressly demonstrate the real consumer harm are quite rare. An example to these cases is *Anadolu Cam*. In this case, the TCB assessed the claim that Anadolu Cam distorted the competition in glass home products market by terminating supply to some customers including Solmaz Mercan, a competitor of dominant undertaking in the downstream market. In its analysis; the TCB stated that four conditions must be satisfied to conclude termination of an existing supply relationship abuse of dominant position.

These conditions are:

- The company which refused to deal must be dominant,
- There must be a refusal,
- Termination must not rely upon objective justifications,
- Termination must have restrictive effects on competition.

In this case, the TCB concluded that all conditions except the last one were satisfied. In evaluating whether the last condition was satisfied or not, the TCB focused on whether there were alternative suppliers of the complainant and whether the parameters such as price and quality in glass home products market were appreciably affected. As a result of this evaluation, the TCB found that complainant could find two alternative suppliers and refusal did not negatively influence the relevant market parameters. Thus, the TCB concluded that although the complainant was affected by the refusal, refusal did not significantly harm competition in the market. However, the Council of State stayed the execution of this decision and concluded that the conduct of dominant undertaking should be considered as an abuse of dominant position, owing to the fact that it had restrictive effects on competitors. Therefore, while the TCB focused on the effect of refusal in the market, the court found harm to rivals sufficient to conclude the conduct in question was an abuse.

In large part of the cases, however, it seems the TCB adopts a kind of presumption that any RTD which excludes or threatens to exclude rivals from the market has a net harmful effect on consumer welfare unless it has reasonable justification.

[7] It should be stressed that the TCB did not consider indispensability criterion in its evaluation of some traditional RTD cases.
[8] 21.12.2000; 00-50/233-295

Therefore, in most of the cases, threatened exclusion is deemed sufficient for finding of an abuse. However, this does not mean that all possible contingencies are accepted as threatened exclusion. Rather, it can be said that a reasonable expectation of exclusion of the rivals in the short or medium term is required in finding of threatened exclusion. In this vein, it should be underlined that the TCB puts considerable effort to draw a line between those cases, which harm only the rivals and those which harm the competition. For example, in *TDİ*[9], refusal of access to a port was not found as an unlawful RTD by the TCB, because it was deemed that although building a new port required substantial investment, it was not impossible for rivals who aspired to compete in the market. In this decision, the TCB expressly stated that Turkish competition law aimed at protecting the competitive process as a whole rather than protecting individual firms.

The TCB considers various indicators to demonstrate the existence of threatened exclusion. One of those indicators is relative changes in market shares of the dominant company and those of rival firms. In *TTNet* for example, after indicating that the margin left to TTNet was not sufficient to cover its costs, the TCB revealed that during the alleged time frame, there was a significant increase in the customer base of TTNet, while that of rivals remained unchanged as compared with the previous shares, implying that the rivals were marginalized in the market. In *Teleon* case, the termination of sport programmes by some rival television channels was considered as a sign of threatened exclusion.

The TCB also considers the duration of refusal in concluding existence of threatened exclusion. In cases where the refusal was realized in a limited time period or non-systematically, the TCB did not find an abuse considering that the exclusion of rivals was not probable. For example, in *Siemens-Philips* case[10], the TCB did not find an unlawful RTD.

As regards the intent, it can be said that in RTD cases, the TCB does not consider the intent as sufficient evidence to find an abuse; rather it generally uses this evidence to support its findings about the effect of the conduct. The TCB also analyzes intent to demonstrate the consciousness of the dominant firm in the abuse, thus uses this finding in the determination of the fine as aggravating factor. The TCB generally uses internal documents such as e-mails between the employees, internal reports and strategic plans as evidence for existence of intent. In *TTNet*, insistence of the firm on the abusive behavior despite the internal reports' warning about the competitive concerns was also considered as evidence of exclusionary intent.

The role of history of dealing in RTD assessments can be traced in the light of *Eti Bor* and *CNR* cases. According to these decisions, in the cases involving termination of the ongoing supplying relationship between the dominant undertaking and the customer/competitor (known as traditional RTD), history of dealing is one of the conditions to be satisfied to find the conduct unlawful. If there is a history of dealing, the TCB might not analyze whether the refused input is essential or not.

Considering the practice of the TCB, it can be said that history of dealing between the dominant undertaking and third parties (customers, who are not the rivals of dominant firm) is not an evaluation criterion in RTD cases. In RTD cases, there was not an assessment on whether there was an ongoing dealing between the dominant firm and the firms which were not actual or potential rivals of it. An exception to this situation is the *Eti Bor* case, in which it was claimed that Eti, the sole supplier of boron and its raw materials, refused to supply Ceytaş, a new customer and a potential rival, with raw boron material. The TCB determined

[9] 09.01.2003; 03-03/25-7
[10] 06.12.2007; 07-9/1131-442

that Eti refused to supply Ceytaş while it supplied customers located abroad with raw boron material. However, the TCB found that the conduct of Eti was not an infringement of the Act.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

   If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

As mentioned in A. 2, the Act does not set out a distinct provision on any type of RTDs, including access to essential facilities. However, in practice the subject matter is handled within the scope of Art. 6 of the Act which contains a non-exhaustive list of abusive practices.

The definition of essential facility can be found in individual cases. In ÇEAŞ, essential facility is defined as an element owned by a dominant undertaking, which is not possible to be reproduced or duplicated by other undertakings in terms of technical, legal or economic considerations or such a reproduction or duplication is uneconomic and irrational, and which displays a prerequisite for the competitive structure in a related market.

In Turkish enforcement, two cases emerge as the milestones reflecting the view of the TCB on essential facilities doctrine. These cases are *Ulusal Dolaşım* and *ÇEAŞ*. In the light of these cases, it can be stated that following conditions are necessary for a refusal involving essential facility to be regarded as unlawful:

- Access to the infrastructure is essential to provide services in the market,
- Duplication of the relevant infrastructure is either impossible or uneconomic/irrational,
- There must be an outright or constructive refusal to access,
- There are no objective and valid grounds for the denial.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

    a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

    b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

Turkish competition law enforcement does not provide sufficient data for analysis of refusals involving intellectual property as no "textbook" case related to intellectual property has been brought before the TCB . The only in-depth investigation in which there has been a discussion about intellectual property is *Bilsa* case. In this case, it was claimed that Bilsa, a software company, used an encryption which prevented rival companies from reaching students' data that was previously entered into the school automation system. Bilsa's defense was based on the idea that the encryption was aiming at protection of source codes which were subject to intellectual property rights. According to the company, Addendum Article 8 of Act on Intellectual Property Rights (Act No: 5846) allowed producers of databases to prevent access in order to protect intellectual effort by explicitly stating the term "*producer of database*." However in the final decision, the defense was not accepted, as the scope of mentioned article did not go beyond encryption aiming at protection of source codes. It should also be

emphasized that Article 11 of Act No: 5846 clearly states that *" ...however, protection provided here, cannot be expanded so as to protect data and material in the database."*. The data transfer of which was the core of the case was not considered to be a product in itself and the defense was refused. Therefore, it is not possible to say that *Bilsa* is a case of refusal involving intellectual property.

