

A Critical Assessment of Competition Policy in Turkey

Tolga İşmen¹

This article evaluates the performance of the Turkish Competition Authority as a policy making body. The article argues that the importance of competition is little appreciated or understood in Turkey and this is the greatest obstacle hindering the implementation of competition policy. Consumers and corporations alike lack basic comprehension of the competition law and, therefore, the Competition Board is left to implement competition policy on its own. The article then points out some problem areas associated with secondary legislation, investigations and merger control.

*Av. Tolga İşmen, Derman Ortak Avukat Bürosu, Maya Akar Center Büyükdere Caddesi No:100/17, Esentepe İstanbul; Telephone: (212) 355 1300, Facsimile: (212) 355 1301, E-mail: tismen@doab.com. The views expressed in this article are the views of the author and do not represent the views of Derman Ortak Avukat Bürosu or any of its clients.

Disclaimer

Starting an article with a disclaimer can hardly be called standard practice. However, the subject of this article forces us to do so. Criticizing is an ungrateful act. It mainly focuses on negative issues, failures and fallacies but rarely gives attention to positive aspects or the circumstances that created the failures and fallacies that are criticized. A critical assessment of the competition policy in Turkey will be no different. In the sections below, we will concentrate on the questions of “what went wrong” and “what should have been done”. However, in doing so, we will have the luxury of viewing all the action from a distance and will not be circumscribed with the realities of life.

Therefore, before stating anything else we would like to state that we believe, under the given circumstances, the performance of the Competition Board and the Competition Authority were very satisfactory. The Competition Authority is a quasi-governmental entity and it is one of the best functioning governmental entities in Turkey. Having said that, there were certain things that the Competition Board should have done, and many things it should have done better. We will criticize the Competition Board, without taking into account the political and social pressures applicable. Such a preference is made not because it is easy to do, but because if one starts taking into account the reasons for the failures of the Competition Board then no failure may be left without a proper explanation, and this exercise will, consequently, be without benefit.

With this disclaimer in mind, we can begin our criticism of the competition policy in Turkey and especially of the actions of the Competition Board. We intentionally left the Competition Law out of the scope of this article. This is not because we are fully happy with the Competition Law, but we believe that it is more helpful to focus on the acts (or omissions) of the Competition Board than it is to comment on the legislative preferences of the Parliament. We believe the Competition Board should improve its performance in the following core matters:

- Creation of an awareness of the importance of competition and awareness of the competition law among consumers and small and medium sized enterprises.
- Ensuring that secondary legislation are not mere translations of the documents of the European Union and reflect the differences between Turkey and the European Union.
- Showing adequate attention to the standard of proof in its investigations and only utilizing the concerted practice presumption in a reasonable manner.
- Rationalizing the merger control regime by abolishing the market share threshold, increasing the turnover threshold and introducing a stringent policy with respect to deficiency reports.

Culture of Competition

Turkey adopted the Law Number 4054 regarding the Protection of Competition (the “Competition Law”) on 1994. The reason for this law regulating competition was that there was an attempt to obtain the approval of the European Parliament on the Association Council Decision establishing a customs union between Turkey and the European Union. Domestic economic, political and social considerations did not play a significant role in the acceptance of the Competition Law. The Competition Law was a foreign policy tool. Consumers, the government, business and bureaucrats had no intention to regulate competition in Turkey.

Furthermore, such lack of interest in regulating competition was not necessarily a result of a conscious political choice. Turkey was largely unaware of the benefits or costs of economic regulation prior to the enactment of the Competition Law. The lack of interest regarding regulation of competition was evidenced in the first years of the implementation of the Competition Law. The members of the Competition Board, the executive body enforcing the Competition Law, were not appointed until 1997. It took another six months to establish the Competition Authority and the Competition Law finally become enforceable in November 1997. When the Competition Board was established, it did not have any social or political support and it was seen as a mere nuisance for business and government alike.

Although, consumers and small and medium sized enterprises are the groups that should have benefited from the Competition Law, they did not (and we believe that they still do not) have a full understanding of the scope of the Competition Law. The Competition Law can only be seriously implemented if consumers and small and medium sized enterprises force the companies in the market to abide by the competition policy. As a regulatory body, the Competition Board has limited power to actually implement the Competition Law. The consumers must begin the process by initiating lawsuits and filing complaints against violators.

