

Competition Law in the Electricity Market: Liberalization and its Consequences

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Introduction

In this article, I am going to examine the application of competition law in the Turkish Electricity Market from an EU perspective.

When we look at world history, we see that wars have broken out mostly because of energy sources. The mine sources in Alsace-Lorraine were very important in the breaking out of the Second World War, just like controlling the petrol sources in Iraq was very important in the American occupation of Iraq¹. One of the underlying reasons of the founding of the European Union (EU) has been the peaceful utilization of the energy resources. The European Coal and Steel Community, founded in 1951 to strengthen and control the coal and steel markets with a supranational authority in order to ensure peace, establishes the basis of the EU. At that time, coal and steel were the most important two substances for industry after the Second World War; and the management of these substances was going to be transferred to a supranational authority. Two of the three Communities (EURATOM and European Coal and Steel Community) which constitute the Eu-

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1 Chomsky, Noam, 'Can a Democrat change US Middle East policy?', Khaleej Times, April 3, 2008

ropean Community were established in order to ensure the peaceful consumption of energy resources.²

Energy law includes a number of areas: electricity law, gas law, and renewable energy law, to name a few. In some legal systems, it is divided in electricity law and gas law.³ In this article I am going to focus on the electricity market, and what this law contains will be explained in the following parts.

In the beginning, electricity was only used for illumination. Later, the demand for electricity increased. As the demand increased, the importance of electricity also increased. Because of this increasing importance, EU got interested in this subject and today electricity related rules are an important part of the *acquis*.

The Turkey – EU relations started in 1963 with the Ankara Agreement.⁴ In time these relations have deepened and led to the Customs Union between Turkey and EU in 1996. In 1999 at the Helsinki European Council, Turkey was declared as a candidate country for the EU. This caused the necessity for Turkey to comply with EU *acquis* in order to become a Member State. Consequently, Turkey also has to comply with the rules on electricity, which are part of this *acquis*. In this study, I will explore how much Turkey complies with the *acquis* provisions regarding electricity.

This study consists of three main parts: Turkish situation, EU situation, and a comparison. In the first part, I will give a short explanation about the liberalization of the Turkish electricity market, Turkish Competition Law and finally about how competition law is applied in the Turkish Electricity Market. In the second part, the same issues will be analyzed from an EU perspective. Thus, I will first summarize the liberalization of electricity market in the EU. Secondly, I will talk about the relevant aspects of EU competition law and finally explain how competition law functions in the EU electricity market. In the last chapter, I will compare the two systems and propose recommendations for Turkey.

I- TURKEY

A. The Liberalization of Electricity Market in Turkey

In Turkey, the production and distribution of electricity started for the first time in Tarsus in 1902. This electricity was produced by a dynamo with a rated power output of 2 kW. This dynamo, which was connected to a water mill, was upgraded to 60 kW and started distribution to subscribers. By this way, Tarsus has become the first place where the inhabitants met electricity.⁵

2 Sanam S. Haghighi, 'Energy Security and the Division of Competences between the European Community and Its Member States', *European Law Journal*, Vol.14, No.4, July 2008, pp. 461-482.

3 German Electricity Law (Energiewirtschaftsgesetz), Art.1.

4 Agreement Establishing an Association between the European Economic Community and Turkey (Signed at Ankara, September 1, 1963).

5 Erkan Erdogdu, 'Regulatory Reform in Turkish Energy Industry: An Analysis', *Energy Policy*, Vol. 35, 2007, pp 984-993.

Turkey's first big power plant was established in Silahtaraga, Istanbul, in 1913 as a public undertaking.⁶

In accordance with the liberal economic policies which had been tried in the years between 1923 and 1930 for electricity issues, privileged partnership applications which started before the establishment of the Republic have been continued.

Because of the global economic crisis in 1929, statist policies were given priority. In this context, the privileges of some privileged partnerships were removed. The right to establish electricity facilities was given to the municipalities by a new Municipality Code.⁷

Between 1938 and 1945, all the foreign funded and privileged partnerships in Turkey have been expropriated.

Beginning from 1950, because of politics which wanted to focus on the private sector in the economy, four Joint Stock Corporations with local private funds were established and these were given regional privileges in the electricity market.

After 1950, it was decided to give more importance to hydroelectric power stations. This is why the State Water Affairs Directorate was established in 1953. This Directorate had the duty to work in order to establish hydroelectric power stations.

In 1963, the Ministry of Energy and Natural Resources was established. The reason why this ministry was established is connected to the planned development efforts after 1960. These efforts were reflected in the electricity market, and the aim was to have more public natured policies. As a result, the Ministry was established.

The Turkish Electricity Institution (*Türkiye Elektrik Kurumu*, hereinafter 'TEK') was established in 1970. This Institution was established in order to operate as a monopoly at all stages of the electricity market. All the electricity belonging to the municipalities and villages were transferred to the TEK under Law No. 2705.⁸ All power plants owned by Etibank, Provincial Bank (*İller Banks*) and the municipalities were transferred to the TEK in order to centralize the electricity sector. In this way, the generation, transmission, distribution and sales of electricity by privileged private electricity partnerships was no longer practiced. Only Çukurova Elektrik AŞ, Kepez Elektrik AŞ and Civari TAŞ were allowed to maintain their existence.

Turkey has switched from a statist economy to a free market economy after 1980. Following the adoption of this new economic model, initiatives that will facilitate the contribution of the private sector into the energy market have been launched. In order to gather establish-

6 Ibid.

7 Hasan Ozulku, 'Türkiye'de Elektrigin Tarihsel Gelistimine Ozet Bir Bakis', 2006, p. 3.

8 Official Gazette 17809, 11 September 1982.

ments operating at different levels of the electricity market and make privatization easier, the monopoly rights of TEK and DSİ were abolished with Law No. 2705. In this way, the private sector gained the possibility to build power plants and sell the electricity which was produced in these power plants. Law No. 3096⁹ made it possible for the private sector to produce, transfer and distribute electricity.¹⁰

By-law No. 85/9799 regulated the electricity production other than that by the TEK.¹¹ In this by-law, authorized companies which produce, transfer and distribute electricity regionally were regulated.

By Council of Ministers Decision No. 87/114485,¹² the application by-law for authorized companies was put into effect.¹³ In this by-law, the principles governing the duties of authorized companies, the application and valuation, report of application, feasibility, the operation rights of facilities belonging to TEK, and expropriation were regulated.

