THE ROLE OF COMPETITION AUTHORITIES AND SECTORAL REGULATORS: REGIONAL EXPERIENCES

Contribution by Dr. Gamze Aşçıoğlu Öz*

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The Role of Competition Authorities and Sectoral Regulators: Regional Experiences

Gamze ÖZ*

agamze@metu.edu.tr

Regulatory reform has long played an important role in a large and growing number of economies today. Despite significant differences across countries and industries, most regulatory reforms, especially in the developing countries, comprise of privatization of former state owned enterprises; liberalization of the markets, redefinition of universal service obligations, introduction of competition to these markets. These substantial structural changes also led to significant conceptual and institutional changes and challenges in the legal and administrative systems of the countries concerned. Not only the regulatory process but also competition law and policy have been among those challenges. This is not surprising given that competition law and policy stands as the main pillar for all of those policies.

If a country has selected markets as the primary basis for organizing its economic system and if it wants those markets to function well it needs to protect the competitive process\(^1\). The creation and protection of competition may have been one of the purposes of the regulatory process and where that is the case, in addition to the Competition Authorities (“CAs”) the Sectoral Regulatory Agencies (“SRAs”) will also have a duty to protect the competitive process in their relevant markets. That needs a constructive relationship between the CAs and the SRAs by way of balancing regulation and competition in such markets.

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* Assistant Professor. Dr., Faculty of Economic and Administrative Sciences, Middle East Technical University, Ankara

Competition law and policy plays a vital role in this process and indeed in the process of privatization and liberalization of state owned/regulated markets, it serves as an indispensable tool for taking measures to ensure that competitive markets are created and protected. In this regard, competition advocacy has become the “essential facility” for the competitiveness of the markets and the protection of the consumer.

Five features can be pointed out today that are common for competition law and policy applied in most jurisdictions.

*Internationalization* of competition law that the same model of substantial rules applies to different jurisdictions from Canada to Malaysia, from the USA to Hong-Kong and even People’s of Republic of China is considering the same principles in its Draft Law.²

*Criminalization* of competition law that in addition to monetary fines available in most jurisdictions, there is a trend in the world that anti competitive practices should also have criminal sanctions.

*Due Process and Judicial Supervision* has become highly significant that in accordance with very wide powers there needs to be a sound system of checks and balances and thus the CAs should be subject to strong judiciary review.

*Private Law Enforcement* proves to be significant not only as a mechanism which enables the CAs to set their priorities but also as a means for the those who claim damages to participate in the process of enforcement of competition law.

Finally more than ever, *Competition Advocacy* is prioritized over competition law. This is explained with three reasons. First in developing and transition countries, market reform has caused a large scale of rule making process and dialogue at an early stage may ensure that competition provides the foundation for legislation. Second the CAs are considered to be less prone to the regulatory capture. And thirdly law enforcement requires sophisticated adjudication of competition cases which young CAs and judicial systems often find challenging.³

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Where a CA has jurisdiction, its role in dealing with the State departments, including the SRAs will largely depend on avoidance of anticompetitive measures taken by the legislative or administrative authorities. Where the CA lacks such jurisdiction, its role will become one of advocacy in the narrower scope.

With the impact of globalization and certainly with the liberalization of trade “Internationalization” has been one of the significant features of competition laws applied in the world today. In that respect, Bilateral and Regional Trade Agreements (RTAs) with competition policy provisions, which form the core of this Conference, have increased substantially. It has been noted that more than 100 of the 300 or so regional trade agreements now in force or under negotiation have competition-policy related provisions.

For developing countries, the two subjects, competition policy and international cooperation, at different levels and in different forms, for developing countries are interrelated and are linked in UNCTAD's present work aiming at the identification of the needs and objectives of developing countries at the national level and assessment of the impact of regional agreements in that respect.

In this connection, this paper rather than presenting a comprehensive analysis of their roles separately, aims at exploring some of the arguments in relation to the relationship between CAs and SRAs in general and the probable impact of RTAs on this matter.

As also set forth therein this topic (the relationship between CAs and SRAs) is probably one of the areas which still stands as a potential avenue for further research. RTAs, unless specifically drafted for this purpose, do not cover this area as much and as explicitly as they refer to the substantive competition rules. There are only indirect references to certain policy measures which in any case, require some degree/kind of relation between the CAs and the SRAs. For example in the related Directive on the

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4 Dr. Supachai Panitchpakdi, Opening Statement by Secretary-General of UNCTAD, 5th UN Conference to review all aspects of the Set of Multilaterally agreed equitable principles and rules for the control of restrictive business practices, Antalya, Turkey 14-18 November 2005.
regulation of electronic communications in the EU, it is stated that “Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member states shall ensure where appropriate consultation and cooperation between those authorities and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. Where more than one authority has competence to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.”

Additionally specific emphasis is also made to the interrelation between the SRAs and the national CAs by stating that “As soon as possible after the adoption of the recommendation or ant updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national CAs.”

Today, cooperation between the national CAs, is institutionalized and already very well established by organizations such as ICN and with the impact of the international organizations such as the OECD, UNCTAD, this relationship is even fostered. In addition to the organizations as such, actively operating worldwide, there are also regional institutions such as the DG Comp of the EU that operates in cooperation and coordination with the national CAs and by means of bilateral agreements, it cooperates with its counterparts in other jurisdictions. In the light of the foregoing the RTAs may play a significant role in the establishment of efficient and constructive relationship between the CAs and SRAs.