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

The Act applies almost fully to the regulated sectors (with some exceptions in terms of merger cases in banking sector). However, after Turkey started to liberalize markets such as electricity and telecommunications where former state-owned monopolies were operating, regulatory frameworks and authorities have been set up to deal with the sector specific issues, *inter alia*, especially rules for access to essential facilities. However, it has been an important debate whether and to what extent the TCB will investigate access issues especially when there exists a specific provision in the legislation or the regulator in question imposed on the dominant operator a duty deal. This debate has recently become more complex where there is an access obligation imposed by regulation in the upstream market while there is no regulation in the downstream market and the practices of dominant undertaking in the downstream markets have the potential to undermine the duty to deal in the upstream market. Such kind of cases dealt by the TCB is mostly related with telecommunications and energy sectors.

Considering all the cases, whether in-depth investigations or preliminary reviews, it is hard to say that the TCB adopted a unique approach to RTD cases in regulated sectors. In some cases, it intervened despite the existence of a specific provision set out by sector specific legislation or of obligation to deal imposed by regulator, while in other cases it refrained from intervention and left the problem to the competence of regulatory authority. However, it can be stated that the TCB adopted a more interventionist approach in the early years, but recently it has preferred to be reluctant if there is a duty to deal stemmed from sector specific legislation, and has intervened only where there was no distinct regulation for the conduct in question. It mainly intervened to constructive refusal to deal, such as margin squeeze where no regulation existed in the downstream market.[11]

As a distinct feature, it should be stated that in RTD cases arose in telecommunications sector, the TCB has to take into account the views and regulations of the regulatory agency, Information and Communication Technologies Authority (ICTA), although the views are not binding.

The intervention of the TCB depends on case specific conditions and particularly whether there is a specific duty to deal stemming from sector specific legislation. Although there exists a contradiction in decisions, the approach of the TCB can be classified as follows:

- If there is a specific provision or decision of regulator imposing a duty to deal on dominant undertaking or regulating the terms and conditions of the provision of any service: The general approach of the TCB is termination the investigation in preliminary stage by referring relevant legislation or decisions. For example, in *UMTH*[12], the TCB did not accept to investigate claims by alternative fixed line operators against the practices of incumbent operator, Türk Telekom, which would amount to constructive RTD by referring to competencies of regulatory agency and conciliation procedures provided in

[11] See *TTNet.*
[12] 22.12.2005; 05-87/1199-348

the legislation. In other example, in *Superonline*[13], the TCB refused directly the allegations about price squeeze in broadband internet services sector by considering that related tariffs (both wholesale and retail) were approved by the ICTA.

On the other side, in the early years of the practice, in two in-depth investigations, the TCB intervened and punished the dominant operators due to denial to access to their networks. One of them is *ÇEAŞ*, in electricity sector, the other one is *National Roaming*, in telecommunications sector. Although there were specific provisions for access to distribution network of ÇEAŞ and the dispute between the complainants and ÇEAŞ were being handled by the related Ministry and courts, the TCB found based on essential facilities doctrine that ÇEAŞ infringed Art. 6 of the Act by refusing its competitors to access to its transmission and distribution network. In the second case, in *Ulusal Dolaşım*, there was a provision in the telecommunications legislation imposing mandatory roaming obligation for all operators and the ICTA had specified the terms and conditions of that obligation. However the TCB, by deciding that competition law could apply even if there was more specific and concrete sector specific obligation to deal, found that collectively dominant undertakings in the GSM infrastructure market, abused their collective dominant positions by refusing to supply national roaming.

- Secondly, in case where there is no specific regulation regarding duty to deal TCB intervened and punished the dominant firm. *Kablo TV* decision is a foremost example of this case. In its decision, the TCB accounted for competitive harm and made his assessment mainly on this ground.
- Thirdly, in cases where there exists a partial regulation which means that while there is specific regulation imposing a duty to deal at regulated terms in the upstream market, there is no regulation in closely related downstream market, the TCB assessed the price squeeze allegations under Art. 6 of the Act. *TTNet case* is an outstanding example for this approach. In this case, although the wholesale market and prices were regulated and Türk Telekom had to provide access to his wholesale services, the TCB found Türk Telekom and its subsidiary had violated Art. 6 of the Act by engaging in price squeeze via pricing policies in the retail market where there is no price regulation.

To sum up, it can be said that, although it intervened under competition law when there is a duty to deal stemming from sector specific legislation in the early years of its practice, the TCB has consistently refrained from investigation of RTD claims in recent years. However, if there is no specific duty to deal or there is partial regulation, it intervenes in RTD cases. In this cases, the TCB makes a careful and comprehensive assessment by taking into account the general competitive conditions in the market as well as objective justifications of the dominant undertakings.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

RTD analysis both in regulated and non-regulated sectors does not significantly change according to whether the dominant firm is a state-created monopoly or not. However, if the dominant companies' facilities were rolled out with the public resources, it can be argued that imposing a prospective duty to deal on that undertaking does not undermine its incentive to invest in. According the approach of the TCB in *Kablo TV*, the cases where refusal of utilizing facilities created by public resources should be handled distinctly. When the facility has not been constructed as a result of commercial decisions and success of the dominant firm (state- created monopoly), refusal to access to it explicitly lies within the scope of competition law. However, the *sine qua non* is that the action appearing as a refusal of this facility should

[13] 08.09.2005; 05-55/833-226

have exclusionary effect, impede competition or create such a risk in the relevant market. Otherwise, if there is no anti-competitive effect stemming from the action of state created monopoly, the firm does not have any other responsibility in terms of competition law.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

Although there is not a direct definition of refusal in legislation, in *Ulusal Dolaşım* case, the TCB stated that in addition to outright refusal, refusal could be in the form of imposing unreasonable and uneconomic terms to the competitors. In the TCB's practice, constructive refusal has appeared in the form of excessive pricing and delays in supply (*Ulusal Dolaşım*), margin squeezing (*TTNet*), imposing unfair contract terms (*Teleon*), encryption (*Bilsa*) and provision of low quality goods/services (*Türk Telekom*[14]; although the TCB concluded there was not an abusive conduct, it stated that provision of low quality service could constitute an RTD). These forms of constructive refusal are non-exhaustive in the sense that there may be other examples which produce similar result.