A new by-law electricity tariffs abolished the old by-law;¹⁴ the new by-law was prepared according to actual legislation.¹⁵

The 1990s were the years in which legal regulations for the privatization of electricity sector were experienced.¹⁶ The privatizations which were tried to be accomplished between the years 1991 and 1996 did not happen because of various legal disagreements. In 1993, with a Council of Ministers' decision, TEK, which was a public financial institution, was restructured as two separate financial state enterprises, being TEAŞ¹⁷ and TEDAŞ.¹⁸ TEAŞ was created for the production and transfer of electricity and TEDAŞ was created for the distribution of electricity. In 1994, Law No. 3974 privatizing TEK, was annulled by the Constitutional Court on 10 December 1994.

The 2000s are the years when the restructuring of the electricity market has started and important steps were taken to attain this. The most important development was the adoption of Law No. 4628 in 2001.¹⁹ This law, titled the Electricity Market Law (EPK), aims at establishing an electricity energy market which is financially strong, stable and transparent, which is able to function in a competitive environment according to special legal rules, which would ensure independent regulation and monitoring in this sector. These would enable sufficient, good quality, constant, low cost and an environment friendly supply of elec-

9 Official Gazette 18610, 19 December 1984.

10 Izak Atiyas and Jorge Nunez Ferrer, 'The Evolution Of The Turkish Telecommunications, Energy And Transport Sectors In Light Of EU Harmonization', 2007, p. 104.

11 Official Gazette 18858, 04 September 1985.

12 02 February 1987.

13 Official Gazette 19381, 23 February 1987.

14 Gazette 10528, 17 June 1967.

15 Official Gazette 20654, 03 October 1990.

16 I. Yılmaz Aslan, 'Enerji Hukuku – Elektrik Piyasasında Rekabet ve Regülasyon', 2007, p. 6.

17 Turkey Electricity Joint Stock Corporation (Türkiye Elektrik Anonim Şirketi).

18 Turkey Electricity Distribution Company (Türkiye Elektrik Dağıtım Şirketi).

19 Izak Atiyas and Jorge Nunez Ferrer, 'The Evolution of the Turkish Telecommunications, Energy and Transport Sectors in Light of EU Harmonisation', 2007, p. 100.

tricity for consumption by consumers.²⁰ Different than previous efforts, Law No. 4628 aimed at liberalizing the electricity market and organizing it around markets. This law provides for the continuation of the vertical separation in the sector and the restructuring of public enterprises as separate enterprises for generation, distribution and transmission.

Within the scope of the EPK, the Electricity (and later on Energy) Market Regulatory Authority (EMRA), was established in 2001. This board was given very broad regulatory powers. Additionally, TEDAŞ, which was established in 1993 as a public enterprise, would continue to exist, but TEAS would separate into three parts: the Electricity Production Joint Stock Corporation (*Elektrik Üretim AŞ*), Turkey Electricity Transmission Joint Stock Corporation (*Türkiye Elektrik İletim AŞ*) and Turkey Electricity Undertaking and Trade Joint Stock Corporation (*Türkiye Elektrik Taahhüt ve Ticaret AŞ*). All three parts are separate state financial undertakings.²¹

EMRA decided to create a competition-based environment in the electricity production and retail sales market. For this reason, the electricity energy distribution services were to be privatized. The main reason for privatization was the rapid growth of electricity demand,²² together with having insufficient funds for the necessary investments in the state budget.²³ In this context, TEDAŞ was taken into the scope of privatization scope with decision No. 2004/22, dated 02 April 2004. The privatization experience in the Turkish Electricity Industry has been shown as a very interesting example of what globalization by international investment in the privatization of an emerging country's strategic sector can do, even though public opinion and even the national judiciary may be against it.²⁴

The by-law of energy fund regulates sources of the fund, areas of activities, units of fund management and the duties of these units.²⁵

By Supreme Planning Board (*Yüksek Planlama Kurulu*) Decision No. 90H-70, dated 17 August 1990, Trakya Elektrik AS which was 99.6% owned by TEK, was established. This company was to take over the electricity production, transfer and distribution facilities of TEK in the Trakya area²⁶ and make investments in this area. The French Electricity Institution had plans to cooperate with Trakya Elektrik AS but these efforts did not bring any results.

20 Article 1 of Electricity Market Law.

21 Ozlem Ozkivrak, 'Electricity Restructuring in Turkey', *Energy Policy*, Vol. 33, 2005, pp 1339-1350.

22 Berna Haktanirlar Ulutas, 'Determination of the Appropriate and Energy Policy for Turkey', *Energy*, Vol. 30, 2005, pp. 1146-1161.

23 Ivan Starodubtsev, 'Reform of the Turkish Electrical Energy Sector: Basic Principles and Interim Results', *Institute of Middle Eastern Studies*, 2007.

24 For an explanation of how the national judiciary has reacted to the privatisation of electricity distribution in Turkey, see Ali Ulusoy and Fuat Oguz, 'The Privatisation of Electricity Distribution in Turkey : A Legal and Economic Analysis', *Energy Policy*, Vol. 35, 2007, pp 5021-5034.

25 Official Gazette 20834, 03 April 1991.

26 Trakya is the part of Turkey located in Europe.

B. Turkish Competition Law

Article 167 of Turkish Constitution stipulates that '[t]he state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets'. This article has an imperious character. This article gives a duty to the state by saying '...and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets...'. The Act on the Protection of Competition (Competition Law) was adopted on 13 March 1994. With this statute, the state has completed this obligation.

By the decision of the Association Council which was established under the Association Agreement (Ankara Agreement) between Turkey and EU, a customs union was established.²⁷ According to this decision, one of the main tools of the customs union constituted between Turkey and EU, is harmonization of competition policies and competition laws. In other words, Turkey is supposed to adopt EU competition policies and EU competition law. Also, Turkey is obliged to institute a Competition Authority and cooperation between this authority and the Association Commission is envisaged.

According to Article 37 of Custom Union decision, Turkey has undertaken to constitute a competition code. Turkey has also undertaken that it will act in accordance with the EU law with its regulations, case law and principles. This undertaking is not just for the beginning. Turkey has also undertaken to accept the changes made by the EU in the future during the application of the rules. This is why; it was an obligation to issue a Competition Code according to the Customs Union decision.

1) The Act on the Protection of Competition

The Act on the Protection of Competition consists of six chapters; first chapter contains three articles which include: aim of the code, scope of the code and some terms.

Second chapter consists of three parts. In the first part, articles relating to substantive law which we can say fundamentals of the code and banned activities are regulated. Second part is called 'Powers of the Authority' and regulates issues like: negative determination, ending a violation, notification, withdrawal of negative determination and exemption, asking for information, examination onsite.²⁸ Third part regulates the types of fines and their provisions.²⁹

²⁷ Katinka Barysch, 'Turkey's Role in European Energy Security', Centre for European Reform Essays, 2007, p. 6.