I. The relationship between SRAs and CAs

Introducing competition into previously state owned sectors requires a sound choice of policy in terms of the defining the jurisdiction and relationship between the CAs and the SRAs. The allocation of work in between these institutions does not only depend on the best models of competition policy and regulation and the capabilities of the

7 Article 16(1) of the same Directive above in Footnote 6.
institutions but it is also shaped under the limitations of the legal and administrative systems and sometimes even bureaucratic culture and traditions of the country concerned.

Certainly there is not only one model or best model or recipe of doing that however there are good or bad examples and experiences arising from such examples to take into account.

“Establishing the proper relationship between the competition agency and regulators is a significant and ongoing challenge in most countries. The issue has been discussed and debated in international fora in recent years. No single solution has emerged. Different jurisdictions have different approaches and even within a single jurisdiction the approach to the relationship can vary. In one jurisdiction a competition agency has statutory powers for some aspects of sector regulation. In another, sector regulators and the competition authority exercise concurrent jurisdiction. In yet another, a formal agreement establishes a framework for cooperation between the sectoral regulators and the competition authority.”

As stated above the model preferred varies from one legal system to another, and sometimes even in the same country the relations of various SRAs with the CA may be different from one another. With respect to specific industries the activities in which are within the authority of SRAs, competition considerations and regulatory functions can be reconciled through different mechanisms:

i) Competition law and sectoral law may operate in parallel, with CAs overseeing competition considerations and SRAs dealing with regulatory considerations. This refers to the conventional ex ante and ex post control and supervision of the markets. Therefore the SRA shall be vested with ex ante control powers whereas the CA shall be given the ex post authority. For example, reviews of company documents for compliance, licensing requirements clearly require an ex ante control whereas anticompetitive practices in the relevant market may require an ex post review. Or for example approval of prices should

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be within the *ex ante* authority of the regulator unless the prices are claimed to be excessive or predatory which then may require an *ex post* review by the CA\(^9\).

ii) CAs and SRAs may have shared jurisdiction over competition considerations and in this option the SRA and the CA have a concurrent jurisdiction.

iii) If the SRAs are assigned under their governing law with sole authority over competition, in addition to the regulatory powers, the SRA here is also vested with exclusive authority to also deal with competition issues,

iv) Finally in some jurisdictions Competition Law may be expressly exempted or impliedly repealed as a result of the law governing sectoral regulation and thus the industry/market in question is immune from the application of competition law.

Despite their clearly defined roles respectively, as noted above, it is not easy to identify a recipe on the relationship of CAs and SRAs in the making a post privatization and liberalization environment successful especially for the consumer. Also it would be valid for any jurisdiction that it highly depends on the particular characteristics of the country in question, the level of liberalization, the background, the experience, the maturity or capability of the relevant SRAs and the CAs and basically who is better placed to do the job in the relevant market\(^11\).

On how to regulate the activity in a market where both a SRA and a CA already exist? There are two possible answers\(^12\) none of which could prevail the other and both of which can be preferred as to several different factors:

1. There can be a clear *allocation of roles* according to the issue; or
2. A framework for a *cooperation* between the two authorities.

If these two authorities will be exercised complementarily, then the legal framework and the process of cooperation become highly significant. One of the

\(^{10}\) Laurence I; Relationship between antitrust agencies and sectoral regulators – Subgroup 2 “Who should regulate, and how should they regulate?” Bonn/ICN/7th June.

\(^{11}\) For a discussion on the same question regarding the role of the EC Competition Authority in the electricity markets see JM Glachant, F. Leveque; Communication at the 3rd Mines Berkeley Conference “Balancing Antitrust and Network Industries” Paris 12-13 January 2006.

\(^{12}\) Laurence I; Relationship between antitrust agencies and sectoral regulators – Subgroup 2 “Who should regulate, and how should they regulate?” Bonn/ICN/7th June.
questions which raises attention in any option is whether it is necessary, or not, to build a legal framework for this cooperation or to leave it purely informal. It mostly depends on the legal system and the administrative traditions. Nevertheless as Laurance\textsuperscript{13} advocates, the French system where there exists an institutional framework with compulsory and preliminary advice of the other authority provides satisfactory results. Not only because Turkey follows the same administrative law system but also for what has been experienced until now in the Turkish regulated markets, I would also comment in favour of the same model which has already proved to be well functioning in the case of TCA and Privatization Administration relations\textsuperscript{14}.

II. Country Examples

In the UK, in addition to the principal authority, Office of Fair Trading (OFT) a number of SRAs have a specific role to play in promoting or facilitating competition within their sectors. SRAs in the UK have concurrent jurisdiction with the OFT. Some of these regulators which also have the power to apply the Competition Act 1998 concurrently with the OFT are:

- Ofgem - in the energy markets
- Ofwat - in the water industry
- Ofcom - in the communications sector
- ORR - for railway services
- CAA - in relation to air traffic services
- Ofreg - for gas and electricity in Northern Ireland

DTI and HM Treasury jointly take the lead in formulating economic regulation policy and ensuring the regulatory framework is fit for purpose. These regulators have all the powers of the OFT to apply and enforce the Act to deal with anti-competitive agreements or abuse of market dominance relating to relevant activities in their designated sector. The OFT alone, however, has powers to issue guidance on penalties and to make and amend the Procedural Rules. The Competition Act 1998 (Concurrency) Regulations 2000

\begin{footnotesize}
\textsuperscript{13} Laurance Laurence I; Relationship between antitrust agencies and sectoral regulators – Subgroup 2
\textsuperscript{14} “Who should regulate, and how should they regulate?” Bonn/ICN/7th June.
\end{footnotesize}
have been made for the purpose of coordinating the exercise of the concurrent powers and the procedures to be followed.

