

2013 Competition Report

on

“Public Interventions from a Competition Policy Perspective”

I. Introduction

Competition reports, which have been published for the last two years, have filled up a much needed role among the tools that the Turkish Competition Authority (TCA) has available in its advocacy efforts. With the introduction of these reports, TCA stepped up to take a new role whose main purpose is to raise awareness of market players, consumers and government officials about the competition issues by using a comprehensive report and thus enjoying the increased credibility it brings.

As it is agreed upon by all, a consistent competition policy, and therefore the existence of a healthy market economy, requires public administration to carry a sensitivity and understanding of the effectiveness of a competitive market economy. As a result like their counterparts in other countries or maybe even a little bit more, competition authorities in the developing countries need to increase competitive awareness in public bodies to avoid adoption of anticompetitive measures, to help them internalise the concept of competitive neutrality and to make it clear where the regulation starts to become a “bad thing”. While, as mentioned, this is clearly an important goal that the authorities pursue every day with different tools, the TCA decided to handle this issue on a more macro perspective by setting the topic of its second competition report to “Public Interventions from a Competition Policy Perspective”.

In this context 2013 Competition Report (Report) aimed to analyse the public interventions from a competition policy perspective by taking into account the reasons, the means and risks that they bring about. The report is structured as to consist of three sub-sections. In the first section the reasons, the means and the risks of public interventions to the markets are analysed having in mind how the history affected their importance for the market. The main discussions are nested in the second section, where the public interventions in Turkey are reviewed from a competition policy perspective under four sub-titles. There are; presence of public in the markets as a player, public regulations, public procurements and public interventions in the form of state aids. The report is concluded with the suggestions and proposed actions needed to be taken by the relevant public bodies and institutions to solve the competition issues analysed in the previous chapter.

II. 2013 Competition Report

At this point it would be best to present the findings and suggestions of the report as in line with the systematics of it: under the four sub-titles used.

II.A. Presence of Public in the Markets as a Player

Under this heading the report discusses the current position of public as an active actor in the markets, its effects on competitive structure and also the effects of public's withdrawal from the markets, i.e. the effect of privatizations. Though it is diminishing substantially over the last couple of years, the report points out that public involvement in important sectors such as energy, banking and transportation are still high. The most important negative effect this brings is surely the fact that advantages and exclusive rights granted to public enterprises distort competition in the market, leading to a failure to establish fair competition conditions. In order to make sure that the undertakings operating in the market compete under equal conditions independent of their origin and thus to ensure competitive neutrality the report suggests that;

- providing financial benefits to public enterprises should be avoided,
- cooperate governance principles should also be adopted by the public enterprises,
- regulations that favours public enterprises should be demolished,
- regulations that opens room for public enterprises to escape application of competition rules should immediately be removed.

On the other element of this topic, privatizations, the report underlines that public could also have negative effects on the market by the policies and practices it chooses to deploy while withdrawing from the market. The way the privatization is implemented and whether the legal monopoly rights are transferred during the process are identified as key points. Within this framework following recommendations have been made:

- priority should be given to terminating the presence of the public in those markets where it operates without economic or social reasons,
- privatizations should be seen as an opportunity in the markets and competition policy goals should be taken into consideration during privatizations.

II.B. Public Regulations

In this sub-section the question of where should the limits end of well-established regulations have been examined as unnecessary regulations could have real dampening effect on the competition in a

market. This fact taken in hand with the fact that among OECD members Turkey is one of the countries with the most restrictive regulations, enhances the importance of this topic for the TCA. As a result of this, within the context of the Report, sector-specific regulations, regulations related to professional services and grant of exclusive rights are addressed separately among the interventions of the state as a regulator.

In relation to sector-specific regulations, the report makes the following recommendations from a competition policy perspective;

- relevant regulations should have a clear goal and framework,
- those affected by the relevant regulations should be informed and contributions of the relevant persons and institutions should be gathered,
- a mechanism to monitor the goals and processes of sector-specific regulations should be established, RIA should be utilized and implementations should be systematically reviewed/harmonized,
- it should be ensured that public entities furnished with the authority to prepare sector-specific regulations take their decisions without conflicts of interest and prejudices, in an objective, impartial and consistent manner,
- regulatory entities should have effective communication and cooperation with the TCA.