Even though there is not a clearly defined criterion for the constructive RTD, the practice of the TCB implies that any difficulty created by the dominant undertaking in order to prevent its rivals from dealing with it and therefore produces similar results as outright RTDs is regarded as constructive RTD.

The critical part of the analysis of constructive RTDs is determining whether the conduct constitutes a refusal (one of the conditions sought by the TCB both in traditional RTD analysis and RTDs involving essential facility). For it forces the TCB to decide on whether the terms of dealing imposed by the dominant undertaking are reasonable or not. For example in *CNR* case, in which the main claim was that CNR refused to rent a fair ground to its rival through excessive pricing, the vital part of the TCB's investigation was to examine whether the price demanded was excessive or not. As a conclusion, the TCB did not regard the conduct of CNR as a refusal and did not find an abuse.

In the cases, in which the TCB regards the conduct in question as a constructive RTD, it is possible to say that the legality analysis is the same both for outright RTDs and constructive RTDs.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

    You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing;

[14] 24.7.2003; 03-53/601-267

any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

Turkish jurisdiction recognizes the concept of margin/price squeeze as an abuse of dominant position and has executed several investigations (both in-depth investigations and preliminary reviews) about price squeeze allegations. All of them are related with regulated industries, particularly with telecommunications sector. Recently, the TCB conducted an in-depth investigation about an economic unit consisting of Türk Telekom and TTNet (fully owned subsidiary of Türk Telekom). In this investigation the TCB handled the concept of price squeeze quite comprehensively and decided that this economic unit abused its dominance through price squeezing. Therefore, it is appropriate to answer the question mainly on the grounds of the assessments of the TCB in the mentioned decision, namely *TTNet*.

The criteria to determine the price squeeze are set as: (i) vertical integration (constituting an economic unit/single undertaking in the relevant upstream and downstream markets), (ii) dominance (dominance in the upstream market), (iii) lack of substitutability of the input, (iv) unprofitable margins, (v) impediment to competition and (vi) justifications of the undertaking.

Vertical integration: In *TTNet* case, having regarded the practice of Türk Telekom and TTNet, the TCB stressed on the economic unit concept to explain vertical integration and decided that TTNet and Türk Telekom made up an economic unit and should be recognized as a single vertically integrated undertaking although they were two distinct legal entities.

The effects of margin squeeze: The effects of margin squeeze in the downstream market are taken into account for assessment of the violation of the Act. In *TTNet* case, the TCB made a detailed assessment about the general competitive conditions in the broadband internet market in Turkey and particularly about the effects of the practices on the state of competition in the market. It concluded that, even if there was no actual exclusion during the period of the investigation, the market shares and the state of play for rivals became quite limited. According to the TCB, despite bearing losses rivals tried to survive only for being able to operate in the future when more competitive models would be set in the market. In another case, *Turkcell/UMTH*[15] the TCB evaluated the allegations that the dominant undertaking in GSM sector, Turkcell, was engaging in price squeeze by setting its retail tariffs for mobile calls below the interconnection prices for rival telephone operators. The TCB found that these tariffs did not amount to a price squeeze due to the existence of sufficient margin covering the costs. Nevertheless, it made an effect analysis and examined whether the alleged behavior of the dominant undertaking damaged the operations of the complainant. As a result, it stated that the losses incurred by the complainants have been probably resulted from high and uncompetitive prices compared with those of dominant undertaking, i.e. from complainant's free commercial preferences.

Dominance: Regarding margin squeeze cases, the TCB seeks only upstream dominance to find a violation of Art. 6. In *TTNet* case Türk Telekom was found dominant and beyond this, actual (*de facto*) monopolist in the relevant wholesale market for broadband internet access services. Therefore the TCB found that wholesale services were essential to provide services in the downstream market, it also considered the fact that specific regulation was imposed on Türk Telekom a duty to supply. TTNet was also found dominant in the retail market; however

[15] 4.7.2007; 07-56/634-216

the TCB stated that being dominant in the retail market was not required to find abuse. In fact, it concluded that the relevant economic unit abused its dominant position in the relevant wholesale market via engaging in price squeeze in the retail market.

Difference from predatory pricing: In practices of the TCB, price squeeze analysis differs from predatory pricing on two grounds. One of them is vertical integration condition, which is required for price squeeze whereas it is not essential for predatory pricing. Second one is the fact that existence of price squeeze does not require retail price to be predatory. Rather, in price squeeze the combination of both wholesale and retail prices should create negative profit margins. In *TTNet* case, the TCB mentioned that even if it was impossible to find a predatory behavior in the downstream market, the dominant undertaking could still impede competition via price squeeze. At this point, it should be restated that, in *Türk Telekom/Tissad* case, the abusive practice of dominant undertaking, Türk Telekom, (while determining the tariffs for the internet access so low, determining tariffs for the access to network so high such that rivals could not compete in the relevant market) was evaluated within the context of predatory pricing; and was found as an abuse in this context. However, it seems that even if the TCB had not detected pricing below cost, it would have found a violation via price squeeze. In fact, the TCB made implicitly a price squeeze analysis as it included essential facility and vertical integration concepts in its decision.

Cost Benchmark: The most comprehensive cost calculation method regarding margin squeeze was used in *TTNet* case. The general approach is that cost benchmark used in margin squeeze analysis can be product-specific. However, as mentioned in the summary of *TTNet* case, historic data was used for fully distributed cost method due to the fact that TTNet's only business practice was limited to the resale model which did not require fixed investments. Thus all costs incurred by TTNet were categorized as incremental or avoidable. To add, according to *TTNet* case and other preliminary reviews, the TCB puts as a principle that if the margin is not sufficient to lead an efficient firm to operate profitably, condition (iv) is said to be satisfied. As regards the decisional practice, the margin which covers only the downstream costs is considered to be lawful, thus the TCB implicitly clears pricing practices which leave room for a positive profit.