The USA is also a unique example due to its federal structure. In the USA industrial regulators granted a monopoly in enforcing all or part of competition law in their relevant sectors. Department of Justice and Federal Trade Commission often advice industry–specific regulators on matters that may affect competition. This advice may be voluntary or, in some circumstances, required by statute. For example, the US antitrust agencies, like any private person may file comments offering their competition expertise in regulatory proceedings before independent agencies. In contrast, some states require the regulator to seek advice from the competition agencies in particular types of proceedings.

In Ireland on the other hand, a new framework for the relationship between the Competition Authority and various statutory bodies, including sectoral regulators, is outlined in Section 34 of the Competition Act 2002, which came into effect on 1 July 2002\textsuperscript{15}. This provides for “cooperation arrangements” and the exchange of information, in line with the suggestions of the OECD and the Competition and Mergers Review Group.

The list of potential matters that could be included in any such agreement is deliberately non-exhaustive. However, the definition of co-operation arrangements included in the Act includes regular consultation (especially on issues where there is a natural overlap of jurisdiction), the exchange of information and a procedure for allowing one body to cede responsibility to the other. Irish CA and the SRAs will be able to exchange information, with the in-built safeguard whereby any information exchanged between the Authority and a body will be treated confidentially. There is also a provision for a default agreement being imposed by the sponsoring Ministers in the event that the Authority and the regulator cannot come to an agreement. Such an outside option will no doubt focus minds as each body attempts to control its own destiny. Whilst it is clear that the Authority and the National Regulatory Authorities (NRAs) will sometimes have divergent opinions, a formal co-operation agreement and continual high level contact

\textsuperscript{15} Submission in response to the Consultation Document “Towards Better Regulation” Submission No. S/02/001 Date: 1 July 2002.
should ensure that such inevitable differences do not escalate and prevent mutually beneficial co-operation from taking place.

In Denmark, sectoral regulator has to ask a vinculative opinion from the CA, where as in France and Germany there is just a duty of informing the other party. In Italy and Sweden, CAs have the primary role and receive opinion from the other SRAs and in Netherlands there is explicit coordination between the SRAs and the CAs\textsuperscript{16}.

Unlike other jurisdictions, the balance of power is different in Chile as Chile Competition Law, in addition to being applicable to individuals and enterprises, under certain circumstances may also apply to the decisions of ministries and the agencies even where they are acting in a regulatory capacity, and not just when they are acting in a proprietary capacity. A usual practice has been that when a government entity will decide something that can have competition problems it asks for a consultation of the Competition Authorities- Prosecutor’s Office or Competition Tribunal-to inquire whether go ahead or not\textsuperscript{17}.

Another example is Australia\textsuperscript{18} where in addition to its core competition function the Australian Competition Authority has a number of key economic regulatory functions. With the division of labor between various regulators, there is potential for some degree of overlap of functions between the Australian Competition Authority which administers competition regulation across all the sectors of economy and those technical and economic regulators that operate within specific industries or within certain States across a number of industries. For this reason, a number of steps have been taken to minimize uncertainty regarding the jurisdiction of particular regulators and avoid confusion for consumers and the business community.

Variety of options in international experience shows that interaction between sector and competition regulators can be managed through different institutional approaches: giving primacy to the sectoral regulation or the competition or requiring consultation between both the regulators.

\textsuperscript{16} P.P. Barros; The Relationship Between sectoral Regulators and Competition Authorities-Incentives For Action; p. 6, Lecce, 8 September 2004.

\textsuperscript{17} The relationship between Competition Authorities and Sectoral Regulators, Contribution From Chile, p. 3; 12 January 2005, submitted for the Session II of the Global Forum on Competition dated 17-18 February 2005.

\textsuperscript{18} Davidson Elizabeth.; The interface between competition authorities and sectoral regulators, Regional Seminar on Competition Policy and Multilateral Negotiations, 16-18 April 2002.
III. Relationship between TCA and SRAs in Turkey

In the late 1990s and early 2000s the Turkish Parliament launched a number of privatization, deregulation and market reforms with a significant impact on a number of sectors such as energy, telecommunications sectors. This also has and will continue to have an impact on the application of general competition law and the policy therein.

Competition advocacy by the Turkish Competition Authority (‘‘TCA’’) has two dimensions. The first reflects the agency’s role as a consultant to the government and to SRAs concerning legislation and regulations that implicate competition policy. The second is as a proponent at large for increased public recognition and acceptance of competition principles. Within the scope of this paper only the first dimension will be focused upon.

Since there is not a statutory provision on the interrelations of the TCA with the other state departments this may create an obstacle to promote competition policies effectively, while the ministries that regulate industry and investment, and that might have historically encouraged non-competitive practices, are and may still be more powerful.

It is not only the Government actions which may, directly or indirectly, hinder competition, but legislative acts of the Parliament enacted earlier or later than the Competition Law may have an adverse effect on the competitiveness of the markets. The legislative acts and government decisions should be consistent with the competition policy. A study carried out by the TCA experts disclose a list of those legislative and administrative acts which are considered to have conflicting provisions with the competition legislation. It should also be considered that the TCA could challenge those administrative acts before the Council of State on the grounds that they are contrary to the Law. However up to date, the TCA has not yet invoked such a process.