²⁸ Articles (8-15) of The Act On The Protection Of Competition.

²⁹ Articles (16-19) of The Act On The Protection Of Competition.

Third chapter, is titled ‘Organization’, and consists of three parts: Competition Authority, Prime Ministry, experts and vice-experts and financial provisions.³⁰

Fourth chapter regulates the procedures which the Authority has to follow in its investigations.³¹

Fifth chapter regulates consequences of restriction of competition.³²

In the Sixth chapter, are the final provisions and the three temporary articles?

2) Purpose of the Act on the Protection of Competition:

The aim of this Code is to set up and to protect the free competition. Subjects which may affect the free competition like government actions, state aid and dumping of imports which are regulated in a different code are outside the scope of this code. Subjects, which effect free competition, are included in the scope of the code: settlements and concerted practices between companies, decisions of groups of undertakings, mergers and acquisitions and abuse of dominant position.

The full name of the Competition Code is the Code on the set up and protection of competition. The reason why the term ‘the set up and protection of competition’ was used is to allow a broad interpretation when a behavior is obviously deterring, restricting competition but does not completely fall within the scope of a prohibition. By this way the Competition Authority can prohibit anti-competitive behavior even if it does not carry all the conditions of specific violations.³³ In the Competition Code, tools mentioned above are mentioned explicitly but the main aim, set up and protection of free competition was not emphasized.

The Article 1 of The Act On The Protection Of Competition which regulated the purpose of the code states that ‘the purpose of this Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end.’

In Article 1 (purpose of the code), the tools which are going to used in order to reach the purpose are pointed out:

- 1) Agreements distorting competition between undertakings.
- 2) Undertakings abusing their dominant positions.

³⁰ Articles (20-39) of The Act On The Protection Of Competition.

³¹ Articles (40-55) of The Act On The Protection Of Competition.

³² Articles (56-59) of The Act On The Protection Of Competition.

³³ I. Yılmaz Aslan, ‘Rekabet Hukuku’, 2001, p. 28.

Restricting competition by mergers and acquisitions³⁴ was not included into Article 1, article of purpose. This does not have any specific meaning. It has been said that the article has been written badly according to the law making technique.³⁵

Actually, Article 20 explains the purpose of the code better than Article 1: ‘...to ensure the formation and development of markets for goods and services in a free and sound competitive environment...’

3) Scope of the Act on the Protection of Competition:

Article 2 of The Act on the Protection of Competition regulates the scope of the code. According to Article 2 ‘Agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey, and the abuse of dominance by the undertakings dominant in the market, and any kind of legal transactions and behavior having the nature of mergers and acquisitions which shall decrease competition to a significant extent, and transactions related to the measures, establishments, regulations and supervisions aimed at the protection of competition fall under this Act.’

4) Definitions:

In Article 3 of The Act on The Protection of Competition, some definitions are given:

Ministry: The Ministry of Industry and Trade,

Competition: The contest between undertakings in markets for goods and services, which enables them to take economic decisions freely,

Dominant Position: The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers,

Undertaking: Natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole,

Association of Undertakings: Any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals,

Goods: Any kind of movable or immovable property which is the subject of trade,

Services: Physical, intellectual or combined activities carried out in return for a cost or interest,

³⁴ Article 7 of The Act On The Protection Of Competition.

³⁵ I. Yilmaz Aslan, ‘Rekabet Hukuku’, 2001, p. 28.

Authority: Competition Authority,

Board: Competition Board.

5) Application of the Act on the Protection of Competition in terms of Territory:

The acts which are constituted by the Republic of Turkey are applied within the borders of the country. Borders of the state are determined by international agreements.³⁶ In Articles 2, 6 and 7 of The Act on the Protection of Competition, there is a provision on the territorial application of the law:

Article 2: ‘...any undertakings operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey...’

Article 6 and 7 ban abuse of dominant position and mergers and acquisitions which are aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country. These provisions are related to the determination of the geographical market.

6) Application of the Act on the Protection of Competition in terms of Time:

In the Act on the Protection of Competition, the times when the provisions will take effect are explicitly shown. The legislature wanted to put in a transition period so some provisions took effect after the publication of the law. Article 64 (titled ‘Entry into Force’) of The Act on the Protection of Competition states that “Articles 16 and 17 of this Act concerning administrative fines shall enter into force one year after its publication, while the other articles on the date of its publication.”

C. Competition in the Turkish Electricity Market

The national energy policy of Republic of Turkey can basically be framed like to introduce the energy in a qualified, trustworthy and economic way. In 5-year development plans which show the priorities in energy policy the main issues are:

- Supplying of energy which is needed to reach the aims of economic and social development
- Ensuring the supply safety of energy
- Encouraging the investments which are needed to provide the increasing energy demand

To enable access into the electricity market and to create a sector

³⁶ Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923. British Empire, France, Italy, Japan, Greece, Romania, and the "Serbo-Croat-Slovene" State on one part and Turkey on the other.

where competition is ensured, the monopoly structure needed to be divided. But this is not enough alone. It is needed to be provided that every divided part should work in harmony. What is meant by dividing the monopoly structure is that transmission and distribution should be divided from production, sales and commercial. This means a structural decomposition, not a separation in functions.

In spite of the division, other undertakings are allowed to take part in facilities like sales, commercial and production by enjoying the services which the monopoly supplies, even though monopoly continues to exist.

Here, there are some obligations of the monopoly:

- allow the third party access,
- give operating rights to use the transmission and distribution systems,
- While doing the above mentioned issues not to discriminate between the parties.

On the basis of the Act of Energy Market No. 4628, the Electricity Market Distribution Regulation³⁷ was issued. According to Article 1 of the Electricity Market Distribution Regulation, “the objective of this Regulation is to set forth the principles and procedures pertaining to the reliable and low cost operation and planning of the distribution system for the construction of the market model set in Law No. 4628.”

“This Regulation covers the principles and procedures that shall be imposed upon related parties pertaining to obligations of the distribution companies and users of distribution system, facility design and operation rules that shall be complied and issues on the planning and operation of the distribution system in accordance with the non-discrimination principles among arms-length parties.”³⁸

According to the Article 5(1) of the Transmission System Supply Reliability and Quality Regulation, Turkish Electricity Transmission Company, *Türkiye Elektrik İletim Anonim Şirketi* (TEİAŞ), is obliged to plan and develop the transmission system in compliance with the principles and procedures laid down in the applicable legislation.