Duration of the Conduct: Temporary margin squeeze issue was also handled in *TTNet* case. According to the approach of the TCB, short term and temporary discounts and campaigns could be permitted as objective justification; however the crucial point here should be the persistence of these practices and their overall exclusionary effect in the market.

Difference from other RTD types: Price squeeze violations can be regarded as constructive RTDs when the dominant undertakings implicitly refuse to deal with rivals. This kind of conduct usually emerges where dominant undertakings have regulatory obligations to deal with and/or not to discriminate against their rivals in the upstream market. Therefore, the essentiality of the input (lack of substitutability) is of crucial importance in the assessment. Nevertheless, detecting a margin squeeze requires its own specific conditions which are expressed above and handled in the cases of the TCB.

Price squeeze in regulated industries: As mentioned before, the entire price squeeze allegations evaluated by the TCB are related with regulated industries. The approach of the TCB is clear. If the markets are regulated in terms of pricing, i.e. the prices, price discounts or other terms are supervised or approved by the regulatory authority, the TCB does not intervene. On the other side, if only wholesale market is regulated in terms of prices and other issues but the retail market is not (in terms of prices), like in *TTNet* case and other preliminary reviews, the Art. 6 of the Act applies.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

Considering Turkish practice, it is possible to say that there is a basic distinction between the assessment of traditional refusals (termination of an ongoing dealing relation) and the refusals involving essential facility. In traditional RTD cases, in case of existence of the following conditions, the RTD is presumed unlawful. These conditions summarized in *Anadolu Cam* case are:

- the company which refused to deal must be in dominant position,
- there must be a refusal conduct,
- termination must not rely upon objective justifications,
- termination must have restrictive effects on competition[16]

In the refusals involving essential facility, satisfaction of following conditions is sought by the TCB to presume the RTD illegal. These conditions summarized in ÇEAŞ case are,

- possession of the essential facility and dominant position in the relevant market,
- prevention of rivals from having access to essential facility,
- lack of any legal and technical justification for the prevention,
- impediment to actual and potential competition in the relevant market by using the dominance.

(For RTD cases via price squeeze, See, A.14)

As explained above, there are some conditions under which a RTD is presumed to be illegal. In order to rebut this presumption, undertakings in question have to justify their refusal in terms of both traditional RTDs and RTDs under EFD. The existence of reasonable justification is quite important in concluding whether refusal is abuse under the Act. According to the characteristics of the market and the supply relationship between parties, different arguments can be considered as an objective justification (For detailed explanations for objective justification and defenses, See A. 17). So, it can be said that determining panacea conditions to rebut the presumption of illegality is not possible.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

Regarding safe harbors, the policy of the TCB is not well developed, therefore it can be said that there is not any specific safe harbor for each RTD type. However, the only safe harbor accepted by the TCB can be found in price squeeze analysis. According to *TTNet* case and other preliminary reviews related to price squeeze, the TCB puts as a principle that if the margin is not sufficient to compensate the downstream cost and a certain amount of profit, condition (iv) (See, A. 14) is said to be satisfied. As regards the decisional practice, the margin which covers only the downstream costs is considered to be lawful, thus the TCB implicitly clears pricing practices which leave room for a positive profit. That means positive

[16] In some cases this condition was not sought by the TCB, in some others intent rather than anticompetitive effect was set as a criterion for the violation.

margins which cover costs can be accepted as a safe harbor for the undertaking.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

Regarding both the in-depth investigations and preliminary reviews of the TCB it is hard to say that there exists a specific justification or defense that permits the dominant undertaking for any kind of RTD. However, the TCB evaluates several justifications and defenses put forward by the undertakings or it makes its own evaluation on possible justifications. Rather, the TCB examined every justification *case by case*. The burden of proof is usually borne by the undertakings. Also, the TCB can analyze the conditions related to the market, the conduct of the complainant and of the dominant undertaking to determine whether the conduct of the defendant has an objective justification.

The justifications and defenses can be listed as follows:

- Commercial disputes on agreement are evaluated by the TCB as a possible legitimate ground for the refusal. The circumstances where the complainant fails to abide by its responsibilities can be accepted as justification for the dominant undertaking's refusal. On the other side, for example in *ÇEAŞ,* the TCB assessed the claim of ÇEAŞ that the dispute stemmed from the complainants' faults in complying with the agreements and refused the commercial dispute defense.
- Legal justifications are also evaluated by the TCB. Especially, if the terms alleged to be unreasonable in the agreement stem from a legal provision or a decision of another government agency, the TCB may not rule the conduct as an abuse. As an example, in *Türk Telekom/Tissad*, the allegations of refusal to activate ISPs' lines and of tying fulfillment of the demand for lines to the grant of the equipment to be used were refused by the TCB on the grounds that these practices were permitted by regulatory provisions.
- Capacity constraint, supply constraint and technical impossibility are commonly put forward as justification. Particularly, in outstanding in-depth investigations, such as *Ulusal Dolaşım, Kablo TV* and *Türk Telekom/Tissad,* and several preliminary reviews the TCB took these types of justification into account and grounded its assessment on technical views of regulatory agencies such as the ICTA, evidence provided by dominant undertaking and evidence found during examinations.
- Damaging the incentive to innovate and creating free rider problem by favoring the rivals are other arguments which the TCB assessed whether they can be regarded as objective justifications. For example, in *Teleon,* the dominant undertaking claimed that requesting a letter of guarantee was put into agreements to protect the investment made by itself in the relevant market. However, the TCB stated that since the refusal via unreasonable terms impedes competition in the market, the conduct cannot be grounded legally on protecting investments. This claim was raised also in *ÇEAŞ,* but was refused by the TCB.
- For the RTD via excessive price, the defenses are commonly made on the grounds of cost increases. In that respect, in *CNR* the TCB accepted the arguments of CNR that the increases in rents were related to cost increases, while in *Ulusal Dolaşım* it refused the

same argument by showing that the prices did not technically reflect the costs of dominant undertakings.