It will be consumers and competitors and not the regulatory body that will be harmed by violators. Therefore, awareness of the competition policy among consumers and small and medium sized enterprises is the key for a successful competition policy in Turkey. So far, however, the Competition Board has not launched any serious effort to boost consumer awareness of the Competition Law. The Competition Board is much more focused on and concerned with business centers, its main foes, than it is with its main clients, consumers and the small and medium sized enterprises. In Turkey's political and social environment, this choice is both expected and understandable. There are no serious consumer groups in Turkey and the rare individual is not an interesting audience. In order to illustrate the problem, a comparison between the web site of the Competition Board and similar pages of the regulatory authorities of other countries can be made. The language on the web site of the Competition Board is considerably sophisticated. It states that any person that has incurred any damage from an agreement between enterprises that restrict competition may submit a complain at the Competition Board. This statement is correct but too vague for a layman. In plain language, it should state that *"Dear Consumer, if you believe you are paying too much for a product because its producers are keeping the prices high, then please inform us. You can also apply to a court and if you win you will be compensated at a rate three times the excessive price."* Millions of leaflets in plain language should be prepared to create consumer awareness of the Competition Law, asking and encouraging consumers to file complaints or lawsuits against big companies that violate (or are suspected of violating) the Competition Law. Such an awareness campaign might be considered Competition Board's crusade against big business and thus may raise serious protest, which will take the form of political pressure on the Competition Board. They may accuse the Competition Board of being an enemy of the business, and hence an enemy of development. They may even state that if the Competition Board continues to act in such manner they will be forced to close down their business and hence create millions of unemployed. Of course, the Competition Board might counter these arguments by stating that businesses that do not infringe the Competition Board will not be subject to any fines or lawsuits.

From a merely economic perspective, consumer action against anti-competitive behavior is essential. What are the consequences of infringing the Competition Law? The relevant

agreement is considered void and the enterprise can be fined up to 10% of their turnover. It is a well-known fact that the Competition Board has not generally imposed fines of more than 3% of the turnover of any firm. From a rogue businessman perspective, the decision of whether or not to infringe the Competition Law or not is merely a mathematical question. In a hypothetical oligopolistic market, if there are four firms with similar market share and the demand in such a market is largely invariable (i.e. where establishment and maintenance of a cartel is possible) then the decision is based on a simple formula. If the profit to be obtained from a price fixing cartel is higher than 3% of one year's turnover plus the cost of the investigation then even if the Competition Board always detects such infringement and imposes fines, it is more profitable to fix prices. It is clear that in most cases an economically reasonable businessman will choose to violate the Competition Law, pay the associated penalties and offset such penalties from the anti-competitive profits that he has enjoyed. The only real constraint will be the lawsuits initiated by the consumers and its competitors (if any of them was not a part of the cartel). The Competition Law enables consumers and competitors to claim triple damages and therefore creates an important detriment.

Competition policy will become an important factor for every firm once consumers and small and medium sized enterprises understand and utilize this option. Although in the current economic, social and political context it would be unfair to expect the Competition Board to enter into a venture to raise awareness regarding the important role competition plays in empowering consumers and small and medium sized enterprises, it should be their primary and most important task.

Secondary Legislation

Turkey is not the European Union ("EU"); it is not even a member of the EU. The EU is a supranational organization that consists of separate national markets. The dynamics determining the policy choices during the preparation and the application of the Rome Treaty were materially different from the dynamics in Turkey. However, not only the Turkish Parliament but also the Competition Board opted to adopt the EU's competition law for Turkey without any material changes. This was not a good choice on their part. One of the main objectives of the EU competition law was the single market integration goal. The opposition to vertical restraints derived mainly from this goal. At the time of the enactment of the Competition Law, Turkey was a single market and thus any measure whose aim was to assist the single market integration goal of the EU was obsolete. Yet the Competition Board's approach to vertical restraints was identical to that of the EU and thus did not have any positive impact on competition. It should also be noted that even the promulgation of a Block Exemption that is the equivalent of the indulgent Vertical Restraints Block Exemption of the EU took the Competition Board two years.