It is very important in creating competition in electricity production, that structure of vertical integrated monopoly is divided in a structural basis, and not in a functional basis. When the monopoly in the electricity sector is divided, production, transmission, marketing and distribution businesses is going to be done by different companies and this will ensure a healthy competition in the sector. For example, a distribution company may use the customer the connection service

³⁷ Official Gazette 25025, 19 February 2003.

³⁸ Article 2 of Electricity Market Distribution Regulation.

and other services which are provided by the monopoly to bind customers to itself. According to this example, the distribution company abuses its dominant position in the distribution market (upstream market) in the retail selling market (downstream market).³⁹

The present legal situation of the Turkish Electricity Distribution Inc. (TEDAŞ) which gives it a privilege of natural monopoly may cause some disadvantages while performing in the retail selling and production areas. However, according to Article 3-c Turkish Electricity Transmission Company (TEİAŞ) is banned to be active in these areas. It says that ‘Turkish Electricity Transmission Co. Inc. cannot engage in any activity other than transmission activity in the market.’ But it is possible that private distribution companies produce electricity at a specific amount in regions determined in their licenses.⁷⁴⁰ Private distribution companies are *de facto* monopolies in the regions determined in their licenses for eligible customers in distribution activity.

The private distribution companies doing electricity production at the same time are allowed to support distribution services with the profit which they made in production. This kind of cross subvention would not affect social welfare negatively. However, they are *de facto* monopolies for the eligible customers in their license regions. Thus, if these kind of private distribution companies support production activities with the profit which they made from distribution activities, it would be an abuse of dominant position. This kind of cross subvention may affect social welfare negatively and advantages expected from competition may not be achieved.

1) Controls of Mergers and Acquisitions in Electricity Sector:

According to Article 7 of The Act On The Protection Of Competition ‘merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition is prohibited’. Also, in accordance with Article 11 of the same act, the operations⁴¹ which exceed the limitations in communiqué of Turkish Competition Authority must be notified to the Authority in order to acquire validity.

- Relevant Market:

Before determining the effect of a merger or an acquisition on the competition in a market, the borders of the market which it will effect must be drawn. The market where the competition conditions are homogeneous and the goods can be substituted in price, qual-

³⁹ Mustafa Erdem Can, ‘Hukuki Acidan Elektrik Piyasasinda Rekabet’, p.312, 2006.

⁴⁰ Electricity Market Law No.4628 Article 3(c).

⁴¹ According to Communiqué no.1997/1, operations which exceed 25 million New Turkish Liras (NTL) of turnovers and 25% market share in related market.

ity, and purpose of use by the buyers is called related market. And the geographic region where is effected is called related geographic market.⁴² Whether the competition will be effected positively or not by a merger in a related market which consists of these two elements is considered according to approach of the Competition Authority, structure of the market or the possibility of concerted practice in the market. Consequently, how the borders of the market are drawn determines the decision of the authority of whether a merger is permissible. The related market is determined according to the activities of the parties of a merger or acquisition. In other words, if an owner of a power plant wants to buy another one, the market to be defined will be the market related to the production of electricity. In merger of two distribution companies, the related market is the distribution of electricity.

2) Hindering the Competition in Energy Market by Agreements and Concerted Practices:

Decreasing or increasing prices by agreement, explicitly or implicitly reducing of the demand or supply is banned in Article 4 of The Act on the Protection of Competition. It is aimed that the market operation which desired to be competitive is not distorted with this ban. Constituting an agreement which hinders competition is no longer possible in Turkey since 1994. Consequently, companies usually fulfill their cooperation which hinders competitions secretly. This kind of cooperation is called concerted practices. If this kind of cooperation is not severely punished, the advantages which are expected from liberalized markets would not be realized. Fighting with these agreements which hinder competition is one of the duties of Competition Authority in order to ensure a healthy operating electricity sector.

In Turkey, it is projected that the wholesale electricity market is shaped by long term supply agreements. So, distribution companies, which do not have the chance of reflecting the changeable prices to their companies, are protected against the power plants which use their market power against distribution companies. The price levels, which are going to be used by distribution companies for a long term are determined with these agreements constituted between producers and distributors. But in daily operations, in the situations of that demand is over supply or vice versa, market tries to balance the difference, which cannot be balanced with supply agreements, with charging and discharging tenders. In charging tenders, the power plants which supposed to enter the market; in discharging tenders, the power plants which are supposed to be taken out of the market are determined by uniform tenders.

42 I. Yılmaz Aslan, 'Enerji Hukuku – Elektrik Piyasasında Rekabet ve Regülasyon', 2007, p. 523.

3) Energy Market Regulatory Authority as the Competition Authority in Energy Market:

The advantages of liberalization can only be achieved in one condition: the sector must be re-organized with competitive markets.⁴³

The electricity market constitutes a very special case within the general competition law. Because the demand in the market is more sensitive to price changes, there needs to be special competition regulations organizing the market; which should be implemented by a special agency. This is why in Turkey competition in the electricity market is no longer within the exclusive domain of the Competition Authority. It is the Energy Market Regulatory Authority that is responsible for ensuring competition in this market.

Production, transmission and distribution used to work in vertically integrated markets. After the division of these activities and after production opened up to competition, the price in the electricity market is determined by the market mechanism. The price of the transmission service which belongs to state will be a variable which regional electricity distributors consider their trading decisions

4) Authorities of Energy Market Regulatory Authority while Providing and Protecting Competition:

Energy Market Regulatory Authority has some authorities to provide and to protect competition such as:

- Imposing Sanctions
- Authorities while Resolving Disputes
- Authority in Expropriation and other Operations

-Applying Sanctions:

Energy Market Regulatory Authority has the authority of imposing sanctions. Article 11 of Energy Market Law the sanctions which can be applied by the Energy Market Regulatory Authority and the conditions under which these sanctions can be imposed are regulated. The Energy Market Regulatory Authority is authorized to impose fines and cancellation of license fines according to the situation. That the Energy Market Regulatory Authority can give administrative fines is not mentioned as one of the authorities which the Energy Market Regulatory Authority has in Article 5 of Energy Market Law. In Article 11 of the Energy Market Law which regulates the sanctions, all the offenses and their sanctions can be imposed are listed. According to Article 5 (7) (I), it is not possible to impose sanctions besides the actions which are regulated in Article 11.

The Energy Market Authority has the right to demand or to investi-

43 I. Yılmaz Aslan, 'Enerji Hukuku – Elektrik Piyasasında Rekabet ve Regülasyon', 2007, p.515.

gate on site all the information and the documentaries from all public and private undertakings while performing its lawful rights which are given by Law. In the Energy Market law the procedures of how the sanctions are going to be imposed and the defense rights of the related companies are not regulated. These absences must be regulated as soon as possible.