- Duration of refusal can also be brought before the TCB as a defense by the dominant undertakings or be assessed by the TCB itself. In cases where the refusal is realized in a limited time period and non-systematically, the TCB may not find an abuse by accepting the defense as objective justification.
- Property rights and protecting technical properties of the facility were also considered in the evaluations. In two "encryption" cases which were related to medical devices market, the TCB accepted the arguments that giving the codes to everyone (whether rival or non-rival) could cause harm on consumers. On the other side, in *Bilsa,* the TCB refused the arguments of the dominant undertaking that the database should be protected against misuse. The dominant undertaking also claimed that encryption was required to protect its intellectual property. However, according to the TCB, continuing to encode database after the termination of agreements between the dominant undertaking and schools caused prevention of transmission of database to be used in other software programs (of rivals). Thus it was accepted that encryption constituted a barrier to entry for the rival software suppliers. In addition, the TCB stated that although software programs can be regarded as an intellectual property, it is hard to reach the same conclusion for this type of encryption. It also grounded its decision on the relevant legislation for intellectual property rights. (See, A. 10)
- Losing profits/increasing costs due to involving in a deal is also examined while deciding whether the refusal constitutes an abusive practice or not. The dominant undertakings can claim that accepting to deal with or terminating the terms in the agreements which are alleged to be unreasonable (such as high price) requires additional investments, forgoing a more efficient production/distribution system leading to increase in their costs or decrease in profits. So, they demand that their commercial preferences based on alleged efficiencies should be permitted as a justification. Against such kind of allegations in *Kablo TV*, for instance, the TCB decided that if the investment can be attributed extraordinarily and solely to the cooperation with the rivals (meaning that the dominant undertaking would not otherwise make such an additional investment for its sake), refusal might not constitute an abuse. Besides, the TCB stressed that if there are no efficiency gains due to the refusal or if achieving/protecting the profit depends merely on preventing or distorting the competition in the market, these arguments cannot constitute an objective justification.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

The detailed list of remedies applied in cases where refusal to deal was found to be unlawful is as follows:

- In *Kablo TV*, a letter of order to terminate the violation was sent to the relevant undertaking.
- In *Teleon*, the company was mandated to deal under *reasonable conditions.*

- In *Türk Telekom/Tissad II*[17], a decision resulting in termination of ADSL sales was granted until the necessary regulation by ICTA comes into force.
- In *TTNet*, a letter of order to terminate the violation was sent to the relevant undertaking.
- In *Ulusal Dolaşım*, it was decided that the ICTA would determine the conduct to terminate the infringement as well as conduct required and to be avoided to re-establish competition in the relevant market in line with its duties to set relevant regulations in the telecommunications market. And it was also decided that, once the conditions determined by the ICTA, these conditions would also be subject to the approval of the TCB.
- In *Bilsa*, the company was mandated to provide the schools their data in an unencrypted, correct, safe and concrete manner upon their request.
- In *TTNet*, as an interim measure during the investigation period, it was decided that TTNet should cease all of its campaigns comprising price discounts that can result in price squeezing or that TTNet should redesign those campaigns in a way that prices should not be below company's costs in those services.

When these remedies are examined, it can be seen that, even in situations where the TCB decides a duty to deal, it tries to avoid acting as a price regulator by either not mentioning the price or using vague terms such as considerable conditions. In *Ulusal Dolaşım* case, a different approach was adopted and the ICTA was pointed as the right place to decide the necessary conditions to re-establish competition in the market. To summarize, it should be noted that the TCB does not have a unique approach regarding remedies. In some cases where the infringement was already over, the TCB did not impose any remedy except administrative fines. In price squeeze cases, it ordered dominant undertakings to terminate the violation. Regarding the decisions that the TCB set out remedies, in some cases it did not articulate the terms and conditions of the duty imposed at all, while in the others it addressed the terms and conditions of the duty rather vaguely. The only exception to this approach is *Ulusal Dolaşım* case that the TCB referred the terms and conditions to be specified by the regulator.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

The only case the TCB referred to sector specific regulation for the remedies is *Ulusal Dolaşım* case. After deciding that the actions of jointly dominant undertakings constituted an abuse the TCB stated that conditions indicating how to terminate the abuse and the conduct which should be fulfilled or abstained from in order to restore the competition in the relevant market could be favorably determined by the regulatory authority (ICTA). The TCB also imposed remedies in regulated industries without any reference to applicable regulatory provisions. However, these remedies included general terms of duty to deal without articulating details.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence

[17] 29.01.2004; 04-09/82-22. This decision was taken since the interim measure ordered in *Türk Telekom/Tissad* decision was not fully complied.

the decision whether or how to bring a refusal to deal case? If so, please expain your response.

NA

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

As it is emphasized in the general preamble of the Act , competition is an essential element in functioning of free market economy. Therefore, it can be said that expectations from a market economy cannot be realized adequately in the absence of a competitive environment. However, existence of a competitive environment alone is not sufficient for the functioning of a market economy. It requires some other principles and protections, as well. One of those principles is "protection of private ownership" or in other terms "protection of property rights". Another critical element of the market economy is "freedom of contract". However, a duty to deal which is mandated for the sake of competition generally contradicts with them. Therefore, mandating a duty to deal to a company in fact rests on a policy choice.

Regarding this issue, it can be said that Turkish competition policy generally acknowledges the necessity of an approach which seeks a balance between the protection of the competition on the one side and the protection of "freedom of contract" and "property rights" on the other. As it was explicitly stated in *Eti Bor, Ulusal Dolaşım* and *Kablo TV* decisions, the TCB considers that "property rights" by their nature involve prohibition of the third parties' access to a particular property. Therefore, the sole usage of these rights should not be considered as an abuse unless this conduct causes serious harms to competition. In this vein, the TCB states that, interference of a competition authority to an RTD should be limited with the cases where the RTD excludes or is likely to exclude rivals from the market. As regards the remedies, the TCB states that a remedy which mandates a firm to deal with its rivals cannot be justified unless there is reasonable expectation regarding the restoration of the competition as a result of that remedy.

Evaluation of an RTD case is also related with that jurisdiction's political preferences and priorities regarding various efficiencies. It is widely accepted that an RTD by a dominant firm may have various –and to some extent conflicting- short term and long term effects. For example, while an RTD may harm consumers in the short term in terms of higher prices or reduced product diversity, the long term benefits of the same conduct in the form of increased investments and innovation could be substantial. Therefore, an evaluation of an RTD necessitates a careful comparison of short term and long term effects of each conduct and thus can not be isolated from the political preferences and priorities of that jurisdiction regarding various efficiencies such as cost efficiency, distributive efficiency and dynamic efficiency.