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19 This part is a chapter from the Report by Öz Gamze.; Legal and Institutional Aspects of Competition Policy in Turkey and Its Impact On Investment, Report prepared as part of a larger Project within the framework of the FIAS/Competition Authority/TEPAV Project on ‘Competition Policy and the Impact of Investment Environment in Turkey: Sectoral/Institutional and Legal Framework.

20 Ekdı, B.; Öztürk, E.; Ünlü, H., Ünlüsoy K.; Çınaroğlu S.; Rekabet Kuralları ile Uyumlu Olmayan Mevzuat Listesi (I), Rekabet Dergisi Sayı 9, s.46-72.
In any case each one of these legislative or administrative acts need to be revised and assessed very carefully for their impact on the competitive process and their rational either before the Competition Board takes a decision or before the relevant enactment is amended. In either of these procedures the TCA should be in the centre of an cooperation procedure either before by way of encouraging the participation of the related parties to the prior discussion of such a policy decision or if a law amendment will take place then the opinion of the TCA should be obtained.

Sectoral ministries should be responsible for helping to establish conditions for effective competition in the industries under their purview (perhaps through revision of the foundation laws), and for co-coordinating with the TCA to ensure effective enforcement (rather than protecting industries against enforcement action). Since the regulatory authorities have been established following the establishment and operation of the TCA, the relevant laws concerning these regulatory institutions all comprised of provisions, some in general and some in more detail, related with competition in each relevant market.

In terms of the choice of the institutional design, in many countries the option of relying exclusively on competition law has not been chosen because continuous monitoring is required to steer a market from a monopoly to a competitive market and continuous access regulation and price regulation is also required. Competition policy is mainly *ex post* whereas industry regulation is primarily *ex ante* and on-going\(^{21}\). Thus it is important to provide a way for cooperation preferably through statutory measures. The Protocol and the Opinions delivered by the Competition Authority provide some insight into the principles of work division between the regulatory authorities.

Competition policy should be integrated into the general policy framework for regulation. Its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition itself. The move towards competitive markets in sectors where goods or services are previously provided by the public sector reveals the problem of conflicts.

of interests. In Turkey too, in certain sectors, the State used to be the player and the regulator in the same market.

Independent regulators are not immune to risks as they may “slow structural change” and obstruct convergence between sectors or lead to institutional rigidities. They may also contribute to fragmenting governmental policies and actions, in particular in the case of competition policy. Surely competition advocacy is not only comprised of the interrelations between the government departments and the TCA. It has a broader scope than that. Nevertheless for the efforts and the contribution it makes for an established competition culture at all levels in the society, the TCA can be shown as an excellent example compared to most of the state departments.

Nevertheless it seems that the regulation of sectors changing from a monopolistic sector or heavily regulated market structure to a competitive sector and the methods of cooperation/coordination between industry regulators and competition authorities will be on the agenda of the Government and the regulatory authorities. As in everywhere else, in Turkey too, regulatory practices reflect cultures, so they may not change quickly. Regulated industries are not homogenous sets of components subject to the same degree of competition. These industries have the capacity to achieve different levels of competition depending on several factors such as industry structure before privatization, market size and dynamics, regulatory features.

They are also not necessarily exempt from any risk of capture. In addition, when setting up independent authority’s accountability is not automatically ensured and may be improved by setting up explicit objectives and requirements for reporting to Parliament and Government such as procedural requirements and substantive judicial review. Therefore implementation becomes more significant than de jure rules. For the reasons above, the interrelation between the government departments and the TCA and their attitude towards competition policy will have the major role in the competition advocacy and in the enforcement of the competition policy in general.

The success of an advocacy activity depends on a competition authority’s ability to influence other regulatory authorities whether for example the opinions given by the competition authority is considered in the regulation and policy making activity of the regulatory authority concerned. The possibility of issuing binding recommendations is an
effective way of advocacy with regulated industries. In general Competition Law does not provide a basis for such binding opinions. Further the opinions of the TCA delivered under the privatization process are not binding. Thus the opinions delivered by the TCA during the privatization process become binding only when they are reflected in the final decision of the Competition Board while approving the acquisition of the state owned property. Nevertheless the TCA states and publishes its opinion on the Parliament and Government actions.

There are different systems applicable in different jurisdictions. However as noted above CAs’ ability to influence regulatory institutions may vary substantially depending on the institutional and political situation. Some CAs are specifically mandated to scrutinize legislation that will distort competition.

Advocacy activities, though successfully carried out by the TCA, should be improved. Open and active dialogue with the regulatory authorities being the primary issue among all others, the consultation process should operate bilaterally meaning that before publishing general advice or guidelines the TCA should also take opinions. In sectors that have been more directly regulated, such as transport and telecommunications, energy and distribution networks, the TCA can employ and/or work with study groups to develop policy ideas and recommendations.

In the coming years where the regulatory authorities also become experienced in regulating the relevant markets, the success of the competition advocacy may be assessed in those regulated sectors.

TCA should also aim at creating a pro-competitive environment in the regulated markets which would increase transparency and consider and encourage the participation of consumer associations during the decision making process where appropriate.

Ministries and other government agencies such as the Privatization Administration should be responsible for helping to establish conditions for effective competition in the industries under their purview (perhaps through revision of the

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22 South African Competition Law 1998 which requires the Competition Commission to “review legislation and public regulations and report to the Minister concerning any provision that permits uncompetitive behaviour” in Whish R.; Competition Law footnote 10 in p.21.

23 For the idea and the methods used for such an assessment can be found at Competition Advocacy in Regulated Sectors: Examples of Success, April 2004, International Competition Network 2004 Annual Conference Korea.
foundation laws), and for co-ordination with the TCA to ensure effective enforcement (rather than protecting industries against enforcement action).