-Authorities while Resolving Disputes:

Resolving the disputes which occurs between license owners is one of the authorities of the Energy Market Regulatory Authority. The Authority resolves these disputes according to the provisions of the Energy Market Law and the provisions of the licenses of the related parties. Disputes may arise from the transmission systems agreements or agreements related to the connection to a distribution system and use of the system. The dispute resolution authority of the Energy Market Regulatory Authority concerns only disputes which arise between a distribution company which is a natural monopoly or a distribution company and the other license owners and agreements which were constituted for making benefits by using distribution system. To resolve disputes which a natural monopoly is not a party is resolved by courts. Also, the disputes which arise between transmission companies and distribution companies or the agreements which are not related to transmission or distribution between other license owners are also resolved in courts.

-Authority in Expropriation and other Operations:

Article 15 of the Energy Market Law gives special authorities to Energy Market Regulatory Authority. After liberalization of the electricity production and distribution, the private sector companies were supposed to have rights which allow them to build electricity production units or to install distribution lines on lands which are owned by state or private persons. In the times when all the electricity systems are owned by the state, there were no problems at all, since the state could easily use the state-owned-lands. As for lands belonging to private persons, the state could privatize these places in order to provide an undisturbed service. Therefore, Article 15 of Energy Market law has regulated:

The expropriation demands of the license holding corporate bodies performing generation and/or distribution activities in the electricity market shall be evaluated by the Authority and if found appropriate, expropriation is performed on the basis of the procedures established in the Expropriation Law no. 2942 by the Authority. The decision of the Board on the requirement of expropriation is deemed as "public interest". In such cases, the expropriation cost and other costs incurred are paid by the related legal entity.

The license holding corporate bodies performing generation or distribution activity in the market may file a request to the Authority for

the establishment of right of easement, usage right or rent over the immovable owned by Treasury or under state control. The Energy Market Regulatory Authority is authorized to give permission in these situations.

-Sharing and Conflict of Authority with the Competition Authority:

The authorization of the Competition Authority covers all sectors in the economy. The Act on the Protection of Competition does not separate any inapplicable sectors. Consequently, the Competition Authority is also authorized in electricity sector.

If there is a specialized institution related to a particular subject, the authorization of the generally authorized institution would be removed. However, there is no provision in the Energy Market Law which abolishes the authorities of the Competition Authority in the electricity market.⁴⁴ On the contrary, there is a provision stating that the competence of the Competition Authority continues in mergers and acquisitions:

In addition to the approvals required in licenses issued under this Law and other approvals specified herein, the approval of the Board is required to be obtained in respect of any 10 % or higher capital changes in the partnership status of a legal entity or any 5 % or higher capital changes in the partnership status of a publicly-traded company operating in the market or in case of a merger between such legal entities or a consolidation or change in control status of any legal entity or in case its status as a legal entity is altered through a sale, transfer or other arrangements or a material part of generation, transmission or distribution facilities owned by a real person is effected by a sale, transfer or any other change. The principles and procedures concerning obtaining a Board decision are established by a regulation. The provisions regarding the partnership status of the legal entities performing activities in the electricity market are not applied to the facilities conducting generation activity for the natural gas market. However, natural gas storage facilities are subject to the referred provisions.

The Competition Board reserves the right to issue the authorizations with respect to any merger or acquisitions to be carried out in the market under the scope of Article 7 of the Law on Protection of Fair Competition No: 4054.⁴⁵

Although, the duty of providing competition is given to the Energy Market Authority, there is no provision which states that when competition is distorted with agreements and abuse of dominant position, the authority of imposing sanctions is given to the Energy Market Regulatory Authority. Consequently, when there is a breach of competition in the electricity market, the competence of the Competition Author-

44 Izak Atiyas and Jorge Nunez Ferrer, 'The Evolution Of The Turkish Telecommunications, Energy And Transport Sectors In Light Of EU Harmonisation', 2007, p.111.

45 Article 8 of Energy Market Law.

ity, of imposing sanctions, still continuous. But also, article 11 of the Energy Market Law states that: '[t]he fines are imposed separately on all of the parties who act in violation of this Law. In cases where the actions requiring imposition of fines as per this Law are deemed as crimes as per Turkish Penal Code or other codes including sentence provisions, this does not form an obstacle against the imposition of these fines and the cancellation of licenses.'

II- EU

A. Liberalization of the Electricity Market in the EU

The first EC regulation which aims at liberalization of the electricity market is Directive 96/92/EC concerning common rules for the internal market in electricity.⁴⁶ This directive regulates common rules in production, transmission and distribution of electricity.⁴⁷

Two methods are presented to the Member States for the new power plants which are going to be built:

- 1) Tender Procedure
- 2) Authorization Procedure

Member States are allowed to choose one of these options. They are also allowed to choose a combination of these methods.

In the Tender Procedure, a Member State determines necessary production capacity for the future by taking estimated demands of distribution system operator and other related establishments into account.

In the Authorization Procedure, all the production companies which fulfill the requirements determined by the Authorizing institution are given authorization, without looking at electricity demand. Most of the Member States adopted the Authorization Procedure.

The directive accepts the Eligible Consumer Principle which means that directive abolishes legal monopolies by allowing big electricity consumers to select their providers.

Also, the directive brought an obligation for vertically integrated companies to allow access to third parties into their transmission and distribution networks. This is called Access of Third Persons to Network Principle.

According to the Decomposition Principle, a distinction is made between the network related activities of the vertically integrated undertakings and their other activities, even if the activity is at a minimum level. Directive 96/92/EC took the first step to separate the regulated parts of the market (Network) and the competitive parts (production and retail sales).

⁴⁶ Official Journal L 027 , 30/01/1997 P. 0020 – 0029.