The Competition Board should have adopted policies that are suitable for Turkey, not only with respect to vertical restraints but also in other fields. We can understand the reasons for following the EU precedents. The EU system was a well-established system with all the advantages of past experience and precedents. The Competition Board (at least at the early stages of its establishments) did not have sufficient resources to draft its own policies. The Customs Union Decision between the EU and Turkey obliges Turkey to follow the competition law policies of the EU. We acknowledge these issues. However, we still believe that the Competition Board could have adopted tailor-made policies in Turkey.

Investigations

Currently an investigation of the Competition Board takes 12 to 18 months to be finalized and then the parties wait for another year or two for the reasoned decision to be written. We do not believe that the investigations (including the reasoned decisions) need to take more than one year to be finalized. It is the responsibility of the Competition Board to expedite the investigation process. We do not believe the reports, on-site inspections and evaluation of the evidence should take years to finalize, as the defending parties were given considerably less time in our preparations (one to two months) when compared to the time available for the investigation committees (six to twelve months). We believe all involved parties will benefit from finalizing investigations as soon as is practically possible.

With the risk of superficially contradicting our previous point, we would like to state that the level of diligence shown by the Competition Authority in evaluating the factual circumstances involved in investigations were generally not satisfactory. The investigation committees used concerted practice presumption too often and too easily. We do not believe that the concerted practice presumption set forth in Article 4 of the Competition Law empowers the Competition Board more than Article 81 of the EU Treaty empowers the EU Commission with respect to proving an allegation of infringement of the Competition Law. The Competition Board used the presumption in some cases to shift the burden of proof to the alleged violators and asked them to prove that they did not participate in any infringement. In doing so, the Competition Board did not care to establish that the relevant market showed meaningful anti-competitive patterns. It is virtually impossible for firms to prove something that does not exist. We do not believe it is necessary to go into the details of the concept of concerted practice presumption within the scope of this article. It is, however, important to state that utilization of concerted practice presumption should be an exemption and only be used in extreme cases in which there is definitely something wrong with the competition in the relevant market.

Finally, in some investigations the Competition Board acted as if it reached verdicts regarding the issues without having a clear understanding of the circumstances prevalent in Turkey. Most importantly, acute hyperinflation had a significant impact on the movement of prices and consumer preferences in Turkey. The Competition law is based fundamentally on price theory. Hyperinflation (and/or the hyperinflation expectation of consumers) alters the basic assumptions of price theory. Therefore, without understanding and taking into consideration the effects of inflation in Turkey, it is not possible to conduct an economical analysis of price movements. The Competition Board (especially in its early decisions) failed to recognize this phenomenon.

Merger Regulation

Merger regulation is one of the competition policy successful stories. The corporate scene in Turkey is not developed enough to allow for mega mergers that may have a significant impact on competition. Most of the decisions of the Competition Board on mergers were merely bureaucratic actions, approving either a foreign-to-foreign acquisition or a foreign-to-domestic acquisition. In both instances, one or both of the parties were not present in the Turkey and thus there is no concern about competition law issues.

However, the merger control regime is not free from certain fallacies and the main secondary legislation, Merger Regulation 1997/1 must be re-written. The basic rule of the Merger

Regulation is, concentrations between enterprises that enjoy more than 25% of the relevant market or had a total turnover more than TL 25 Trillion, should be reported to the Competition Board. There are three serious problems with this rule.

Firstly, the Merger Regulation is unable to provide a decent definition of the concept of concentration. Its reference to the concept of control is ambiguous and thus from the grammatical interpretation of the Merger Regulation, every share or asset sale, whether there is a change in the control structure of an enterprise or not, is subject to the approval of the Competition Board. This interpretation is wrong but it took a couple of years for the Competition Board to clarify this issue, albeit implicitly, with its decisions. Secondly, the provision on the notification thresholds is also grammatically wrong. It is not possible to understand whether the TL25 Trillion turnover must be made in the relevant market or not. It is also not clear whether this threshold is related to domestic or global turnovers. Finally, the link between the notification requirement and the definition of the relevant market is not a proper one. Under the current Merger Regulations, parties should define the market to evaluate if they have reached the 25% market share threshold. The Notification requirement should be the easiest and most preliminary analysis in merger control and should not require the definition of the relevant market. It is not rare for the counsel of the parties and the Competition Authority to disagree on the definition of the relevant market. Therefore, the market share threshold creates an important uncertainty in merger control regime in Turkey and should be abolished.