In the currently regulated markets such as telecommunication, energy, the option of relying exclusively on competition law has not been chosen since continuous monitoring is required to steer a market from a monopoly to a competitive market and continuous access regulation and/or price regulation is also regulated.

Despite the fact that industry regulation is primarily *ex ante* and on-going and competition policy is *ex post*, both the decision of the regulatory authorities (such as tariffs) and the decisions of the Competition Board\(^\text{24}\) show that there may arise some jurisdiction problems. Compared to the first years of the Law SRAs have informed the TCA more frequently in recent years about the pending draft law proposals. However the Prime Ministry’s communiqué is not treated as obligatory and there are no sanctions if an agency fails to notify the TCA of an important regulation. The new draft law proposal amending the Competition Law sets forth a provision expressly requiring public institutions and organisations to obtain the Board’s opinion concerning “*any acts, by-laws and regulations ... which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory.*” State agencies would not be obliged to accept the TCA’s opinion, but failure to obtain it would render the resulting measure unenforceable as a matter of law.

This proposal is in line with the comments and recommendations of the EU Commission in its Progress Report. It is pointed out in the Progress Report\(^\text{25}\) that “*The Competition Authority is the sole body responsible for the enforcement of anti-trust rules. However, all public authorities, including Parliament, should ensure that competition is not distorted through the adoption of legislation or administrative decisions. The existing legal barriers stemming from both primary and secondary legislation cause serious distortions of competition. Remarks by the Competition Authority should be taken into consideration in the drafting of all types of legislation that may have an impact on competition. As a matter of urgency, public authorities should prepare amendments to sectoral legislation, which currently includes anti-competitive provisions, and should*”

\(^{24}\) ÇEAŞ and Roaming decisions of the Competition Board are examples of such a case.

\(^{25}\) 20004 Regular Report on Turkey’s progress towards accession {COM(2004) 656 final} p. 93.
associate the Competition Authority fully in this process. During the privatisation process, competition aspects should play an important role, in particular where dominant positions exist. Privatisation models that ensure a high level of competition in the respective sector in the post-privatisation period should be designed. Effective coordination between the Competition Authority and sectoral regulatory authorities such as the Energy Markets Regulatory Authority, and the Banking Regulatory and Supervisory Agency, should be ensured”

In terms of the type of the relationship between the CAs and the SRAs there is wide diversity of models whatever model chosen. There are certainly no countries where that division of labor is regarded as finally settled between the two authorities. Therefore the interrelation between these authorities needs to be clearly defined in the relevant laws. Unless it is clearly defined in the law, it is likely that there may arise an overlap between the TCA and the SRAs.

Where the economy-wide competition law takes precedence, the sectoral regulator may still have a role in assisting the competition authority to conduct analysis of the competitive effects of agreements in the regulated industry, especially with their national advantage over technical issues. The use of a single agency for both sectoral regulation and enforcement of competition law is another approach\textsuperscript{26}.

In Turkey competition protection is separated from access and economic regulation, and thus cooperation and coordination are needed to avoid inconsistent, investment discouraging application of the two set of policies. Despite the fact that it applies on the basis of the willingness of the two institutions, informal cooperation which regulates the interrelation of the TCA with other institutions either by a protocol (as in the telecom sector) or by Prime Ministry’s Communications none of which does not provide an obligatory referral to the TCA.

\textsuperscript{26} International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Sub Group 3: Interrelations between antitrust and regulatory authorities, Seoul, April 2004, p.5.
IV. Forms of Cooperation

Various forms for cooperation and means to avoid inconsistencies\textsuperscript{27} are pointed out herein below together with the existing situation as regards such possibilities under Turkish competition law and practice. Following the type of the cooperation the countries which apply the relevant form of cooperation is also provided as an example. A checklist for each form of cooperation is provided in the light of the current practice in Turkey by which it is aimed at providing options for different means of cooperation to the relevant authorities.

Some of the options set forth below cannot be applied immediately due to the legal/structural constraints arising from the relevant laws but some may contribute to the development of the competition advocacy.

The forms of cooperation applied in various jurisdictions are grouped under three main headings.

1. Informal and soft techniques of cooperation

2. Delimitation of jurisdiction

3. Organized cooperation

1. Informal and soft techniques of cooperation

1.1. Various forms of information exchange

a) Informal contacts and exchange of views: Applied widespread in all the jurisdictions. Also applies in Turkey.

b) Appointment of contact persons (on the directorate level): Applied widespread. In Turkey there are relevant departments in the regulatory authorities (such as regulatory competition directorate) which may be contacted. In addition to that TCA experts may call the relevant expert on informal basis.

c) Appointment of industry experts when necessary: Australia. Not applicable (NA) in Turkey.

d) Regular or ad hoc meeting to consider a pending matter: Australia, Canada, Finland, Germany. Applicable in Turkey under the Protocol between the TCA and the TA.

e) Setting of joint working groups (Finland) or inter-agency task forces (USA): NA in Turkey.

f) Public information: Widespread for all jurisdictions.

1.2. Staff training and exchange of officials

a) Previous employment of industry regulators’ staff by CA and vice versa: Finland, Germany. NA in Turkey.

b) Educational cooperation and vocational training: Widespread in all jurisdictions.

c) Institutional cross exchange of officials: Australia. NA in Turkey.