As it is obvious in the wording of the general preamble of the Act which was mentioned in A. 8 the indicators of consumer welfare in Turkish competition policy are not only short term price reductions (distributive efficiency) but also reduction in production costs (cost efficiency) as well as technologic development and increased innovation (dynamic efficiency) too.

As regards the decisional practice, although the current cases do not provide sufficient data to reach clear conclusions about the policy preferences of the TCB regarding various efficiencies, it can at least be said that the TCB acknowledges importance of dynamic efficiency and thus incentives for innovation and investment for the consumer welfare. For example in *TTNet* case, by addressing to the general preamble of the Act, the TCB explicitly expressed that it did not only accept the distributive efficiency as an indicator of the consumer welfare but also the cost efficiency and the dynamic efficiency as well. On the other hand, in a number of cases such as *Teleon* and *TTNet,* the TCB did not accept innovation and the protection of investment as an objective justification to RTD. However, it should be mentioned that in these cases the TCB did not reject the claims in principle. Rather, it analyzed whether those arguments could be considered as an objective justification of the alleged conduct, and concluded that the arguments were not acceptable under the special conditions of these particular cases. Therefore, it can be concluded that, the TCB acknowledges importance of incentives for innovation and investment to the benefit of consumer welfare, and if there is a reasonable ground, it takes them in account in its decisions.

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.

When the enforcement of the TCB and the recent developments in competition law in major jurisdictions such as the EU and the US are examined, two main developments can be anticipated for Turkish competition law practice regarding the RTD cases:

- First of all, a more coherent and uniform standard for various kinds of RTD cases can be expected. In this respect, "essentiality of input" criterion could play a pivotal role for any kind of RTD analysis.
- Secondly, a more effects-based approach for the future decisions of the TCB may be anticipated. Undoubtedly, this would mean a higher abuse standard for RTD assessments in Turkish competition law. However, when the appeal court's decision in *Anadolu Cam* case is taken into account, it is not clear whether the approach of the TCB will also be adopted by the appeal court.

ANNEX: Summaries of Cases

***Teleon* Case**[18]

In *Teleon* case, the TCB examined the conduct of requesting a guarantee letter of 2 million USD to provide three-minute highlights from the matches by Teleon, a pay-tv company with a contract based monopoly over broadcasting and filming of super league football matches in Turkey.

During the investigation, as an interim measure, it was decided that Teleon had to deal under *reasonable conditions*.

As a result of the investigation, it was found that a guarantee letter of 2 million USD worked as a deterrent factor over the television companies requesting these highlights and thereby it resulted in the fact that rival television companies could not buy the needed three-minute highlights of football matches. It was also found that Teleon's alleged behavior did not have any objective justification. Thus such request for a guarantee letter of 2 million USD constituted a constructive 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 programmes. Considering these facts, the TCB concluded that RTD by Teleon constituted an abuse under Art. 6 of the Act.

***Türk Telekom/Tissad* Case**[19]

In this case, the TCB initiated an investigation against the incumbent fixed line telecommunications operator and monopolist, Türk Telekom, after considering the following alleged conduct in ISPs markets as serious:

- Preventing directly or indirectly another undertaking from entering into the area of commercial activity, or carrying out actions aimed at complicating the activities of competitors in the market via tariffs and refusal to provide an opportunity to ISPs to offer a dial up internet access service without the local network users need to subscribe.
- Distorting competitive conditions in the internet services market via offering internet access below cost to internet users.
- Non-provision of Primary Rate Interface (PRI) lines demanded by ISPs to offer services to subscribers using local telephone network, obliging ISPs to use TTNet20 infrastructure, tying discount system in leased lines for ISPs to the condition to conclude 3-7 years-long contracts, and restricting production, marketing or technical development to the prejudice of consumers by preventing development of rival new networks in this way.
- Providing no response on time to applications by ISPs for lines, tying fulfillment of the demand for lines to the grant of the equipment to be used, denying ISPs other than revenue sharing partners and TTNet the opportunity to offer internet access through cable network, thereby putting forward different terms to ISPs with equal status for the same and equal rights, obligations and acts.

[18] 06.02.2001; 01-07/62-19
[19] 02.10.2002; 02-60/755-305
[20] TTNet is the name of both internet backbone owned by Türk Telekom and its internet service providing unit by the time of the investigation.

- Demanding from the ISPs information that have the nature of trade secrets and using them in favor of its own internet service, allowing return of maximum 10% of VPOPs (Virtual Point of Presence), obliging the ISPs, leasing basic telecommunications facility from Türk Telekom, to use products of certain firms in these facilities, and thereby carrying out actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market.

At the end of the investigation the TCB imposed fine due to the action of Türk Telekom, *inter alia,* for abusing its dominant position in the network market for broadband internet access by determining the tariffs for the access to network so high such that rivals cannot compete in the relevant market while determining the tariffs so low for the internet access.

The TCB grounded its decision on the assessment of predatory pricing, found an abuse in this context and imposed an administrative fine to Türk Telekom; however it seems that even if the TCB had not detected a pricing below cost, it would have found a violation via price squeeze. In fact, the TCB made implicitly a price squeeze analysis as it included essential facility and vertical integration issues in its decision.

For the other allegations examined in the investigation and concluded not an infringement of the Art. 6 of the Act, the TCB permitted the defenses of the dominant undertaking as an objective justification or it took the regulatory provisions and interventions of the ICTA into account.

***Ulusal Dolaşım (National Roaming)* Case**[21]

In this case, the TCB assessed the claim that two incumbent mobile operators, Turkcell and Telsim, refused İŞ-TIM which was the new entrant mobile operator by denying the request for using their mobile infrastructure for national roaming.

In the analysis, the GSM infrastructure services market and GSM services market have been established as the relevant product markets; the relevant geographic market has been established as Republic of Turkey.

The assessment concerning (i) whether the TCB was empowered to resolve the issue in the face of cautionary judgments obtained from Courts of Law and (ii) the powers of TCA and ICTA about the subject matter of investigation were discussed in detail by analyzing the special legislation pertaining to national roaming. The latter subject was handled in two subheadings, namely general aspects of the powers of the TCA in the telecommunications sector and powers of the TCA pertaining to national roaming.

The key competition law concept that shaped the decision in this case was “essential facility”. It was stated that in order for an input to be considered as an essential facility, the conditions required are;

- the undertaking possessing the input should be in a dominant position in the relevant market,
- alternative input cannot be developed under “reasonable conditions”.

