Intergovernmental Group of Experts on Competition Law and Policy

Geneva, 16-18 July 2008

Independence and Accountability of Competition Authorities

by

Turkey

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THE LIMITS OF INDEPENDENCE AND THE RELATIONSHIP BETWEEN TRANSPARENCY AND ACCOUNTABILITY: THE TURKISH EXPERIENCE

Independence and Accountability

The independence of competition authorities has recently been the cornerstone of institutional reforms insulating competition law implementation from political influences. This is also a point at issue for the regulatory agencies that are responsible for implementing market-specific regulations. The argument behind these reforms is based on the assumption that the most efficient type of administrative structure and sound policy outcomes are assured only if the institutions involved are independent. However, the establishment of public institutions operating independently may give rise to some problems regarding accountability especially in regulated markets.

The accountability of competition authority reflects that the rules and procedures, on which decision-making process was constituted, should be laid down clearly and so, the other parties, which are undertakings, consumers and public institutions, should stay in an environment where the limits of agency’s power for conducting investigations and applying sanctions are predictable. This should be understood as the pre-requisite for predictable administrative mechanism rather than full-predictability of the results of the competition infringements. Through this perspective, accountability connected with the predictable antitrust standards and enforcement can be increased by making transparency certain. What we have to understand from transparency is to provide information for stakeholders regarding functions, activities, economic and fiscal policy goals of administrative unit, and this concept includes both financial and functional information of the agency that allows the stakeholders to be informed about present and future position and activities of the agency.

In the foregoing context, this paper, which aims at revealing the challenges competition authorities may face due to lack of transparency, will focus on the regulated markets. Since accountability and independence are multi-dimensional concepts, the context of this paper is limited to the relationship between competition and regulation agencies, and its review from the perspective of independence and accountability. After determining the accountability problems in regulated markets, the effectiveness of cooperation mechanisms between antitrust and regulatory agencies in handling accountability problems would be discussed in the light of Turkish experience. Lastly, essentiality of independence in setting up relations with other independent agencies will be evaluated.

How does transparency affect the accountability of competition agencies in regulated markets?
In some countries, competitive process, especially of some infrastructure industries, is under the oversight of two distinct bodies: a competition authority which has economy-wide powers and a sector-specific regulator. Looking at the country practices and theoretical discussions about which institution should be responsible for investigating competition infringements, it is seen that the result varies widely depending on chosen perspective. Besides, in some jurisdictions, such as Turkey, there is no sole authority in charge of protecting competition and implementing antitrust rules. Although the co-existence of independent regulatory and competition authority may be beneficial to make industries competitive provided that the borders between the jurisdictions of two independent authorities are clearly drawn, the absence of these conditions may lead to legal uncertainty and institutional conflict that may hinder competition in these markets. This confirms that legal transparency that covers the rules, mechanisms and procedures applicable to competition issues is a critical factor in assuring accountability.

On the other hand, competition authorities, which happen to be highly independent may endorse an ‘accountability deficit’ in case of non-transparency which means that the borders between the jurisdictions of two independent authorities, namely competition authority and regulatory body, are not clearly drawn. In other words, lack of *ex-ante transparency*, consisting of clear rules and clear division of powers between regulatory and competition authorities regarding competition law enforcement, renders the legal conditions under which businesses and consumers operate uncertain. This sort of environment may cause not only uncertainties about competition enforcement but also an accountability problem. *Ex-post transparency* may also be an alternative method that can be applied in such a way that independent judicial review of the decisions of both regulatory agency and competition authority works as a dispute settlement mechanism if any doubt exists regarding what authority -to what extent- would be in charge of investigating competition restrictions. In this sort of situation, both agencies may hold independent decisions in accordance with the principles of its own jurisdiction and the court settles the conflicts if any.

