

Unclassified

DAF/COMP/GF/WD(2013)34

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

31-Jan-2013

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Turkey

-- Session II --

This contribution is submitted by Turkey under Session II of the Global Forum on Competition to be held on 28 February and 1 March 2013.

JT03333869

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2013)34
Unclassified

English - Or. English

COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Turkey --

1. Regulatory Framework

1. Turkish television broadcasting market can be regarded as competitive although an oligopolistic structure prevails in the sector.

2. Until 1990's there was only one television channel controlled by the state –Turkish Radio Television Agency- but with the wave of liberalization, privately owned broadcasters began to emerge in the market. As of end of 2011 the situation in the market is as follows¹:

Table 1. Number of Broadcasters

Type of Terrestrial Analog TV Broadcast	Number of Broadcasters
Nation wide	25
Regional	15
Local	207
Total	247

Table 2. Number of Licensees

Cable TV Licensees	90
Satellite TV Licensees	185

3. The liberalization of the market began with an amendment in the Turkish Constitution in June 1993 stating that “Radio and television stations shall be established and administered freely in conformity with rules to be regulated by law.”; and with the enactment of the Act on the Establishment and Broadcasting of Radio and Televisions in 1994 (the Act No. 3984). The annulment of some of the provisions of the Act by the Constitutional Court led legal uncertainties regarding the spectrum allocation and licensing².

¹ Radio and Television Supreme Council, Annual Report, 2011, http://www.rtuk.org.tr/sayfalar/DosyaIndir.aspx?icerik_id=dbb289d9-10c8-47ea-b856-4918d7eb33a5

² As it can be seen from the header of the table-1, due to some legal uncertainties the neither spectrum allocation nor the provision of the licenses to the broadcasters has been made yet. The broadcasters operate in the market with ‘broadcast permission’ given by the Radio and Television Supreme Council for temporary basis.

4. The most important annulment was about the ownership of a television broadcasting company. The article 29 of the Act No. 3984 states that a natural or legal person's capital share may not exceed 50% in a television company whose annual ratings exceeds 20%. Similarly, if the annual ratings of a company exceed 20%, and if that company's more than 50% share is owned by one natural or legal person, that person should reduce his share below 50%. As stated, these two provisions were annulled³ by the Constitutional Court and the regime for the ownership structure of television broadcasting market remained unsettled till 2011.

5. In 2011, new legal framework entered into force with the Broadcasting Act (the Act No. 6112) and the relevant regulations. The Act No. 6112 provides the regulatory authority (Radio and Television Supreme Council) with the necessary means to plan the digital broadcasting, to initiate the spectrum allocation auction and to collect the usage fees from the analog broadcasters. In the Act, **media service provider** is defined as the legal person who has editorial responsibility for the choice of the content of the radio, television and on-demand media services and determines the manner in which it is organized and broadcast; while **infrastructure provider** is defined as the organization operating the infrastructure for the transmission of media services and **platform operator** is defined as an enterprise which transforms multiple media services into one or multiple signals and provides the transmission of them, through satellite, cable and similar networks either in an encoded and/or unencoded mode in a way accessible directly by the viewers. The Act also defines the **multiplex operator** as an enterprise which ensures the transmission, by combining more than one media service to be provided via terrestrial network in a way they fit into one or more than one signal, between media service providers and the infrastructure operator or between the transmitter systems and operator companies. So, it could be said that with the new legislation several new and different technologies such as IP-TV, DVB-H ve HDTV and new services such as broadcast on demand, multiplex transmission or platform provision for the provision of media services was also included in order to overcome the legal uncertainties and to increase competition in the market.

6. Besides, the Act provides the limitations for the ownership through which limitations regarding the media ownership have been both reduced and made clearer. According to the article 19:

“A broadcasting license shall be granted to the incorporations which are established in accordance with the provisions of the Turkish Commercial Law for the purpose of exclusively providing radio broadcasting service, television broadcasting service and on-demand media service... The same company might provide only one radio broadcasting service, one television broadcasting service and/or one on-demand media service.

... A real or legal person can be direct or indirect partner to a media service provider holding maximum four terrestrial broadcasting licenses. However, in case of partnership to more than one media service provider, annual total commercial communication revenue of those media service providers in which a real or legal person has direct or indirect shares, should not exceed thirty percent of the total commercial communication revenue of the sector⁴. The real or legal persons whose total commercial communication revenue exceeds this rate, shall transfer their shares in media service providers in a way that it will be reduced down to the aforesaid rate

³ The Constitutional Court first suspended the enforcement of the relevant provisions in June 2002. In September 2004 the provisions were annulled and in August 2006, the annulment of the provisions entered into force.

