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Working Party No. 2 on Competition and Regulation

INNOVATIONS AND COMPETITION IN LAND TRANSPORT

-- Note by Turkey --

28 November 2016

This document reproduces a written contribution from Turkey submitted for Item III of the 62nd meeting of the Working Part No. 2 on Competition and Regulation on 28 November 2016.

More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competitionand-innovation-in-land-transport.htm>

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-- TURKEY --

1. Road Transport

1. The regulation power in land transport and passenger transport services (outside the boundaries of municipalities) rests with the General Directorate of Land Transport (“KGM”) which serves as the main unit of service at the Ministry of Transport, Maritime Affairs and Communications (“MoTMAC”). The main duties of the KGM include specifying the 65 909 km long network of motorways, state highways and provincial roads and preparing the modifications on this network and constructing, improving and repairing the roads and bridges on the road network and keep under continuous maintenance to provide the secure use of them and providing necessary training on these subjects etc.

1.1 Privatization of Motorways

2. Following the previous efforts, a privatization process was started in 2010 for the motorways and bridges (including their connection roads) and service facilities as well as the maintenance-operation and toll collection units based on Privatization High Council’s (PHC), led by the prime minister of Turkey, decision dated 15 October 2010 and numbered 2010/88. The assets to be privatized under one package via Transfer-of-Operating-Rights (TOR) agreement for a period of 25 years starting from the transfer day were:

- Edirne-İstanbul-Ankara Motorway
- Pozantı-Tarsus-Mersin Motorway
- Tarsus-Adana-Gaziantep Motorway
- Toprakkale-İskenderun Motorway
- İzmir-Çeşme Motorway
- İzmir-Aydın Motorway
- Gaziantep-Şanlıurfa Motorway
- İzmir, Ankara and Fatih Sultan Mehmet Bridge Peripheral Motorways
- 15 Temmuz Şehitler (Boğaziçi) and Fatih Sultan Mehmet Bridges

3. The first tender date was 17 December 2012 and the first ranking bidder was a Joint Venture with the amount of \$5.720.000.000. However the tender cancelled by Privatization High Council on the date of 22 February 2013.

4. As a part of the Communiqué no. 1998/4¹, the Privatization Administration, which is the public authority to implement PHC decisions, notified the TCA before the tender and asked Turkish Competition Board's (TCB) official opinion about the effects of the privatization of the abovementioned assets on competition. In its opinion, the TCB stated that the motorways to be privatized cannot be considered as competitors thus there is no need for a clause to be specified about the privatization and there are no competition concerns regarding the privatization of the two bridges in one package, as well. However, the TCB gave warnings about the competition between the motorway service areas as those were also to be operated by the new owner of the motorways, which could result in leverage of its dominance in access-controlled motorway infrastructure services market to the motorway service areas market. Although the tender was cancelled by the PHC afterwards, the TCB authorized the acquisition of the assets by the bidders with its decision dated 13 Dec 2012 and numbered 12-64/1639-601. Those assets are still in the portfolio of the Privatization Administration².

1.2 Antitrust Cases related to Intercity Bus Services

5. Turkey's passenger land transport relies on passenger cars (63.7%) followed by buses (34.9%). As one of the main means of intercity passenger transport, buses use intercity lines and city terminals, which were the subject of a couple of antitrust cases in Turkey. Among those cases the important ones which went into investigation phase are *Şanlıurfa Intercity Bus Services Cartel Investigation* (decision dated 06.06.2006 numbered 06-40/504-131), *Sakarya Intercity Bus Services Cartel Investigation* (decision dated 25.07.2005 and numbered 06-55/713-203), *Bartın Intercity Bus Services Cartel Investigation* (decision dated 26.12.2006 and numbered 09-94/1191-357), *Trakya Intercity Bus Services Investigation* (decision dated 28.10.2010 and numbered 10-68/1445-545).

6. In addition the ongoing investigation launched on 29.06.2016 about Volkan Yolcu Taşımacılığı Seyahat Nakliyat Tic. A.Ş. and Öz Edirne Birlik Mustafa Altunhan to determine whether they violated article 6 of the Law no. 4054³ on the Protection of Competition ("Law no. 4054"), an important recent investigation is about abuse of dominance allegations related to the intercity bus terminal of Edirne, a city located at the Northwest of Turkey. The *Edirne Bus Terminal Abuse of Dominance Investigation*⁴ (decision dated 01.12.2013 and numbered 13-67/928-390) was conducted to determine whether Volkan Metro Turizm Seyahat ve Nakliyat Tic. Ltd. Şti. (Volkan Turizm), which is operating Edirne Bus Terminal, violated article 6 of the Law no. 4054 by refusing to rent offices to competing undertakings. The investigation was initiated upon various complaints in order to establish whether Volkan Turizm, which acquired the operating right of Edirne Intercity Bus Terminal, violated article 6 of the Law no. 4054 by refusing to allocate places to undertakings engaged in road passenger transport and/or selling tickets. At the investigation phase, the following issues were analyzed:

¹ In terms of competition law, Communiqué no. 1998/4, which was replaced/abolished by Communiqué no. 2013/2 that maintains primarily the same approach with its predecessor, divides the process related to privatization transactions into two stages; namely, the pre-notification stage and the (final) authorization stage. Within this framework, before the announcement of the tender specifications to the public, a pre-notification must be made to the TCA. During the pre-notification stage, the TCB evaluates the results of such a privatization within the relevant market and the status of any legal and de facto concessions that might be held by the undertaking to be privatized, after which it prepares the Official TCB Opinion which will serve as the basis for the tender specifications document on these subjects. Basically, this opinion forms the phase in which the TCA lays out its recommendations concerning what can be done privatization in question to ensure a more competitive market and carries out its function as a Competition Consultant. [http://www.rekabet.gov.tr/en-US/Pages/Control-of-Mergers-Acquisitions-Resulting-From-Privatization-Process]

² http://www.oib.gov.tr/portfoy/motorways_bridges.htm

³ Article 6 of the Law no. 4054 on the Protection of Competition prohibits abuses of dominant position.

⁴ <http://www.rekabet.gov.tr/en-US/News/Hearing-for-the-Investigation-concerning-Volkan-Metro-Turizm-Seyahat-ve-Nakliyat-Tic-Ltd-Sti-To-Be-Held-on-November-26-2013>

- whether Volkan Turizm enjoys a dominant position in the upstream market for operating Edirne Intercity Bus Terminal and downstream market for intercity road passenger transport
- whether it refused to allocate places to competing undertakings and whether Edirne Terminal is objectively essential for those undertakings to operate
- whether the conduct in question has justifiable grounds, eliminates competition in markets concerned
- the harm on consumers caused by the conduct.

7. As a result of the discussion of the contents of the file by the TCB on 02 December 2013, it was decided with number 13-67/928-390 that Volkan Turizm, which enjoys a dominant position in the upstream market and also operating in the downstream market, violated article 6 of the Law no. 4054 by refusing to make agreements with its competitors in the downstream market and therefore it should be imposed administrative fines. Moreover, the decision included structural measures. Within this framework, natural and legal persons, particularly the contractor, should make their requests, offers and commitments in writing and in a way that can be supervised and those agreements should be documented to the TCA. In addition, since exceeding 20% threshold for office ownership stipulated in the tender specifications for the bus terminal indirectly distorts competition in the market for intercity road transport in Edirne, an opinion regarding the necessary measures should be sent to Edirne Municipality. Besides, the MoTMAC as well as the Ministry of Internal Affairs should be informed of the subject.

1.3 On-Demand Car Services and BiTaksi Monopolization Case

8. Due to the regulations and strong lobby from the taxi associations, on-demand car services in Turkey are not expected to be a direct alternative to taxis soon. For the same reasons the business models of on-demand car service companies generally consist of prices higher than or equal to taxi fares and including taxis in the network and thus acting as just a medium between the customers and the drivers. In this context, instead of integrating independent contractors and being a direct competitor to taxi owners, Uber, which entered into the Turkish market in 2014, works as a platform providing only taxi call (UberTaxi) and pricier transport services (UberXL) –and also UberBOAT, a sea transfer service between the costs of the Bosphorus.

9. In addition to similar taxi call services like Taksibul, Taxiglob and Taksi Rehberi, the leading taxi-call application is BiTaksi which was the subject of an abuse of dominance case in Turkey. In 2014 the TCA started a preliminary investigation regarding a complaint by an association in Istanbul claiming that BiTaksi Mobil Teknoloji A.Ş., the company behind BiTaksi application, “may” monopolize the market through spreading among the users and thus create consumer harm. In its reasoned decision dated 02.07.2014 and numbered 14-23/462-200 the TCB defined the relevant market as “mobile taxi call applications” and -despite recognizing BiTaksi’s high market share in the relevant market- the TCB decided that the market was still in its initial phase and it was too early to assess dominance within the market and not fined the undertaking. In the decision, the TCB also added that the same assessment would be made even if the relevant market were defined wider as “taxi call services”, where BiTaksi would have much less market share.

2. Rail Transport

10. The existing railway network of Turkey consists of 11 319 km conventional line and 1 213 km high speed train line owned and operated by Turkish State Railways (TCDD) which is an organization affiliated to the MoTMAC as a monopoly in operating rail transport services in Turkey while its monopoly rights are in process of termination as a result of the liberalization process in the industry.