**Limits of Independence**

With reference to the independence, the critical point is how accountable competition authority can be constituted without ex-ante transparency or whether the ex-post transparency replaces the ex-ante one. For the later question, it is obvious that in the process of ex-post transparency, businesses and consumers may not know under what legal conditions they operate unless the judiciary adjudicates the legality of one of the decisions taken by the authorities. It means even if the court may play a role in creating a transparent environment, accountability is still a problem for the ex-post transparency. Hence, it doesn’t seem possible for ex-post transparency to entirely substitute ex-ante transparency.
On the other hand, establishing cooperation mechanism between the competition authority and regulatory agency appears as an alternative method in dealing with the accountability issues. But the challenge we may encounter is how these two agencies come together and develop a common ground to coordinate their activities as both of them are independent and there is no force that can push them to cooperate with each other.

In theory, independence is generally defined as the insulation from the political interventions, but in reality this concept affects all the institutional relations regardless of political identity of the other party. In other words, since the institutional relations with the other public bodies, including not only political institutions but also other independent public agencies, are supposed to be shaped on a basis of the specific meaning of independence, what we mean by independence is getting importance. If the competition authority sticks to the interpretation that independence gives the competition authority full discretion and allows it to operate without seeking consent of other related bodies, it means competition authority assumes itself as the sole protector of competition in the markets. On the other hand, competition authority, instead of taking actions, may also expect regulatory agency to take measures to ensure competitive market structure and make competition enforcements. Both cases are based on the independent actions of the competition agency. Moreover it is assumed that there is no legal transparency and proper coordination mechanism defined by law or through formal relations.

The Turkish experience proves the theoretical explanations mentioned above. Two cases we have faced in Turkey would be insightful examples, shedding light on the accountability problem stemming from non-transparent jurisdiction. Both cases also indicate the importance of establishing a functional cooperation mechanism in order to achieve accountability.

“National Roaming Case” below, presents several points on the institutional structures of and relationship between the sector-specific regulator and the competition authority. This case shows how the absence of well-established (formal/informal) communication channels between the Telecommunications Authority (TA), independent regulatory agency, and the Turkish Competition Authority (TCA), autonomous administrative agency, makes impossible an effective division of tasks and collaboration in mobile telecommunications market.
The national roaming case\(^1\) was brought about by the new entrant into the mobile telecommunications market, Aria, against the incumbent operators, Turkcell and Telsim who were the first two players in the Turkish mobile telephony market and began their operations in 1994. Aria entered the market in 2001 and has been promised a national roaming right in its concession agreement until it would establish its own nation-wide network, which it was obliged to do in three years. Apart from general competition law concerns regarding essential facility, the roaming issue is explicitly stated in the Telecommunications Law\(^3\) (article 10), which requires “mobile telecommunication, data operators or operators of other services and infrastructure as determined by the [Telecommunications] Authority are also required to satisfy reasonable, economically proportionate and technically feasible roaming requests of other operators.”

The economy-wide anti-trust power is assigned to TCA by the Competition Act of 1994\(^4\). TCA’s power virtually covers all markets and all forms of economic activity. For telecommunications industry, the law does not draw a clear border between the tasks of TA and TCA. Regarding antitrust investigations, Telecommunications Law provides the TA with the authority to investigate anticompetitive practices in the industry, while the economy-wide authority of TCA –stemming from the Competition Act- still encompasses telecommunications industry. TA was authorized to issue regulations for the telecommunications industry, determine operators which are responsible to provide interconnection and roaming services, regulate or set tariffs, monitor compliance and impose fines in case of non-compliance. Telecommunications Law (Article 16) does not deny TCA’s authority in the sector, but merely obliges it to take the TA’s opinion into consideration before taking any decisions regarding the telecommunications industry. However, the same Law does not require the TA to seek the opinion of the TCA.

Aria, after unsuccessful negotiations with incumbents on national roaming, applied to the TA in early 2001. Following another stage of unsuccessful negotiations, in October 2001, TA determined the terms and conditions of the roaming agreement and asked the parties to accept them. Aria accepted, while the incumbents declined and sought for a preliminary injunction.

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\(^{1}\) Roaming is critical for new entrants into mobile telecommunications market. Delays in attaining full coverage would seriously increase the cost of attracting subscribers, and the resulting delay in revenues would jeopardize the viability of the new entrant against the incumbents which are strengthening their dominance through the network externalities provided by new subscribers.