2. Delimitation of jurisdiction

2.1. Abstention

2.2. De facto assignment of lead jurisdiction as way to mitigate overlap: Canada, Ontario electricity sector: Competition Bureau’s policy is not to enforce competition law in regard to anti-competitive actions that are the subject of an enforcement action by an industry regulator. NA in Turkey.

b) Industry regulator required to refrain from exercising regulatory authority where sufficient competition exists: Canadian telecommunication and electricity markets. NA in Turkey.

c) Opting not to apply competition law whenever there is a legal basis of an industry regulation nature for a specific behaviour: Abusive practices concerning telecommunications in Germany. Applies also in Turkey.

2.2. Written delimitation of jurisdiction, cooperation and coordination

a) Clear delimitation by statute of tasks: France, Germany, Japan. NA in Turkey

b) Government decision on the relationships: Japan. The new Draft Law in Turkey proposes Prime Ministry’s involvement.

c) Competition Authority’s continuum of principles for assigning and coordinating the respective agencies’ roles and responsibilities: Canada. NA in Turkey.
d) Joint guidelines on cooperation: Japan. Joint statements: Brazil, Canada, USA. These documents aim at clarifying the operational principles of cooperation. The Communiqués related to the principles and the procedure to be followed in the course of privatization which set forth the duties of the TCA and the relevant government institution. The Protocol itself between the TCA and the TA can also be considered as an example of such a means despite the fact that in practice the Protocol does not apply.

2.3. Federal Logic: NA in Turkey.

3. Organized Cooperation

3.1. Right to make submissions, participate in the hearings and ask for optional referrals

a) Competition Authority’s right to make submissions or provide industry regulators with comments or expert reports: Brazil, Canada, USA, Germany. The Office of the Prime Ministry has issued two communications which require the state departments to refer the matter and take the opinion of the TCA. TCA also delivers opinions to various state departments.

b) Intervention in the regulatory hearings as a possible alternative to investigations: Telecommunications in Canada. NA in Turkey.

c) Optional opinions and referrals: Brazil, France and USA. The TCA does make submissions directly to the relevant sectoral authority only if it is requested. TK may request the opinion of the TCA.

3.2. Joint Proceedings:
Possibility to conduct joint proceedings in order to make use of complementary expertise: Germany. NA in Turkey.

3.3. Mandatory Agreements, consultations, referrals

a) Mandatory competitive factors advisory reports provided by a competition authority to a regulator: Brazil, US Banking sector. Opinion of the TCA required prior to the privatization decision.

b) Mandatory notification of investigations that are within the jurisdiction of the other body: Canada, France, Germany. NA in Turkey.

c) Obligation to obtain the Competition Authority’s agreement for market definition decisions and conclusions about market dominance: Germany. NA in Turkey.
d) Mandatory consultation or referrals: Australia, Brazil, France, USA. Although debateable, as the Telecommunications law opinion of the TA should be obtained from the TA. There also exists a mandatory referral during the privatization process which is a notification for the approval of the privatization.

**3.4. Consultation Time–Frame:** The regulator or the competition authority may have limited allowed time for providing a report or an opinion to the other body: France, Germany, USA. In Turkey, applies both in the privatization process and in the enforcement of the Protocol between TCA and Telecommunications Administration.

**3.5. Appeal Proceedings:**

a) Appeal Proceedings of both kinds of authorities assigned to the same appeal court: E.g France. Also applies in Turkey since 13th chamber of the Council of State is authorized to deal with the decisions of the SRAs as well as the decisions of the Competition Board.

b) In case of conflicting views, leaving the resolution of a matter to the appeal body: Finland. In Turkish Law, under the Council of State Law, it has always been possible for the state departments to refer a question/matter to the administrative chamber of the Council of State and request the opinion of the Council of State. However the opinion of the Chamber is not binding. The new Draft Law sets forth that in case of a conflict of jurisdiction the conflict will be referred to the Prime Ministry that will refer the question of jurisdiction to the Council of State for settlement.

While enforcing the Law in the markets on the one hand, the TCA should regard competition advocacy as one of its priorities. The reason for that is not only the general trend in different jurisdictions in the world but also and mainly the source of the anticompetitive circumstances especially in the regulated sectors may arise from the legislative or administrative acts which have been enacted/issued prior to or later than the Competition Law. This may arise as conflicts of jurisdiction or simply the adverse impact of the regulation concerned on the competitiveness of the market. Regardless of its

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28 The TCA has referred to the 1st Chamber of Council of State for both certain institutional issues as well as on the applicability of the procedural rules: E.g the interpretation of the appointment of the new Board members and on the applicability of the amended provisions of the Law to the Board decisions the reasoned decisions of which have not been served to the addressees yet.
nature, such issues all require some degree of cooperation either defined clearly in the Law statutorily or in the lack thereof by means of the willingness of the authorities concerned. The experience of the TCA despite the existence of a Protocol (regulating its relations with the TA) and two communications of the Prime Ministry\(^\text{29}\) (addressing all the Government departments) and the Communiqués between the Privatization Administration and all state departments carrying out privatization have shown that the cooperation and coordination between the TCA and other state departments should be clearly regulated in the law.

While shared or concurrent jurisdiction and parallel proceedings may result in increased costs and time as well as conflicting outcomes, conflicts can be mitigated by early and regular interrelations between the authorities. The experience that the Turkish business had witnesses both in ÇEAŞ and TURKCELL and TELSİM Roaming decisions are clear examples of such cases. As stated among the options for cooperation codification of interrelation is also a way. Overlaps may however be avoided by giving as exclusive as possible authority to each institution. Nevertheless in the lack of such an explicit provision in the laws, the relevant authorities should seek for the best possible solution/option for cooperation under the existing legislation.