11. In addition to the YHT (*High-Speed Train*) lines and the Marmaray project, which comprises a rail tunnel connecting Europe and Asia under the Bosphorus, the most important recent development related to competition in the railway industry of Turkey is ongoing liberalization and restructuring process. On the other hand, it is worth briefly mentioning the cartel investigation against 9 companies (Schenker & Co AG, Schenker A.E., Schenker Arkas Nakliyat ve Ticaret A.Ş., Fertrans AG, Kühne + Nagel International AG, Kühne+Nagel A.E., Rail Cargo Logistics-Austria GmbH, Express Interfracht Hellas A.E. and Raab-Oedenburg Ebenfurter Eisenbahn AG) conducted by the TCA on the allegations of the violation of Law no. 4054 through customer allocation agreements as a part of Balkan Train and Soptrain cooperation. The investigation was closed by the TCB as it could not detect any anti-competitive effect of the agreement on Turkish markets (reasoned decision dated 16 December 2015 and numbered 15-44/740-267).

2.1 Liberalization of the Railway Industry

12. This process, in fact, envisioned in the 8th and 9th 5-Year Development Plans for 2001-2005 and 2007-2013 terms, respectively. Those plans, which were prepared by the State Planning Organization and approved by the Turkish Grand Assembly, had not only defined the transportation freights mainly by railway –instead of highways- as a strategic objective but also projected commercially oriented and efficient railway services that are in harmony with the market, separation of management and transport utilities of TCDD, operation of private sector trains and productivity increase as a result of private sector involvement. The main steps following this agenda were the Decree Law no. 655 (“The Decree”)⁷, entered in force as of 1 November 2011, and the Law Regarding the Liberalization of Railway Transportation in Turkey no. 6461 (“Law no 6461”), entered in force as of 1 May 2013.

13. The Decree established the Directorate General (DG) of Railway Regulation under the MoTMAC as the main authority responsible from the equitable and sustainable operation of this new liberalized structure of the sector. The DG for Regulation of Railways has duties such as (The Decree Article 8):

- Providing an environment of free, fair and sustainable competition where activities of railway transport can be provided in a fast, economical, convenient, secure, qualified way depending on commercial, economic and social needs and technical developments by promoting public benefit and in a way to cause least harm to the environment, and providing these services with other types of transport and as mutually complementary.
- Specifying service principles, financial capacity and professional respectability conditions of those who are railway infrastructure managers, railway undertakings and organizers, agents, commissioners, railway terminal and station operators in railway transport business and who deal with similar activities; and authorizing these people and supervising them.

⁵ http://www.bilgitoplumu.gov.tr/wp-content/uploads/2014/04/EightFive_Year_Development_Plan_2001-2005.pdf

⁶ http://www.bilgitoplumu.gov.tr/wp-content/uploads/2014/04/Ninth_Development_Plan_2007-2013.pdf

⁷ http://www.udhb.gov.tr/eng/images/20120402_144700_204_2_64.pdf

- Defining rights, liabilities and responsibilities of those who produce services in railway transport business and those who use such services.
- Specifying principles and procedures in railway transport that are related to public service liabilities, etc.

14. This made the DG for Regulation of Railways to be the “safety authority”, “license authority”, “authority of regulation” and the “administrator of public service liabilities”. The Decree also established the Accident Investigation and Examination Council, which is the independent unit to investigate accidents not only in the railways but also in other transportation industries, and the Railway Coordination Council, which ensures compliance and cooperation between the infrastructure manager and train operators.

15. In addition to the Decree, the Law no. 6461 has unbundled TCDD via limiting TCDD’s responsibilities to infrastructure management and establishment of a new affiliate company of TCDD Taşımacılık A.Ş. (TCDD Transport Joint Stock Company – TCDDCo). Possessing its own financial and legal entity and being subject to the Decree no. 233 on State Economic Enterprises and Public Procurement Law no. 4734, TCDDCo is responsible for freight and passenger transportation and expected to compete with the private train operators which will be able to operate following DG for Regulation of Railways authorization and allocation of slots in the future. TCDDCo was registered as a company on 14 July 2016.

16. While this liberalization and restructuring process is still in progress, the TCA has had important roles through its contribution to the legislation drafts. In addition to its official opinion regarding the competitive structure of the draft of Law no. 6461, the TCA sent two sets of opinions and suggestions regarding the drafts of “Regulation on Public Service Obligation” and the “Regulation on Access to the Railway Infrastructure and Capacity Allocation” in 2015. Despite the fact that those opinions and suggestions were not binding, the DG for Regulation of Railways has adopted those and formed the regulations accordingly giving the necessary references to the Law no. 4054.