\(^{2}\) Decision no: 03-40/432-186. Date: September 6, 2003.


decision at the local administrative courts. Consequently, the TA has been unable to force the incumbents to open their facility to Aria due to the preliminary injunction decision of the local court that blocked the execution of the TA’s decision on national roaming.

After these unsuccessful attempts, Aria filed a complaint to the TCA in December 2001. Aria argued that the two incumbent undertakings had a jointly dominant position in the market, and their refusal to supply roaming services constituted an abuse of dominance and hence a violation of the Competition Act. The TCA decided that the ex-post competition investigations are clearly in the TCA’s jurisdiction and started an investigation according to the Competition Act. After the investigation, the incumbents were found to have abused their dominance by declining Aria’s requests for roaming and they faced the ever-large fine that TCA imposed in a case thus far. In its decision Competition Board, instead of determining the conditions of the roaming agreement between the parties, asked the TA to do so in order to refrain from breaching the jurisdiction of the regulatory authority. Meanwhile the TA’s roaming order was annulled by the courts and hence TCA’s decision became ineffective.

When we consider the ineffectiveness of both decisions taken by the TA and TCA, it is obvious that the collaboration between the independent public bodies might play an essential role in establishing accountability. In other words, for this case, effective division of tasks and responsibilities that may have been achieved by the cooperation mechanism would make one of the decisions legitimate and so it might be possible to solve national roaming problem.

Another case regarding “Privatization of the Fixed-Line Telephone Operator” illustrates an experience of good inter-agency communication and effective cooperation: collaboration between the TCA and the Turkish Privatization Authority (TPA) on reviews of acquisitions through privatizations. This case explicitly points out that establishment of clear rules about the roles of two institutions and procedures of collaboration by a formal communiqué minimizes legal uncertainty and increases accountability.

Privatization of the Fixed-Line Telephone Operator

The collaboration of the TPA and TCA is based on a communiqué of Competition Board. This communiqué also establishes a strict time table for TCA and TPA while delineating their respective roles in the privatization transactions. With that communiqué, TCA has the jurisdiction in both ex-ante and ex-post privatization proceedings. Ex-ante review is achieved by TCA, in the pre-notification stage, by forming its opinion on the conditions of the bid in order to make them compatible with the competition legislation. After the bid, TCA reviews the first three bidders upon notification. Although the ex-ante opinion of TCA is not binding on TPA, competition authority may not approve the transaction after the bid in the notification
stage. This mechanism has been very successful in maximizing the role of TCA in the establishment of competitive market structures after privatizations.

Regarding the telecommunications industry, this dialogue mechanism was beneficial through the privatization process of Turk Telekom A.Ş. (TTAS), the fixed line telephone operator. TTAS held the legal monopoly right in fixed line telephone services in Turkey until 2004. It also operated the cable TV infrastructure. Attempts to privatize TTAS date back to early 1990s but had not been successful as courts annulled numerous efforts. In every attempt, government tried to privatize TTAS with all its monopoly position and legal rights on infrastructure.

During the consultative process between competition and privatization authorities, TCA foresaw that the cable TV infrastructure might be a viable alternative to fixed line telephone network\(^5\). The cable TV network had transformed its function through technological process making two-dimensional transmission possible and developed as a potential competitor to the traditional fixed-line network with its voice and broadband internet services. TCA requested separation of fixed-line and cable TV networks (including legal rights to own and operate them) in order to be sold to different owners. The Telecommunications Authority argued that such a separation was not necessary even though it did not have primary authority in privatization process. The privatization process was completed in line with the opinion of TCA, as fixed-line network was privatized, while cable TV network was kept under state-ownership to be privatized later. Upon TCA’s opinion, the fixed-line network was not sold to the dominant player in mobile telecommunications markets, in order to sustain competition between converging infrastructures.

So far, the institutional relations between independent authorities are discussed in the context of setbacks caused by non-transparent legislation. Also it should be noticed that these problems are directly linked with the implementation of competition rules. However, there can be different instances that still require cooperation mechanism with other independent agencies:

1. Even where the boundaries of powers regarding enforcement of competition rules are prescribed properly by the legislation, there is still room for coordination and cooperation with the other agencies for the sake of effectiveness.