⁴ Regarding the limitation related with the commercial revenue of the media service provider, The TCA opined the Radio and Television Supreme Council during the preparations of the Act No. 6112 that further limitations for the media service providers with respect to their commercial communication revenue – which could be regarded as a reward for the performance of the service providers- was not necessary as there were already license limitations for the ownership.

within a time limit of ninety days of the Supreme Council. For any real or legal person who has not fulfilled the decision of the Supreme Council within the given time limit the Supreme Council shall impose an administrative fine of four hundred thousand Turkish Liras⁵ for the each month of not acting accordingly.

...The total direct foreign capital share in media service provider incorporation shall not exceed fifty percent of the paid-in capital. A foreign real or legal person can directly become a partner of maximum two media service providers.”

7. As seen from the provisions cited above, the legislation envisages creation of a competitive environment through clear limitations on ownership and measures for the prevention of monopolization in the market.

8. The Act No. 6112 also states that within two years at the latest as of the publication date of the Act, a ranking tender on digital television multiplex capacity shall be made by the Radio and Television Supreme Council in order to award digital terrestrial broadcasting licenses. Some of the enterprises that has gained the right of digital terrestrial television multiplex capacity allocation in the ranking tender shall also be provided with the opportunity of making analogue television broadcasts for two years at most by considering their ranks in the tender and analogue channel capacities. At the end of the two years following the allocation, analogue terrestrial television broadcasts shall be completely terminated countrywide and analogue terrestrial television broadcasts shall be suspended.

2. The TCA's Experience in the Market

9. Regarding the Turkish Competition Authority's (The TCA) experience in television broadcasting market, there are several cases that deal with different types of competition law enforcement.

10. One of the important cases was related with a horizontal agreement of television broadcasters. BIMAS Birleşik Medya Pazarlama A.Ş. (BIMAS) –an advertisement marketing company founded by the two TV broadcasters Sabah Televizyon Prodüksiyon A.Ş. (Sabah) and DTV Haber ve Görsel Yayıncılık A.Ş. (DTV)- was alleged to encourage the advertiser companies to allocate all their advertisement budget to the TV channels whose the advertisement activities were planned and marketed by the BIMAS through high rebates. It was alleged that the main motive for the creation of the BIMAS by the two TV channels was to exclude their rival channels –mainly Cine 5- out of the market and recoup the all advertisement revenue. As a result of the investigation, it was stated by the Competition Board that BIMAS was owned and controlled by Sabah and DTV, and the commission fee of BIMAS was calculated as 8% of all expenditures BIMAS bear. It was also established that BIMAS did not purchase the advertisement spaces or minutes at first and try to resale them. The mere function of BIMAS was to market the advertisement spaces on behalf of the TV broadcasters. The competent broadcasters used BIMAS as a collective advertisement unit for themselves and they bear the costs of the firm evenly, not according to their shares in expenditures. Therefore, it is not difficult to reach a conclusion that BIMAS was not an independent undertaking. In tariff catalogue of BIMAS, there were 22 different advertisement and several discounts such as launching discount, seasonal discount, continuity discount, budget discount, etc. All the prices and discounts were applicable with same rates to those TV channels. It was established from the receipts that any advertiser company would get the same prices from any of the 4 TV channel for the broadcast of its advertisement if the advertisers would work through the BIMAS instead of negotiating with the TV channels on its own. So the activity of BIMAS could be regarded as the infringement of the competition for the advertisements between the 4 TV channels, not a joint advertisement marketing activity of those channels. Besides, BIMAS was in charge of analyzing the ratings of the programs, movies and series of the

⁵ Approximately \$ 220,000.

channels and advising the channels to change the air time accordingly. Since BIMAS was advising to all 4 channels, all of them were getting the information about their rivals programs, their shares and their possible air times. This kind of information sharing also led those TV channels to find a platform to prevent the price competition among them. Because, with this information provided by BIMAS, a TV channel would choose to charge the same prices for an advertisement space for its program as the other TV channels charge, instead of charging different price levels and competing with the rival TV channels to get more advertisement.

11. In its former decision related with the same subject, the TCA refused to clear the agreement for the establishment of BIMAS and stated that the two TV channels establishing BIMAS then violated the article 4 of the Act No. 4054 on the Protection of Competition (the Competition Act) by determining the prices of TV channels' air spaces.

12. After the first BIMAS decision⁶, TV channels began to circulate separate air time tariff lists along with the common BIMAS tariff list, however those separate lists were not used and the air space of the channels continued to be marketed by BIMAS. The individual tariffs included the price lists that were higher than the prices marketed by BIMAS. Moreover, the examination of the invoices showed that the individual price lists were never used, all sales were done with BIMAS prices.

