

Competition Law Enforcement in the Mediterranean Countries Challenges and Future Perspectives

Vienna, December 2

Fighting Cartels and Abuse of Dominance: Enforcement Challenges faced by the NCAs

Distinguished Colleagues,

Dear Guests, Ladies and Gentlemen,

It is a great pleasure and honor for me to make the opening speech of today's session on "Fighting Cartels and Abuse of Dominance - Enforcement Challenges faced by the National Competition Agencies." First of all, I would like to congratulate the Austrian Federal Competition Agency for organizing such a great event on this very important topic in this magnificent city.

As we all know, from the mid-1990's, many developing countries, including the Mediterranean countries, started to adopt competition laws. To that end, those countries put into effect their competition legislation by taking the European Union as a model. In line with this, those countries established their competition agencies to apply competition legislation. Although the scope and the level of implementation regarding legislation differ in those countries, we can say that there are common problems that all competition authorities face in terms of implementing the legislation.

Turkey also struggled with challenges in this process following the enactment of the Competition Act in 1994. Indeed, 17 years ago when the Competition Act was adopted in Turkey, very few people hardly knew about it. When the Turkish Competition Authority finally started its activities in 1997, the situation was not any better! But with the hard work and belief, the Turkish Competition Authority has overcome those challenges to a great extent. Thus, the Turkish Competition Authority has been brought to its distinguished place not only among the government institutions within Turkey but also in the international fora.

At almost every opportunity, Turkish Competition Authority underlines the importance of the development of social understanding and sensitivity to make the competition culture more institutional.

The Experience of the Turkish Competition Authority:

Considering Turkish experience so far, I can summarize the challenges faced and the methods to be followed by competition agencies in the field of fighting against cartels and abuse of dominant position as follows:

- **Lack of Competition Culture**

At the outset, I believe that the most significant challenge for a competition agency, where competition law enforcement is relatively new, is the lack of a sufficiently developed competition culture among the public authorities, society and the business community.

Accordingly, one of the common challenges is that legal regulations are drafted without taking competition concerns into account. Such regulations might create barriers to the establishment of a competitive market structure or might facilitate anti-competitive conduct by undertakings or associations of undertakings. Since such regulations cannot be interfered with through competition law instruments in many jurisdictions, competition advocacy seems to be the only method for competition agencies to ensure that they are abolished or reviewed by considering competitive constraints. In fact, Turkish Competition Authority has used this method for many regulations mainly in the form of opinions prepared on the drafts of the legal texts such as laws. However, I should say that the weakness of such opinions used as part of the competition advocacy tools is the fact that they are not binding for other public institutions in Turkey. Therefore, it is possible to get effective results from this method only if there is sufficient level of competition awareness among other public agencies.

Lack of competition culture is a challenge in the relations between competition agencies and undertakings and associations of undertakings as well. That is to say, in the first years of enforcement, similar to many competition agencies, the Turkish Competition Authority frequently encountered conduct that undertakings and

associations of undertakings carry out with the understanding that "competing is betrayal" without being aware that such conduct is indeed "illegal". Unfortunately, interference in those types of conduct by competition law instruments is short-term, has narrow scope, and is insufficient to solve the problem that is widely seen in a large part of markets for goods and services permanently. At this point, we see competition advocacy as an important instrument. Another challenge in front of a competition agency with respect to its relationships with undertakings is that undertakings are not familiar with the competition agency or the competition law enforcement. Consequently, they may not behave in a friendly manner to assist the competition authority in its inquiries which leads to certain difficulties during the process of on-the-spot inspections, or the so-called dawn raids, and information gathering. Although there are sanctions in competition laws with respect to these issues, I believe that the problem can only be solved permanently if we foster competition awareness among undertakings and inform them about the aim, function and powers of the competition authority.

Another group that may not be familiar with competition culture is consumers. If we raise competition awareness among consumers and tell the functions of the competition agency properly, we could make them drive the competition investigations. As a result, this could serve for enforcing competition law effectively as well as for reducing the workload on the competition agency by minimizing the number of irrelevant complaints.