⁴⁷ Izak Atiyas and Jorge Nunez Ferrer, 'The Evolution Of The Turkish Telecommunications, Energy And Transport Sectors In Light Of EU Harmonisation', 2007, p. 81

Gradual liberalization which is brought by the Directive 96/92/EC caused different applications on market liberalization in Member States. Other criticized aspects of the Directive related to the possibility of allowing the access to the network of third parties by negotiation method, the restricted nature of the separation between activities, and not making it compulsory that national regulatory authorities concerning energy to be established. Consequently, Directive 2003/54⁴⁸ was adopted concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

Firstly, Directive 2003/54 stipulates that measures should be taken by Member States in order to ensure that all non-household customers are made eligible customers until 1 July 2004.⁴⁹ Household customers have the independence of choosing provider, beginning from 1 July 2007.⁵⁰ This approach ensures to remove different applications of the Member States in liberalizing the electricity market. The aim of the Commission is to ensure the full liberalization of the electricity markets. Nevertheless, the opening up to competition of the retail sales market, which is dominated by settled undertakings in dominant position, does not lead to the creation of competition. There is no provision about this subject. However, some Member States tried to find temporary solutions, such as determining a market share threshold for settled undertakings, in order to solve this problem. For example, United Kingdom divided the present production company in to competitive undertakings in order to create a competitive market structure.⁵¹

1) Access to the Network:

In the directive, it is regulated that Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users.⁵² The Directive has abolished the system of access to network by negotiations, which could lead to discriminatory practices.

2) Regulatory authorities:

According to article 23 of Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent from the interests of the electricity industry. This provision also aimed at solving the problems caused by the previous Directive.

48 OJ L 176, 15.7.2003, p. 37–56.

49 Directive 2003/54, Article 21(1)(b).

50 Izak Atiyas and Jorge Nunez Ferrer, 'The Evolution Of The Turkish Telecommunications, Energy And Transport Sectors In Light Of EU Harmonisation', 2007, p. 83.

51 Richard Green, 'Markets for Electricity in Europe', Oxford Review of Economic Policy, Vol. 17, No.3, 2001, pp329-345.

52 Article 20 of Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

3) Decomposition:

In order to prevent risks of discrimination and cross subvention, which might occur related to vertically integrated companies, the Directive provides Legal Decomposition next to Functional Decomposition. What is meant with Legal Decomposition is that transmission and distribution companies are supposed to have separate decision making bodies (separate company headquarters and separate board of directors) with separate legal and organizational structures.

4) Supply Safety

EU energy policies also aim at a high level of supply safety. Supply safety policy consists of two elements:

- 1) System safety,
- 2) Mid and Long term suitable electricity supply

Even though Directive 2003/54 contains provisions on supply safety, the Commission has prepared a proposal for a directive on this issue, in 2003. The measures provided in the proposal are as follows:

- The development of the liquid wholesale market,
- The responsibility of the system managers to balance the system,
- New investment incentives,
- Possible tenders for small capacity,
- Obligation to have substitute production capacity for retail license holders.

All these measures are a part of the market design which will be established by Member State authorities in order to create a stable investment environment. This proposal has been adopted in 2005.⁵³

The increasing importance of the energy sector is once again evidenced by the fact that the Treaty of Lisbon introduces a new Title on Energy Policy. Title XXI of the Consolidated Version of the Treaty on the Functioning of the European Union reminds us that the Energy Policy of the EU is connected to the functioning of the Internal Market and confirms that this policy area has an important environmental aspect. Within this framework, the Energy Policy of the EU aims to ensure the functioning of the energy market, ensure security of energy supply in the Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy, and promote the interconnection of energy networks. However, the right to determine the conditions for exploiting energy sources and the general structure of energy supply remains with the Member State. These basic principles can be seen as the foundations of a common EU Energy Policy.

⁵³ Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33, 4.2.2006, p. 22–27.

EU Competition Law is regulated between Articles 101 and 108[Ex-article 81 and 88] of the EC. Here I will only give brief explanations as to the aspects of Competition Law which constitute a parallel to the issues already discussed in the chapter on Turkey.

1) Agreements Preventing Competition:

Article 101[Ex-Article 81] EC states that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market shall be prohibited. ‘Agreements’ and ‘Undertakings’ are defined by Case Law.

- **Undertakings:**

There is not any definition of undertakings in the Treaty. In *Höfner and Elser v. Macraton*⁵⁴, ECJ defined undertakings as ‘the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’.⁵⁵

- **Agreements:**

In *Bayer AG v. Commission*⁵⁶, it is said that the proof of an agreement between undertakings within the meaning of Article 101(1)[Ex-Article 81(1)] of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterizes the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market.⁵⁷

These agreements may take form of :

- (a) Directly or indirectly fixing purchase or selling prices or any other trading conditions;
- (b) Limit or controlling production, markets, technical development, or investment;
- (c) Sharing markets or sources of supply;
- (d) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁵⁸

⁵⁴ Case C-41/90, [1991]

⁵⁵ Case C-41/90, *Höfner and Elser v. Macraton GmbH*, [1991], para. 21

⁵⁶ Case T-41/96, [2000]

⁵⁷ Case T-41/96, *Bayer AG v. Commission*, [2000], para.173

⁵⁸ Article 101 [Ex-Article81] EC

Agreements falling in the sphere of Article 101(1)[Ex-Article 81(1)] are automatically void. Article 101(3)[Ex-Article 81(3)] provides for exemptions from the prohibition. Exemptions may be individual or group exemptions and until recently Commission had the sole power to grant exemptions. Council Regulation 1/2003 on implementation of Articles 101[81] and 102(82)⁵⁹ brought the power of applying 101(3) [Ex-Article 81(3)] to Member States. Since 1 May 2004 both national courts and competition authorities can apply Article 101(3)[81(3)].

2) Abuse of Dominant Position:

Article 102[Ex-Article 82] EC deals with abuse of dominant position. Accordingly ‘Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.’ For definitions, we again have to look at case law of the ECJ.

‘Abuse’ is to be understood as ‘abusive exploitation’. In Continental Case⁶⁰ it’s stated that undertakings are in dominant position when they have the power to behave independently, without taking into account their competitors, purchasers or suppliers. Because of their share of the market they have the power to determine prices or control production or distribution for a significant part of the products in question. It is enough that they are strong enough as a whole to ensure to those undertakings an overall independence of behavior.

In United Brands⁶¹, dominant position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.

In Continental Can, the ECJ brought a two-step procedure for the Commission to analyze a firm’s market power: 1) Define the relevant market (product/service & geographical area affected); 2) Assess the firm’s dominance in that market.

The relevant market has 2 dimensions:

1) Relevant Product Market: the general approach of the commission and the court to the definition of the product market has been to focus upon interchangeability: the extent to which goods or services under scrutiny are interchangeable with other products.

⁵⁹ Council Regulation 1/2003 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 04-01-2003, pp. 1-25.

⁶⁰ Case 6-72, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, 21-02-1973.

⁶¹ Case 27-76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, 14-02-1978.

2) The Geographic Market: the relevant geographical market comprises the area in which the undertaking concerned is involved in the supply and demand of relevant products or services. The geographical Market must be wide enough to include 'a substantial part of the common market' for the abusive exploitation of dominant position to be caught by Article 102 [Ex-Article 82].