13. As a result, the formation and the activities of BIMAS were deemed to violate the article 4 of the Competition Act and the TV channels founding it were fined⁷.

14. A recent experience in competition law enforcement in television broadcasting market is the Cine 5 decision, a case related with a TV channel's demand of being included in Digiturk digital platform. The demand of the channel was turned down for a period of time and Cine 5 claimed that the period that it had been declined to be a part of the platform caused a serious loss of advertisement revenue and that conduct was an abuse of dominant position. In the decision the evaluation focused on whether the conduct satisfied the three criteria necessary to arrive at a conclusion of infringement via refusal to deal: the objective necessity of the product or the service to compete in the market, the possibility of elimination of competition due to refusal and the likelihood of consumer harm. The TCA decided that being on the Digiturk digital platform was not objectively necessary for a TV channel to compete in the broadcasting market and therefore decided that the conduct was not a violation of the Competition Act⁸.

15. As regards to ex-ante control of national television broadcasting market by the TCA, there were also several opinions in relation to the privatization proposals of state-owned broadcasting companies. The most noteworthy opinion of the TCA was the one about the privatization of the media companies of Merkez Group, the second biggest media group of Turkey then. In the opinion, each probable takeover transaction of Merkez Group's companies by three different media group was evaluated separately. Competition Board concluded that the takeover of Merkez Group's companies by Doğan Media Group, the biggest media group, would result in significant impediment of effective competition by creating dominant position (via unilateral effects) along with 80% market share after the transaction; while the probable takeover by Çukurova Group, the third media group, would result in significant impediment of effective competition by creating collective dominant position (via coordinated effects)⁹. As a result of the TCA's opinion, the privatization ended up with takeover of Merkez Group's companies by a new entrant group, Turkuvaz Group.

⁶ Decision dated 01.02.2000 and numbered 00-4/41-19

⁷ Decision dated 05.01.2006 and numbered 06-02/48-9.

⁸ Decision dated 03.05.2012 and numbered 12-24/710-198.

⁹ Decision dated 06.09.2007 and numbered 07-69/857-M.

16. It should be noted that concerning the ex-ante control in national television broadcasting markets, there were no sector specific substantive thresholds with regard to the market-share or number of licenses in the previous legislation, i.e. the Act No. 3984, due to the annulment decision of the Constitutional Court. Yet, mergers and acquisitions were still controlled by the TCA according to the substantive test used for a concentration in any market and the TCA did not take into consideration any other specific criterion for concentrations in media sector. For instance, the TCA did not prohibit the acquisition of a terrestrial analogue broadcasting license by the biggest media group, whose license number would increase to four among a total of 23 licenses (20 of them were actively operating) and evaluated the transaction solely according to substantive test based on competition law principles.

17. There are also some bundling practices in media and telecommunication markets. The Information and Communication Technologies Authority, the regulatory authority in the telecommunications sector, asked in 2010 for an opinion from the TCA upon an application by the firms who were preparing to supply a bundled product in the market. The TCA opined that there were some important factors needed to be taken into account while evaluating such practices and whether the market was foreclosed or not generally needed to be analyzed through an ex-post examination of a case. It could be said that there had already been some practices materialized by three different groups active either in the telecommunications or media broadcasting markets. The first group was dominant in PSTN and ADSL markets and was also operating in GSM operating market. The second group was in dominant position in GSM operating market, had strong market base in pay TV markets and was also operating in broadband internet service market. The last group was operating in pay TV and internet service provider markets. To date, there have not been any anticompetitive practices regarding the bundling of media and telecommunications products.

18. Anten A.Ş. was another example of ex-ante control on a case regarding broadcasting and telecommunications. In 2008, 20 undertakings came together and formed a joint venture (Anten A.Ş.) that would perform the functions of multiplexing, transmission, aerial systems and aerial carrying (except broadcasting). In its decision the TCA concluded that agreement could not be deemed as a concentration. The TCA stated that the agreement might restrict competition and had to be evaluated with the individual exemption criteria. Following the exemption evaluation the agreement was granted individual exemption on the condition that Anten A.Ş. would provide the service on objective conditions and without discrimination to any media service providers, be them the shareholder of Anten A.Ş. or not¹⁰.

3. Conclusion

19. In sum, with the new legislation entered into force in 2011, i.e. the Act No. 6112 and related regulations, issues related with content or ownership structure of the television broadcasting market have been addressed by the sectoral regulatory authority, Radio and Television Supreme Council, more effectively and in a more transparent way. Besides, the TCA has been one of the authorities that have direct influence on the market both through the enforcement of Competition Act and through its advocacy activities.

¹⁰ Decision dated 08.01.2008 and numbered 08-03/35-11.