In that regard the experiences of other countries play a significant role. Nevertheless it is admitted that effective competition advocacy in one country may not be easily replicated in another country not only arising from the roles of the competition authorities but also due to the constraints that may arise from institutional/legal principles of public administration. The nature and the model of interaction between the related government departments and the competition authority not only varies from one jurisdiction to another but even in the same jurisdiction from one regulator authority to the other and sometimes even between the same authorities under different administrations. Therefore taking such possibilities into account formal or informal

\(^{29}\) A communiqué had been issued in 1998 by the office of the Prime Minister encouraging other agencies of the government to consult with the TCA in advance about proposed regulations and decisions that had implications for competition policy. The OECD Peer Review Report (p.80) observed that the Board had sometimes been afforded an opportunity to comment on proposals as contemplated by the communiqué, but sometimes not, and sometimes only very late in the regulatory formulation process. The Report recommended that consultation with the Board be made a formal, authoritative requirement (p.31).
procedures and statutory measures would have a priority in shaping the success of the competition advocacy.

The International Competition Network ("ICN") may play an effective role in guiding countries on how to improve their mechanisms of advocacy. ICN is conducting a pilot program (until June 2007) to facilitate contacts through which newer competition agencies may consult staff members of more experienced competition agencies about investigative techniques, case analysis, and related matters.

In addition to the enforcement of competition law and policy, industrial policy, state aid policy, taxation, company law unfair trade provisions, especially sector policies and SME policies are related with and affected by the competition policy. Progress in terms of legal and policy issues in all of these areas will help Turkey to have a better competitive environment.

In terms of consultation procedure which forms an important part of the cooperation process, the following points may be useful for the CAs and the SRAs as there are three key elements pointed out for good consultation:

(i) consultation documents need to be as transparent and concise as possible; Provided that the rules of cooperation are negotiated clearly between the CAs and the SRAs then the system can function perfectly well\(^\text{30}\). Thus the reports, opinions, notes exchanged in between these authorities should be made available to public.

(ii) it should be clear who is being consulted and what they are being asked; and

(iii) sufficient time should be provided for responses. There should be pre-defined timetables for each step of the process and in the lack thereof relevant authorities should both act timely in order to enable each other a sufficient period of time to opine and consider the impact of the action concerned.

The UK\(^\text{31}\) Better Regulation Task Force (BRTF) makes an observation that “If consultation is to be genuine it needs to start very early in the process of developing new proposals – before insiders make decisions on their own preferred options”.

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\(^{30}\) The objectives of competition law and policy and the optimal design of Competition Agency, -Note submitted by the Consumers International to the Global Forum on 10-11 February 2003, OECD.

\(^{31}\) In the UK, the Cabinet Office has published a Code of Practice on Written Consultation. The Code sets standards for consultation documents issued by the government. It aims to increase the involvement of people and groups in public consultations, minimising the burden it imposes on them, and giving them a
V. The Impact of the RTAs on the relationship between CAs and SRAs

In terms of the impact of the RTAs on shaping the national competition laws, the EU agreements and other statutory tools created within the scope of Turkey-EU relations ("EU Agreements") form the most extensive and closest cooperation between the Contracting Parties.

If these agreements are to be interpreted in line with the dimensions set forth by Cernat, it is possible to point out the following:

The EU agreements mainly based upon the Association Agreement, Additional Protocol and the custom union decision require the existence and enforcement of competition law and the harmonization of the national law with the EU acquis where consultation provisions are also set forward.

In the light of the above, the venue of this Conference (İstanbul, Turkey) is itself quite meaningful to show the impact of the RTAs on the national competition rules since Turkey has been one of those countries where the impact RTAs can be very explicitly observed.

The impact is clearly seen in the historical background of the Law. A number of different motives as set forth below initiated the enactment of the Law, although after a lengthy period of considerations. While efforts of some academics, economists, government officials and politicians to prepare a draft law which prohibit anticompetitive practices appear to date back to the 1970s, no major step was taken until 1992. The delay in the adoption of a competition law mainly arose not for a debate on the substance of the law but on rather political grounds that the either the Governments or the term of the Parliaments were not long enough to enact the Law or the Draft had no longer been a priority issue. In the light of the above stated motives, it may be concluded that the impact of the customs union negotiations had been stronger than others such as the public support coming from the business organisations, firms or universities.


32 For the background and the legislation period of the Law see Anik, G., "Competition Rules of Turkey" [1997] 5 ECLR 311.
In addition to the above said reasons, the role that international agreements played in the enactment of the competition legislation should not be underestimated. Like most member states of the EU and the recent member (former candidate) countries, Turkey also has a competition law system modelled upon the European Competition Law. The Association Agreement between Turkey and the EEC requires that the Contracting Parties should maintain the applicability of the provisions of the Rome Treaty on the harmonization of competition, tax and the laws. According to Article 16 of the Agreement establishing an Association between the European Economic Community and Turkey (signed in Ankara, 12 September 1963):

“The Contracting Parties recognize that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable in their relations within the Association.”

Moreover, the Additional Protocol between the parties requires that for the purposes of approximation of the economic policies of the Parties, the Association Council, within six years following the effectiveness of the Additional Protocol, should take the necessary measures for the implementation of the relevant articles of the Rome Treaty on competition matters, namely, Articles 85-86 (now 81 and 82) on the prohibition of agreements, decisions and concerted practices and the abuse of dominant power which distorts competition and Articles 90-92 (now 86-88) which refer to state aids.