About regulations in professional services it is underlined that the regulation instrument with the least amount of limitations on competition should be chosen, the power to prepare regulations that could restrict competition should be granted only under exceptional circumstances.

Finally, about the granting of exclusivity rights which results in outcomes directly effecting market structure the following points are identified as requiring attention:

- In order to develop a competitive market structure following the grant of exclusive rights, the exclusive rights granted should not include an absolute monopoly right,
- If, due to the nature of the service or in order to fund a social responsibility, it is unavoidable to grant monopolistic rights together with the exclusive rights, the scope of the relevant right should be as clear as possible and limited to what is necessary to meet the goal.
- In order to provide the service related to the exclusive rights at the most efficient price, the granting process for the exclusive rights should be conducted via competitive tenders.
- Particularly in long-term contracts, regulations concerning the re-assessment of price and quality elements should be included.

Moreover when drafting regulations the need to utilize Regulatory Impact Analysis, a tool of governance which allows for the systematic examination of the potential positive and negative effects of a proposed regulation, is once more emphasized.

III.C. Public Procurements

Another practice addressed within the context of state intervention to markets is public procurements. From the perspective of competition policy, public procurements are addressed in the report under two dimensions:

- Design of procurement processes to ensure that they are implemented within a competitive structure.
- Identification and prevention of anti-competitive conduct by tender participants during the procurement process.

As the second one is related to active application of competition law the report stated suggestions on the first points such as:

- participation in the procurement process should not be restricted more than necessary,
- the participants should be given an equal opportunity to compete,
- collusive conduct among participants should not be facilitated.

Also it is advised to utilize the checklist prepared by the Competition Authority related to the prevention and detection of collusive conduct in public procurement processes.

IV.D. State Aids

State subsidies are one of the state intervention tools which may have an effect on the functioning of markets. IN the evaluations to be conducted with a view to guard the balance between the goals of state subsidies and competitive structure, various mechanisms may be developed for the control of state subsidies. In this respect suggested principles by the report for state subsidies which are particularly important in terms of an efficient competition policy may be summarized as follows:

- the necessity, incentive role and potential effect on the competitive structure of a state subsidy should be thoroughly evaluated,
- state subsidies should remain an exceptional practice limited to important policy goals,

- state subsidies should be directed towards those sectors which are suffering from market failures or which are innovative and open to development instead of those markets which have lost their currency during the development phase of the market.
- in case the state subsidy concerned has an effect on the operation of the market, the methods and tools to be used in achieving the relevant goal as well as the effects resulting from the use of those methods and tools should be analysed, which would facilitate choosing those alternative methods and tools with the least effect on the competitive structure,
- intervention should be avoided in those areas where the market is operating on its own and state subsidies should be focused on those sectors and regions where the private sector is unable to receive proper signals, and where investment risks indicate excessive costs for private sector undertakings without subsidies,

III. Conclusion

Public interventions made to achieve certain goals pose the risk of negatively affecting the competitive structure of the markets directly or indirectly. In this context, when faced with the need for state intervention in order to attain various policy goals, it is crucial to establish a complementary equilibrium between the market mechanisms and state intervention in light of the negative effects they may create. This requires active advocacy efforts by the competition authorities not just to increase the general knowledge of public about the competition policy but also sometimes to actively interfere to overcome the risk of dampening competition in the markets.

In this regard, the TCA published a report on the topic of “Public Interventions from a Competition Policy Perspective”. The report does not leave the subject on the ground by just pointing out the possible risks that the public interventions bring, which it also includes, but it analyses all possible public interventions under four headings and attempts to provide clear suggestions and proposed actions for all relevant stakeholders. With the same considerations in mind, the report’s first presentation has been made in a symposium hosted by the TCA attended by academicians, representatives from public bodies and also practitioners.