Raising competition culture and explaining the aim and function of the competition agency should be a priority for competition agencies in order to solve the challenges stemming from the lack of competition awareness. This would also contribute to maintaining competition law enforcement with sound relations with public authorities, consumers and undertakings. Actually, the Turkish Competition Authority attaches special importance to this point and makes great efforts to institutionalize competition culture within Turkey. Examples of those efforts can be listed as follows:

- the Competition Letter, the Competition Handbook, the Competition Glossary which have been issued annually since 2009 and which constitute a link between the Turkish Competition Authority and its stakeholders,

- symposiums jointly organized by universities,
 - supporting post-graduate courses in universities,
 - participating in fairs related to SME's,
 - links on our website such as "frequently asked questions" and "online complaint" that aim to facilitate access for consumers.
- **Uncertainties between Competition Agencies and Sectoral Regulators**

The problems encountered within the scope of the relations with other public institutions are not limited to lack of competition awareness. That is to say, competition law aims to protect competition in all markets for goods and services regardless of the sector. However, certain sectors are subject to economic regulation due to market failures. This leads to uncertainties between sectoral regulators established to regulate and supervise those sectors and competition agencies regarding powers to solve competition problems in the sector in question. Similar uncertainty is seen with regard to regulatory institutions having specific duties for conduct such as bid rigging, which also constitutes an infringement of competition. This uncertainty causes risks such as the cases where both institutions hesitate to take initiatives or an institution interferes with a matter for which the other one may bring a much more effective solution. Those risks can only be eliminated by solving conflicts of power and drawing a frame that is able to regulate the relations between institutions. To this end, Turkish Competition Authority and Public Procurement Authority signed a protocol to take joint action for creating, developing and maintaining a fair and sound competition environment in public procurements on October 14, 2009. Similarly, a protocol with Information Technologies and Communication Authority was made on November 2, 2011 regulating information sharing, taking opinions, coordination and cooperation. Moreover, currently, there are efforts within Turkish Competition Authority to create a mechanism for cooperation, information sharing and coordination with Energy Market Regulatory Authority.

- **Other Challenges: Related to the Competition Law Regulations**

Problems related to competition law regulations constitute another dimension of the challenges that the competition agencies may experience in competition law enforcement. Existing regulations may become insufficient in time or there may be unregulated fields, which complicates enforcement by competition agencies. Especially, the fact that secondary legislation is insufficient or deficient may prevent a competition agency from taking uniform decisions and reduce its credibility before undertakings by creating uncertainty. We should eliminate deficiencies in regulation and issue explanatory texts in the form of guidelines to overcome this problem and ensure uniformity, transparency and predictability in enforcement activities. Accordingly, Turkish Competition Authority has been concentrating on updating and making up the deficiencies in the legislation during the recent years. Within this framework, amendments were made in the Competition Act in 2003, 2005 and 2008. Besides, many Communiqués, Regulations and Guidelines were put into force. A large number of studies related to secondary legislation are still in progress.

Another challenge that may be regarded as the result of competition law regulations is the fact that the power to collect evidence is limited. This power is necessary, especially within the scope of cartels. As we know, the sole instrument of competition agencies to detect and investigate cartels that are secret in nature is on-the-spot inspections. However, the powers of a competition agency to carry out on-the-spot inspections are not only limited but also uncertain with respect to scope. This fact is a huge problem in front of competition agencies taking into consideration fast improvements in information technologies and prevents competition authorities from carrying out their main tasks. Applicability of forensic IT techniques in competition law to overcome this problem is one of the most debated issues recently.

As it is very hard to detect cartels with existing powers to collect evidence, to offset this disadvantage, competition agencies put leniency programs into action. Those leniency programs provide immunity from or reduction of fines to those who actively cooperate with competition agencies to detect and investigate cartels. In fact, Turkish Competition Authority started to implement its leniency program actively after the Regulation on Active Cooperation for Detecting Cartels was put into force on February 15, 2009.