Once the presence of essential facility is accepted, in order for this matter to constitute an infringement from the perspective of competition law, the issues to be examined next would

[21] 09.06.2003; 03-40/432-186.

be (i) whether there exists a denial of access and (ii) whether this denial is based on valid grounds. The conditions that need to be satisfied in order to establish whether the owners of infrastructure are under obligation to conclude a contract were stated as:

- Access to the infrastructure was essential to provide services in the market,
- It was impossible or irrational to duplicate the relevant infrastructure for a time frame for the new entrant,
- Undertakings concerned refused to provide national roaming in different ways (like, by demanding excessive pricing, claiming technical difficulties and delaying negotiation process),
- There were no objective and valid grounds for the denial.

In the light of the conditions mentioned above the findings of the case were:

- Turkcell and Telsim were jointly dominant in the GSM infrastructure market.
- The infrastructures of Turkcell and Telsim were essential facilities for undertakings operating in the market for GSM services, at the stage of entering the market.
- Turkcell and Telsim denied the request of İŞ-TIM to benefit by way of national roaming from the infrastructure that they owned and the denial was not based on objective grounds.

In view of these findings, it was decided that Turkcell and Telsim abused their joint dominance in the GSM infrastructure services market through concerted practices by preventing their competitors from entering the GSM services market, thus violated Art. 6 the Act. The TCB imposed administrative fine on both of the defendants.

This case has great importance because of the remedy imposed by the TCB. As a remedy, it was decided that the ICTA would determine such conduct as regards how to bring about termination of infringement, and conduct required and conduct to be avoided to re-establish competition in the relevant market, as the relevant authority is charged with the duties to establish pertinent regulations in the relevant market. And it was also decided that, once the conditions determined by the ICTA, these conditions would also be subject to the approval of the TCB.

The decision was annulled by the Council of State as the legislation of the ICTA indicating the requirement for national roaming pointed in the case was annulled by the lower court.

***ÇEAŞ* Case [22]**

In this case, it was claimed that ÇEAŞ, which was active in electricity production, transmission, distribution and had concession on transmission and distribution in a region of the country determined by the concession contract, refused to buy and transmit the electricity produced by Enerjisa and Toros which were the rivals of ÇEAŞ in electricity production market.

The TCB defined two relevant markets. One of them was electricity production market and the other was electricity transmission market.

The TCB assessed the case on the notion of essential facility. In the case essential facility was defined as an element (i) owned by a dominant undertaking, (ii) which was not possible to be reproduced or duplicated in the case of other undertakings in terms of technical, legal or economic considerations or such was very difficult in a rational manner and (iii) which was a prerequisite for the competitive structure in a related market.

[22] 10.11.2003; 03-72/874-373

In the case, criteria for application of the EFD were defined as:

- essential element must be controlled by an undertaking which is a monopoly or in a dominant position,
- reconstruction or reproduction of essential element by another undertaking must not be possible under reasonable conditions.

The TCB also stated that the following conditions are sought in order to find an abuse in cases evaluated in the scope of EFD. These are:

- the undertaking in a dominant position has refused to let use of essential element or has prevented such a use,
- it is possible to make use of the relevant essential element, in other words; the action of refusal in question is not based on objective grounds.

In the light of above mentioned conditions the TCB decided that ÇEAŞ;

- possessed the essential facility and had dominant position in the electricity transmission market in the region determined in the concession agreement,
- prevented the complainants from having access to the infrastructure,
- lacked to set forth any legal and technical justification for the prevention,
- prevented actual and potential competition in the upstream market (electricity production market) by using its dominant position in the downstream market (electricity transmission market)

and therefore, abused its dominant position. The TCB only imposed administrative fine to ÇEAŞ and did not impose any remedy.

***Kablo TV (Cable TV)* Case**[23]

In this case, the TCB examined whether Türk Telekom, holding monopoly rights in supply of the infrastructure for broadband internet services abused its dominant position by not opening cable network to rival internet operators.

In the decision, first of all, competences of the TCB and ICTA concerning the subject matter of investigation were discussed in detail. In this vein, the TCB concluded that (i) existence of a regulatory agency in the telecommunications sector did not undermine the competence of the TCB about competition issues and (ii) both of the agencies should work in a cooperative manner to maximize the consumer surplus. As regards the subject matter in the case, the there was no specific regulatory measure to remove the consumer harm. Therefore, the TCB was competent in investigating the issue.

The TCB mentioned about EFD, but did not apply this doctrine to the case. Rather, the TCB used some kind of "no economic sense test" finding that the sole rational explanation of Türk Telekom's conduct was to exclude rivals from broadband internet services market. According to the TCB, Türk Telekom would impede the rivalry in supply of broadband internet services, thus would extend its user network to a scale that secured the return of its investments in DSL infrastructure. The TCB also examined whether Türk Telekom's behavior had any technical or objective justification and found that the alleged conduct was neither a result of technical necessities nor had it any reasonable objective justification. Considering these facts, the TCB concluded that Türk Telekom's behavior constituted an abuse under Art. 6 of the Act and ordered Türk Telekom to open cable network to other operators immediately. However, the TCB's order did not articulate the details of the remedy, i.e. the wording of the order was so

[23] 10.02.2005; 05-10/81-30

general such that it did not indicate under which conditions Türk Telekom should open its network to rivals.

***Bilsa* Case**[24]

In this case, it was claimed that Bilsa (a software company acting in school software systems) used an encryption which prevents rival companies from reaching students' data that was previously entered into the school automation system. The claim was also that through the encryption it was not possible to transfer data to rival systems, which resulted in schools being dependent to Bilsa. According to claimants, Bilsa either refused or asked excessive prices from companies demanding the abolishment of the encryption.

Taking demand and supply conditions into consideration, the relevant product market was established as software for schools.

Bilsa's defense was based on the argument that the encryption was aiming at protection of source codes which were subject to intellectual property rights.

Another claim raised by Bilsa was that in case of sharing of the encryption, a possibility of legal responsibility could occur due to any deterioration of information concerning the company's terms with the schools.

Another defense of Bilsa was that the data could be transferred manually; so that there was no need of sharing encryption.

By refusing all the defenses the TCB concluded that,

- Bilsa was in a dominant position in the software for schools market,
- Bilsa was acting in a way to prejudice competition in the market and violated Art. 6 of the Act.

For the reason of this violation, an administrative fine was imposed on Bilsa. Moreover, the undertaking was mandated to provide the schools their data in an unencrypted, correct, safe and concrete manner upon their request.