The Additional Protocol also sets forth provisions related with the competition law and policy. The goals of the competition provisions in these agreements are in line with:

33. G. ÖZ; Legal and Institutional Aspects of Competition Policy in Turkey and Its Impact On Investment, Report prepared as part of a larger Project within the framework of the FIAS/Competition Authority/TEPAV Project on ‘Competition Policy and the Impact of Investment Environment in Turkey: Sectoral/Institutional and Legal Framework, p.
36. Additional Protocol, Article 43.
37. The 1st Chapter is titled as CLOSER ALIGNMENT OF ECONOMIC POLICIES and COMPETITION, TAXATION AND APPROXIMATION OF LAWS and reads as follows:
Article 43: 1. The Council of Association shall, within six years of the entry into force of this Protocol, adopt the conditions and rules for the application of the principles laid down in Articles 85, 86, 90 and 92 of the Treaty establishing the Community.
Article 57 : The Contracting Parties shall progressively adjust the conditions for participation in contracts awarded by public authorities and public undertakings, and by private undertakings which have been granted special or exclusive rights, so that by the end of the period of twenty-two years there is no
with the purposes of the EC competition law so as to ensure that the same competition rules are applied at the national level and at the EU-Turkey customs union area.

Therefore the impact of her relations with the EU and its impact on the competition policy dates back and goes before the Customs Union Decision 1/95 (“Decision No. 1/95”) of the Association Council. Nevertheless Decision No. 1/95 can be considered to have the most significant and immediate impact on the competition policy. Before Decision No. 1/95 came into effect, this requirement had formally and informally been established as one of the pre-conditions for the operation of the customs union between Turkey and the EU. Given the impact of the Association Agreement and the Decision No. 1/95 which played a significant role especially in the timing of the enactment of the Competition Law, there has been little public awareness and support building during the process of legislation. This point, to a certain extent, may have an impact on the lack of competition culture today.

Since Turkey has been announced as a candidate country, the European Commission regularly publishes a Report on Turkey’s progress towards accession, the most recent ones of which were published in October 2004 and 2005. The findings of these Reports are also significant in shaping the competition policy and the interplay between the CAs and the SRAs in Turkey.

The EU competition acquis covers both antitrust and state aid control policies. Despite the fact that the EU Commission’s 2004 and 2005 regular reports welcome what has been achieved in Turkey in the area of antitrust law, it states that no progress has been made on the adoption of state aid legislation or on the establishment of a state aid discrimination between nationals of Member States and nationals of Turkey established in the territory of the Contracting Parties.

The Council of Association shall determine the timetable and rules for this adjustment; when doing so it shall be guided by the solutions adopted by the Community in this field.

**Article 58**: In the fields covered by this Protocol:
– the arrangements applied by Turkey in respect of the Community shall not give rise to any discrimination between Member States, their nationals or their companies or firms;
– the arrangements applied by the Community in respect of Turkey shall not give rise to any discrimination between Turkish nationals or Turkish companies or firms.

**Article 59**: In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community.

38 Ö. Kayalı, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, UNCTAD, Trade and Competition issues : Experiences at the regional level, UN Publication UNCTAD/DITC/CLP/2005/1, s.

39 Article 16, Decision No. 1/95.

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monitoring authority\textsuperscript{40}. In the past it has been debated for more than a year, however the issue seems to be no longer within the agenda of the Present Government. If the Draft Law on monitoring state aids is enacted this year, this would also probably be with the impact of the Turkey’s obligations arising from the Decision No. 1/95.

In addition to the impact of the EU primary and secondary legislation the Peer Review Report\textsuperscript{41} observed that cooperative arrangements (between the TCA and the CAs in other jurisdictions) might be particularly important for Turkey, since she “\textit{is not part of a supra-national structure with competition policy competence, such as the EU}”. The TCA states that it attaches great importance to cooperating with the competition components of major international organizations and to participating in their activities. Although the TCA wishes to expand cooperation with other countries through multilateral or bilateral platforms, it has not, as recommended in the 2002 Report, established any formal cooperation arrangements with enforcement agencies in other countries.

As stated above, the SRAs such as the Energy Market Regulatory Authority, the Telecommunication Authority, the Banking Regulatory and Supervision Authority, do not ensure efficient cooperation and use of consultation mechanisms with the TCA in order to prevent any competition distortions in their respective regulated markets yet\textsuperscript{42}.

Therefore any RTA which includes CA-SRA relations would serve for the enforcement of the cooperation between CAS and SRAs. In order to facilitate this, it can be useful to have a model for the basis of the CA-SRA interplay. However it should also be taken into account that due to different legal and administrative systems and cultures it may not be possible to have a unique system or “one recipe for all” based on one specific type of cooperation and allocation of work. Nevertheless in order to provide a basis through RTAs, it would certainly be useful to benefit from different country’s good or examples where in any case that would turn out to be useful lessons.

Further research and studies to be concluded on the relations between the CAs and the SRAs at national level and in RTAs would support and guide policy makers on

\textsuperscript{40} For further discussion on state aid monitoring, see Öz, G.; Devlet Yardımları ve Rekabet, AB’ye Tam Üyelik Sürecinde Rekabet Politikasının Rolü ve Önemi, 5 Kasım 2003 Rekabet Kurumu Yayımlı, s. 117-122.
\textsuperscript{41} Peer Review p. 45.
\textsuperscript{42} Commission’s Regular Progress Report 2005, p.
drafting the frame of the interrelation between the CAs and SRAs in a constructive and efficient way.