2. Though the other party of the cooperation is not in a position allowing it to deal with competition issues and also the main task of the party has nothing to do with the implementation of competition rules, there may be still potential gains resulting from the cooperation with this sort of organizations.

The relationship between TCA and the Public Procurement Agency (PPA) would be beneficial to understand the first case. The PPA, an independent public body responsible for enforcing public procurement law, aims at establishing the principles and procedures to be applied in procurements held by all public entities and institutions. In tenders, the contracting entities are liable for ensuring transparency, competition, equal treatment, reliability, confidentiality, public supervision, and procurement of needs are being carried out under appropriate conditions and in a timely manner. In this context, the duty of PPA is to regulate and monitor the public procurement system in accordance with the aforementioned principles. Compared with the tasks of TCA, it is clear that there are no conflicts or inconsistencies in the legal texts.

In terms of transparency, the rules, procedures and division of powers are clear and hence, there is no need for coordination mechanism between them. However, while implementing competition law, TCA has noticed that cooperation machinery envisaged to fight jointly against the bid-rigging activities would be functional and beneficial for both sides. Therefore, this cooperation, still underway, will provide TCA with the information that makes possible to detect the bid-riggings and so, it will constitute another mechanism to supervise public procurements and guarantee efficiency of the public spending.

As mentioned above, there can be some circumstances under which competition agency may gain benefits by establishing cooperation with other public organizations even if these organizations are not involved in the competition enforcement. In this context, TCA attaches importance to the relation with the Central Bank of the Republic of Turkey in its struggle to establish a formal mechanism that would result in gaining the critical information to rank the priority of the markets subject to competition law enforcement. It is expected that the sector-specific price indicators revealing price stickiness would guide the TCA while determining the sectors that should be examined primarily. This kind of cooperation would also help the Central Bank attain price stability. So, in the area of monetary policy, the disinflation strategy of the Central Bank needs the support of more comprehensive policies, one of which is the competition law implementation that could be exploited to reduce domestic inflationary pressures.

These two cases demonstrate the importance of establishing collaboration mechanisms with the other independent bodies in acquiring the critical data that constitute a background for implementation phase of the competition law. A well-defined institutional framework setting a base for the inter-agency relations should assist the competition agency in allocating its resources effectively. However, the important point is that since all of these authorities are autonomous and there is no imperative reason causing them to come together, there should be another incentive bringing this result. In fact, what makes the competition agency get closer to the other independent authorities is the accountability that urges the competition agency to become more effective, accelerate the performance and satisfy the expectations of the people.
to whom competition agency is accountable. This is also the case for the other side of the cooperation; because, for instance Central Bank of Republic of Turkey, primary objective of which shall be to achieve and maintain price stability, will take advantage of this cooperation mechanism in achieving its main objective.

Conclusion

In sum, foregoing experiences indicate that legal transparency, clarifying the effective legal rules, procedures and power of implementation that businesses and consumers face, is one of the conditions required to strengthen the accountability. In case of a deficiency in legal transparency that would bring about an accountability problem, how the competition agency approaches the independence turns out to be a critical factor. If the competition authority considers that independence gives discretion to it to some extent and, at the same time, requires operating in harmony with the other related administrative units, a cooperation mechanism initiated by competition agency would serve to diminish negative results of the accountability problem. This kind of institutional approach embraced by the competition agency also enables to expand the cooperation to cover other public institutions, which can help the competition agency increase the effectiveness of the law enforcement. This also facilitates achieving accountability of the competition agency by improving resource allocation.

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6 With the Public Management and Financial Control Law No:5018 accepted in 2003 and came into force with all its statements on 01.01.2006, the public management and financial control system of Turkey has been entirely changed. The main elements of the new system were to ensure the correct and efficient utilization of the public resources, the union of the public finance, the fulfilment of the transparency and accountability principles and the creation of the control systems. In other words, from the financial point of view, accountability covers not only clearly defined role and responsibilities of the agency but also efficient allocation and utilization of the public resources.