***Anadolu Cam* Case** [25]

In this case, the TCB assessed the claim that Anadolu Cam distorted the competition in glass home products market through terminating to supply some customers including Solmaz Mercan, which was a competitor of Anadolu Cam (via its affiliate Paşabahçe) in the downstream market. The TCB concluded that the conduct of Anadolu Cam could not be considered as an unlawful RTD.

The TCB defined relevant product markets as "glass package market" and "glass home product market" and determined that Anadolu Cam had dominant position in glass package market.

In its analysis; the TCB stated that four conditions must be satisfied to conclude termination of an existing supply relationship as an abuse of dominant position. These conditions were:

- The company which refused to deal must be dominant,

[24] 21.03.2007; 07-26/238-77
[25] 05.06.2007; 07-47/506-181

- There must be a refusal,
- Termination must not rely upon objective justifications,
- Termination must have restrictive effects on competition.

In this case, the TCB concluded that the first three conditions were satisfied. In other words, the TCB found that Anadolu Cam (i) had dominant position in glass package market, (ii) refused to supply and (iii) did not have sufficient objective justification for its conduct. However, the last condition was not satisfied. While evaluating whether the last condition was satisfied or not, the TCB focused on whether there was alternative suppliers of the complainant and whether the parameters such as price and quality in glass home products market were appreciably affected. As a result, the TCB found that Solmaz Mercan could find two alternative suppliers, so that refusal did not negatively influence on mentioned market parameters. So, the TCB concluded that despite Solmaz Mercan having been influenced by the refusal, refusal did not significantly harm competition in the market.

To summarize, the TCB did not hold Anadolu Cam's refusal to supply its competitor an abuse.

After the decision of the TCB, Solmaz Mercan appealed to Council of State. Accordingly, Council of State suspended the execution of the decision, and concluded that the conduct of Anadolu Cam should be considered as an abuse of dominant position, owing to the fact that the conduct had restrictive effects on competitors.

***CNR* Case**[26]

CNR decision was taken upon a dispute between two undertakings acting in the fair organization sector. The complainant undertaking, NTSR, was active in fair organization business and especially specialized on the organization of yachting and water sports fairs while the defendant undertaking, CNR was operating in both fair organization and fairground management businesses.

NTSR, which had a history of dealing with CNR for about 13 years claimed that CNR requested extremely high rental fee from NTSR for the lease of fairground to boatshow fair of 2007. According to NTSR, CNR's imposition of unacceptable conditions to its downstream rival was a constructive RTD and therefore constituted an abuse of dominant position under Art. 6 of the Act.

Upon this application, TCB opened an investigation against CNR and in the meantime decided for an interim measure about the rental fee which is effective for the year 2007. At the end of the investigation, however, the TCB concluded that the alleged behavior of CNR did not constitute an abuse of Art. 6 of the Act. by finding that the increase in the rental fee was due to the increase in the costs of CNR. It was also an increase which raised the abnormally low rental fees of the previous years to its market value.

***TTNet* Case** [27]

In this case, the TCB decided that the single economic unit consisting of Türk Telekom and its wholly owned subsidy TTNet[28] abused its dominance in the retail broadband internet access market by means of price squeezing and accordingly imposed an administrative fine.

[26] 19.09.2007; 07-74/896-333
[27] 19.11.2008; 08-65/1055-411

Although investigation was opened against two separate legal entities of Türk Telekom and TTNet, in its decision the TCB concluded that Türk Telekom and TTNet formed a single economic unit and that this unit held a dominant position in both wholesale and retail broadband internet access market.

The relevant product markets were defined as wholesale broadband internet access market and retail broadband internet access market. The relevant market for retail side was decided to be consisted of internet access over cable network and ADSL. In its analysis, the TCB did not include bit stream access model and local loop unbundling model in the relevant market as they were not developed enough to become a substitute to the resale model. In addition to other factors related with market structure, considering that during the investigated period this economic unit had over 90% market share, the TCB concluded that it was in dominant position.

As establishing the abuse, the TCB took into account two decisions given by the European Commission: *Telefonica* and *Deutsche Telekom*. Accordingly, existence of (i) vertical integration, (ii) dominance, (iii) lack of substitutability of the input, (iv) unprofitable margins, (v) impediment to competition and (vi) justifications of the undertaking were scrutinized. The TCB found that the criteria set above were all present in this case and concluded the economic unit abused its dominant position through price squeezing.

In its profitability analysis, the TCB scrutinized "average" profits and costs of TTNet. Three sets of costs were taken into account. The first group of costs consisted of service payments to Türk Telekom for wholesale ADSL access under resell model. The second group of costs, i.e. operating costs, was calculated on average terms, i.e. total accounting costs were divided by average number of subscribers. The last group of costs, which included subscriber acquisition costs consisted of costs of free internet access, free modems, subscription fee that were not collected, discounts on the monthly fees and advertisements specific to the campaigns. Since these costs were incurred in order to get new subscribers and the inspected entity would enjoy the benefits over a long period, they were spread through a period of both 24 and 36 months separately. Accordingly, monthly profitability tables were prepared for 24 and 36 periods. For the both two periods TTNet recorded negative profits.

The method for calculating profitability was based on historic data, so discounted cash flows method was not applied. Moreover, the calculation method could be categorized as fully distributed costs. This method may not seem to be compatible with the Commission's practice of using incremental costs (or avoidable costs as proposed by the Discussion Paper); however, the fact that TTNet's only business practice was limited to the resale model and this model did not require fixed investments, all costs incurred by TTNet could be categorized as incremental or avoidable.

In addition to its own profitability analysis, the TCB considered also other evidence such as internal e-mails and memos circulated among the managers as indicators of intent. At the same time, the TCB evaluated the arguments introduced by Türk Telekom and TTNet by stating that the market was an emerging market and formation of a competitive market structure would take time, in this time they were trying to contribute this period and the actions subject to investigations are a matter of improving the broadband internet services in Turkey. The TCB did not accepted these arguments as an objective justification and rendered that the aims and targets towards improving the broadband internet services and expanding the use of internet in Turkey were essential, but achieving these aims and targets via

[28] After its privatization in 2005, Türk Telekom has continued to operate in wholesale market whereas TTNet has started to operate in retail market.

anticompetitive behaviors could not be accepted as a justification. Moreover, the TCB stressed that, should Türk Telekom have such an aim it could achieve this aim through facilities (such as price discounts) in the wholesale internet market.