According to Article 102 [Ex-Article 82] EC, abuse may exist in :

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) Limiting production, markets or technical development to the prejudice of consumers;
- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁶²

Article 106 [Ex-Article 86] EC contains a general exception to rules governing competition. According to this provision in the case of public undertakings and undertakings which Member States grant special or exclusive rights may be partially or wholly excluded from the scope of application of the general community rules on competition.

C. Competition Law in the EU Electricity Market

1) The relationship between the EC Treaty Competition Rules and the Directives

The existence of Directive 96/92, which aimed at establishing the structure which would allow the obstacles of competition in the electricity market to be overcome, did not prevent the need to resort to EC Competition rules and the effectiveness of these rules. It would of course not be possible for the provisions of a Directive to annul the provisions of the primary rules.

The application of competition rules in the energy market, will serve the competition of sectoral rules by preventing the enactment of special rules and applications to prevent new entries to the market and thus to hinder competition.

2) The exceptions of the prohibition of agreements and concerted practices of undertakings which restrict competition

- *Production Growth, Distribution and Supply Agreements*:

In the beginnings of 1990s, the Commission started to re-evaluate the agreements distorting competition. In *Jahrhundervertrag* deci-

⁶² Article 102 [Ex-Article 82 EC].

sion⁶³, the Commission decided to examine the agreement between General Association of the German Coalmining industry (Gesamtverband des deutschen Steinkohlenbergbaus- GVSt) and Association of the German Public Electricity Supply Industry (Vereinigung Deutscher Elektrizitätswerke e.V.- VDEW). Electricity Companies agreed on buying German coal with this agreement which created a quota system. The Commission found the agreement to be restrictive because it prevented electricity companies to search for cheaper trade incomes in other Member States as this obliges the electricity companies to produce their own electricity instead of importing it.

Although, the agreement is contrary to Article 101(1) [Ex-Article 81(1)] EC, quotas were needed to support the coal mine sector which was suffering from a crisis. Commission brought lot of exceptions about this agreement within the scope of Article 101(3) [Ex-Article 81(3)], for the reason that it ensures the electricity supply. Jahrhundertvertrag decision showed that agreements constituted in order to increase supply reliability and develop the production and distribution are in compliance with individual exceptions within the scope of Article 101(3) [Ex-Article 81(3)].

- Agreements Restricting Import and Export:

According to Article 18(1)iii of Directive 96/92, eligible customers are free to conclude supply contracts to cover their own needs with producers inside the territory covered by the system . Also, Directive 2003/54 allows the eligible consumers to obtain electricity from any providers which are listed in Article 21 of directive 2003/54.⁶⁴ According to Article 3(5) of Directive 2003/54, Member States shall ensure that the eligible customer is in fact able to switch to a new supplier. It is obvious that agreements concluded by undertakings and which have as their object or effect the prevention of export or imports will constitute a violation of Article 101(1) [Ex-Article 81(1)] EC. The validity of the agreements depend on whether or not it is within the scope of Article 106 [Ex-Article 86] EC on public service exception.

According to the case Ijsselcentrale⁶⁵, if there is an agreement which creates an import or export monopoly and which can not be considered as a public service exception, Article 101(1) [Ex-Article 81(1)] provision may be applied.

- Long Term Agreements:

Long term agreements constituted between buyers and sellers in order to satisfy their mutual needs distort competition as a result of their nature. This is because, long term agreements restrict buyer's freedom of choice and prevent the competitors of the supplier from selling their

63 [1993] O.J. L50/14

64 Article 2(12) of Directive 2003/54

65 [1991] O.J. L28/32

electricity to the buyers.⁶⁶ Such agreements are usually concluded with B.O.T. agreements (Build, own, operate and transfer).

Long term energy agreements are important for EU energy markets, because EU provides a very big part of its need with long term energy agreements. Long term agreements have many advantages. One of the most important advantages is that the stableness which is a very important element of energy operations is provided for both producer and buyer.

On the other hand, long term agreements have some disadvantages, especially in terms of competition. It is possible for long term agreements, to constitute a violation of Article 101 [Ex-Article 81] of EC Treaty even though they are not *per se* prohibited in EU law.⁶⁷ For this reason, the Commission decides on a case by case basis when evaluating the compliance of long term energy agreements to EU competition rules.

In examinations made by the Commission, it is stressed that long term energy agreements may negatively affect competition from two aspects. First of all, it is more difficult for third parties to access the market because the duration of the agreement is long. Secondly, long term energy agreements which contain provisions called 'exclusive supply provisions' making it compulsory to supply only certain companies with energy, have negative consequences for competition.

The Commission does not completely prohibit long term agreements. However, the Commission demands the duration of these agreements to be shortened (usually 15 years) and the taking out of some provisions from the agreement.⁶⁸ For example, 28 years was found to be too long in case Pego Project,⁶⁹ and this BOT agreement was divided into: one of 15 years and consequently one of 13 years.

3) Abuse of Dominant Position of the Electricity Companies

- Abuse of Dominant Position within the context of Electricity Market Activities:

Article 102 [Ex-Article 82] EC has a regulating role in the developing electricity market. A vertically integrated electricity undertaking may be a threat to an undertaking operating in one of the downstream markets of the electricity market or to an undertaking which wants to enter the market.

Like in other markets, in the electricity market, an undertaking which has dominant position may abuse this position, very generally, in two ways :

- 1) By preventing access to the network;
- 2) By refusing the supply.

66 Mustafa Erdem Can, 'Hukuki Acidan Elektrik Piyasasinda Rekabet', 2006, p.201.

67 Cagdas Evrim Ergun, 'Avrupa Birligi Enerji Hukuku', 2007.

68 Cagdas Evrim Ergun, 'Avrupa Birligi Enerji Hukuku', 2007.

69 Eletricidade de Portugal/Pego Project, Article 19(3) Notice, [1993] O.J. C 265/3

In more specific terms, due to the current structure of the electricity market and specifically due to the fact that many dominant public service undertakings are in a vertically dominant position, it is possible that system operators discriminate to the benefit of suppliers belonging to the same economic structure by not allowing the other suppliers and their clients to access the system.⁷⁰ Here it is important how Article 102 [Ex-Article 82] EC will be applied to the electricity market. Directives 96/92 and 2003/54 state that the rejection criteria should be objective and non-discriminatory.⁷¹ For example, transmission or distribution system operator can refuse access, if it does not have the required capacity.⁷²

Article 23(8) Directive 2003/54 states that ‘Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behavior. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82[New Article 102] thereof.’