However, at this point, there is lack of regulation concerning the status of undertakings benefiting from leniency programs with respect to an anti-competitive conduct which also constitutes an offense before other laws such as bid-rigging. This poses a problem for competition authorities and may lead to inefficient operation of the leniency mechanism.

- **Other Challenges**

Beside the power to make on-the-spot inspections, power to request information is also an important instrument of competition agencies. Hence, agencies frequently resort to requesting information from undertakings in practice. However, the need of information is not limited to information about the undertaking under investigation for most of the time. Competition agencies often need information and statistics about the market where the investigation is conducted within the scope of competition law inquiries. This information may be requested from the competitors, providers and customers of the undertaking under investigation as well as certain association of undertakings or public institutions. Nevertheless, in most of the sectors, it is not possible to obtain sound, compiled and retrospective information from the actors of the sector in question or relevant public institutions. This may complicate the investigation or mislead the competition agency during the process.

The lack of information creates barriers in using economics in competition law inquiries. Taking into account the increasing importance of economic methods and researches in modern competition law and policy enforcement, the fact that relatively young competition agencies have limited resources in this respect and they cannot integrate economics into decision-making process is a deficiency in enforcement. Within this framework, providing the necessary institutional infrastructure to eliminate this deficiency should be a priority. Thus, Turkish Competition Authority issued a directive to put the role of the Economic Research Department in decision-making process and other competition policy practices in writing.

Undoubtedly, the need for competition agencies to establish priorities and allocate resources accordingly is not limited to integrating economic research into decision-making process. Prioritization may be regarded as a part of strategic planning for competition agencies. It means determining where human resources, time and

energy will be directed and developing enforcement policies correspondingly. Prioritization may be made on the basis of competition law enforcement as well as sectors. However, competition agencies with less experience in competition law enforcement may have difficulty and make mistakes in prioritization because they do not know sufficiently the sectors they address and they are not familiar with the legislation regulating those sectors and their dynamics. This issue can only be solved by knowing sectors thoroughly and penetrating into the functioning of the sector. In line with this, we have organized the enforcement units on sectoral basis and we believe that this enables Turkish Competition Authority to better know the sectors. Moreover, to this end, there are many sector inquiries completed or in progress within the Authority.

Of course, gaining knowledge about sectors is not the only aim of sector inquiries. In some sectors, competitive problems do not stem from competition infringements but from the regulations or structural problems in that sector. This makes it impossible to solve the problem with competition law instruments and renders competition authorities remediless. To overcome this challenge and create permanent solutions for competition problems in sectors, competition authorities may resort to sector inquiries. In fact, Turkish Competition Authority has initiated sector inquiries to eliminate failures to be detected in many sectors by focusing on the development of long-lasting efficient measures and has tried to solve competition problems with this perspective.

- **Challenges arising from internationalization of competition laws**

As a final remark, I think it is worth noting that another challenge for national competition authorities in enforcement is the problems arising in investigating international cartels and lack of cooperation between national authorities. International cartels become more and more common in the globalizing economy. However, there are significant uncertainties in those kinds of infringements regarding which country's authority will be entrusted to make an investigation, which powers it can use against which undertakings, how it will coordinate with other relevant competition agencies and which sanctions will be used against undertakings found to violate the competition rules. Actually, Turkish Competition Authority experienced such problems during two of its investigations in markets regarding

import coal and glass container materials. I believe that eliminating this regulatory deficiency and establishing the necessary cooperation between competition agencies immediately are crucial because it is inevitable that competition agencies will deal with such international cartels in economies that are rapidly globalizing.

In conclusion, it is obvious that relatively young competition agencies experience many common challenges especially in the first years of enforcement. However, it seems possible that those difficulties can be resolved in a short time with the efforts of competition agencies. I believe that regular cooperation as well as sharing information and experience is important to accelerate this process.

I wish you a fruitful discussion.

Thank you for your attention.