III- COMPARISON BETWEEN EU AND TURKEY

In terms of the liberalization of energy market, the Turkish experience is similar to the EU experience. In fact, the same restructuring towards the regulation and competition in electricity industry happens globally.⁷³ Turkey has simply followed the European Union in this liberalization trend. Liberalization at EU level began in 1996. Turkey followed the EU in 2000 with the restructuring of its energy market. This is significant because even though the electricity market in every country should be structured according to the culture and legal infrastructure of each country,⁷⁴ Turkey has mainly adopted the EU regulation. This has been the Turkish approach for a very long time. This can be seen from the fact that Turkey has tried to switch to the liberal economic system already in 1923 even though, back then, it did not have the financial, economic, legal and cultural basis to maintain a healthy liberal economic system. The reason why Turkey gave up its liberal economic attempt was the 1929 global crisis. Consequently, Turkey adopted a statist approach afterwards. It can be seen that Turkey has never been left out of the global trends in economy. So, theoretically speaking, the regulation of energy markets in terms of competition should have been flawless for Turkey. However, there are two elements which affect the application of competition law in energy markets being flawless. First of all, the reforms have been described mainly as ‘textbook’ reforms, meaning that they are copied from regulation literature with small modifications but the economic

70 Mustafa Erdem Can, ‘Hukuki Acidan Elektrik Piyasasinda Rekabet’,2006,p.204.

71 Article 5(3) Directive 96/92

72 Article 20(2) Directive 2003/54

73 Paul L. Joskow, ‘Electricity Sector Restructuring and Competition: Lessons Learned’, Cuadernos de Economia, vol.40, no.121,December 2003,pp.548-558 ; Andres Ramos, Mariano Ventosa,Michel Rivier,‘Modeling Competition in Electric Energy Markets by equilibrium Constraints’,Utilities Policy,vol.7,1998,pp233-242.

74 F. Yeşim Akçollu, ‘Elektrik Sektöründe Rekabet ve Regülasyon’,2003.

logic behind them has not been taken into account.⁷⁵ Secondly, Turkey has not adopted EU Competition Law in early stages.

Despite the long tradition the EU has on competition law, Turkey has only started regulating this area in 1994. This was because the EU made it compulsory for Turkey to establish competition law for Turkey to benefit from a Customs Union with the EU. If this was not the case it is not certain if Turkey would, by itself, adopt a competition code and establish a competition authority. The EU did not only want Turkey to adopt any competition law but it wanted Turkey to adopt the EU competition law. Thus, the Turkish competition law is almost a translation of the EU *acquis* on competition. Not only that, but also the interpretation of Turkish competition law also depends on the interpretation made by ECJ. The sudden adoption of such a legal structure without the existence of an accompanying culture caused some problems especially in the beginning. It was difficult even for lawyers to understand what exactly competition law is. This was especially the case in sectors which, until then, were heavily regulated.

The application of competition law in the electricity sector is therefore somewhat unsettled in Turkey.

As I have mentioned above, the Turkish Energy Market is structured similarly to the EU market. Just like EU has demanded from its member states, Turkey has also established an Energy Market Regulatory Authority. However, due to the lack of culture which I have mentioned above, there have been some problems relating to the functioning of this Authority. The Energy Market Regulatory Authority, which also has authorities relating to competition law, sometimes gives political decisions. The reason for this is that the Council of Ministers appoints the members of the Authority and this makes it easier to put political pressure on the members of the Authority. In a good functioning competition system there can be no political influence. This is why, in my opinion, there should be another system to designate members of the Authority.

Another issue which should be addressed by the Turkish legislator is the Authorities and powers of the Competition Authority and the Energy Market Regulatory Authority. Even though the Energy Market Law stipulates that the Energy Market Regulatory Authority should be competent in issues relating to mergers and acquisitions it does not contain any provision concerning the cooperation and information exchange between the Competition Authority and the Energy market Regulatory Authority. The legislation should be made clearer about how and in which situations these two bodies will cooperate.

Concerning the functioning of the market itself, there are also some problems. First of all, most generation capacity is currently either gov-

75 Erkan Erdogdu, 'Regulatory Reform in Turkish Energy Industry: An Analysis', *Energy Policy*, vol.35, 2007, pp984-993.

ernment ownership or the type of contracts relating to them leave no room for competition.⁷⁶ It is obvious that this will have to change. Furthermore, Turkey has adopted the Authorization Procedure which was one of the two systems that the EU member states had to choose according to Directive 96/92/EC concerning common rules for the internal market in electricity. But the legislation is not complete. Accordingly, the Authority approves the tariff suggestions of relevant persons performing market actions if they comply with license provisions. However, the law does not state the economic regulation (maximum price) which the Authority will apply.⁷⁷ The legislator should make it clear what sort of economic regulation the Authority will apply to make the authorization procedure more transparent and trustworthy.

As a result, it can be said that generally Turkey has a good record of applying competition law in the electricity market. It has adopted all the necessary legislation and has made all the structural changes in order to comply with the EU System. However, there are some problems in the application. These problems, in my opinion, relate to cultural reasons. Turkish legal system has many areas where transparency should be increased. The determination of the economic regulation which the Energy Market Regulatory Authority will apply in the authorization procedure is only one of these areas. Furthermore, the political influence on Authority members also is a part of a more general problem. In my opinion, such problems will be solved as the legal culture will get closer to European standards during the accession to the Union.

There are also some problems which Turkey can not solve by itself. There is concern about what to do with undertakings which do not have a dominant position but still abuse their market power. There can not be anything done against them because they do not possess dominant position but they can still distort competition because of the special structure of the electricity market.⁷⁸ Such problems can not be solved by Turkey alone because Turkey is bound with EC Competition Law and can not make up rules which do not exist in EU Law. Turkey can, however, provide important input to EU if this issue will be discussed at EU level. This is why my last recommendation is to the EU. When there is a discussion about a competition law issue in the Electricity Market at EU, Turkey should also be included in the discussion. This is because even though Turkey is not yet an EU member, it applies EC Competition Law completely. And it has many experiences about what can go wrong. By this way the EU can reach more realistic solutions.

76 Izak Atiyas and Mark Dutz, 'Competition and Regulatory Reform in Turkey's Electricity Industry', in Copublication of the World Bank and the Center for Economic policy Research, 'Turkey: Economic Reform and Accession to the European Union', 2005, pp.187-208.

77 F. Yeşim Akcoğlu, 'Elektrik Sektöründe Rekabet ve Regülasyon', 2003.

78 F. Yeşim Akcoğlu, 'Elektrik Sektöründe Rekabet ve Regülasyon', 2003.