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Working Party No. 2 on Competition and Regulation

STRUCTURAL SEPARATION RECOMMENDATIONS: COUNTRY EXPERIENCE

-- Turkey --

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TURKISH EXPERIENCE OF STRUCTURAL SEPARATION IN A REGULATED INDUSTRY: THE OPINION OF THE TURKISH COMPETITION AUTHORITY FOR THE PRIVATISATION OF TURK TELEKOM A.Ş

Introduction

1. Regarding the issue of structural separation, Turkey has had a recent experience in telecommunication industry. The issue has emerged as a crucially important point of discussion between the TCA and the Privatization Administration during the pre-notification stage of the privatisation of the Turk Telekom A.Ş., state owned monopoly telecom operator. In this submission, regarding the issue of structural separation in telecom industry, first of all, the Communiqué numbered 1998/4 will be mentioned shortly. Then, the opinion of the Turkish Competition Authority (TCA) will be examined. Lastly the respond of the Privatization Administration will be mentioned.

The 1998/4 Communiqué¹

2. The TCA adopted a “Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorisation Made to the Competition Authority in order Acquisitions via Privatisation to be Judicially Valid”.

3. This Communiqué has the purpose of regulating the procedure of cooperation between the TCA and the Privatisation Administration, regarding privatisation transactions. It is based on a double stage-procedure, respectively pre-notification to take the view of the TCA, and the final notification for the permission of the TCA. Hence, under this Communiqué, the TCA has a dual role to fulfil. The very first one is about control of concentration in the post-privatisation period. The other one is basically related to its advocacy role. In this regard, the TCA has tried to ensure that the market should be opened to full competition and it should be free from artificial barriers for all competitors. In particular, this Communiqué demonstrates the position of the TCA regarding the privileges assigned to undertakings under the process of privatization.

4. Article 3 of the Communiqué is very important in demonstrating the approach of the TCA towards the privileges assigned to the undertakings to be privatised. Article 3 is about the pre-notification of privatization transactions, and determines the conditions for this stage. This pre-notification is an important stage, because tender conditions are determined on the basis of the TCA’s opinion at this stage.

5. “...For procedures of acquisition via privatization under the scope of this Communiqué, in the case where the market share of the undertaking to be privatised or the unit aiming at producing goods and services at the relevant market exceed 20% or where the turnover of the same undertaking or unit exceed 20 trillion Turkish Liras or *even though the aforesaid limits are not exceeded, but where the undertaking to be privatised does have judicial or de facto privileges, it is necessary to make a pre-notification to the Competition Authority before tender conditions are announced to the public in order to evaluate the results of such privatization* in the relevant market, the condition of judicial or de facto privileges –if any- of the undertaking to be privatised after privatization and it is necessary to take the view of the Competition Board which shall be taken as the basis in the preparation of tender conditions document...”

¹ This sub-section is from the Turkey’s contribution for the Roundtable Meeting of Competition Committee “Regulation Market Activities by Public Sector”, on 9th of June 2004. DAF/COMP/WD(2004)23.

6. The following paragraph of Article 3 explains the meaning of privilege as follows:

“...all privileges including the monopoly rights not had or expected to be able to be not had by other undertakings operating in the relevant product market; appeared as a result of the undertaking being a public organisation; being based on a law or other judicial regulation or formed as de facto...”

7. The main philosophy behind this Communiqué is based on the concern of the TCA in eliminating anticompetitive privileges with a view to create a more competitive market structure which is free from artificial distortions.

The Opinion of the Turkish Competition Authority

8. As envisaged within the Communiqué’s preliminary notification procedure, the Privatisation Administration notified the file on the privatization of the Turk Telekom A.Ş to the TCA. The opinion of the TCA has been prepared and forwarded to the Privatization Administration, which shall constitute the basis for the preparation of the document on tender conditions, concerning the one-shot block sales of at least 51 % of the Turk Telekom A.Ş. Below-mentioned are the assessments made accordingly.

9. Turk Telekom A.Ş operates in several services, such as local calls, inter-city calls, international calls, Internet supply, and infrastructure for third party Internet suppliers, infrastructure for third party GSM operators and some others. Despite the fact that the TT holds a monopolistic position at all infrastructures, competition exists at GSM and Internet supply services. If a GSM operator also acquires TT, then certain anti-competitive behaviour would become very possible and likely. The view of the TCA depended upon this fact to a great extent. What would render the company as a whole more valuable than the sum of its components? Given the very complicated technical structure of the service market and the difficulty of proving a possible anti-competitive behaviour, a structural remedy in advance has been accepted to be necessary rather than interfering upon a complaint.

10. When the characteristics of the telecommunications sector are taken into account, it is seen that operators to enter into this sector can conduct their telecommunications services in the event that they can access to infrastructures over which services can be offered. Therefore, the actual provision of liberalization, accompanied with competition necessitates that access to infrastructures are made subject to tight rules.

11. Nonetheless, even that access to an infrastructure is subject to tight rules cannot be sufficient for fully establishing the targeted competition. Even if liberalization is ensured in services, it does not seem possible to speak about the full realization of benefits to be introduced by competition, as long as an infrastructure remains as monopoly de facto.

12. Though opening the telecommunications infrastructures to the share of other operators is an important step in terms of liberalization, it does not essentially mean that an actual environment of *free competition* has been established. As long as competition is not ensured in infrastructures, operators would be in the position of being *dependent* on the infrastructure of the de facto monopoly, and therefore the monopoly and monopolistic conditions presented by it. For this reason, the full display of benefits of competition may indeed take place in case operators can offer services over different infrastructures.

13. The presence of investment barriers against the formation of telecommunications infrastructures, and particularly that of an alternative local telephone network, which may render it irrational in economic terms, seriously impairs the development of another local telephone network in competition with this infrastructure. Within this framework, the greatest barrier to liberalization is the *bottleneck* experienced in access to the local telephone network.

14. In overcoming this bottleneck, the existence of different infrastructures has an extremely critical importance and value. Therefore, the encouragement of the development of different infrastructures over which telecommunications services can be offered, and the elimination of legal barriers to setting up such infrastructures set one of the most important policies.

15. Within the framework of these explanations, the privatization of the Turk Telekom A.Ş presents great importance as regards the liberalization process being undergone by our country in relation to the telecommunications sector. It is required to display great sensitivity during the process of privatization for purposes of the establishment and development of competition in the sector, and in this regard, the privatization of the Turk Telekom A.Ş constitutes an event that concerns the interests of the entire nation, and that shall give rise to important future effects in the country's economy.

16. The privatization of the Turk Telekom A.Ş is an opportunity for compensating for the time wasted in establishing competition in the sector, and if it is realized in a sound manner, it is the most important means that may be used as a springboard for making the sector have a competitive structure. And this fact obliges that a number of measures be taken in relation to privatization. As a matter of fact, taking necessary measures is compulsory with a view to preventing disputes which may arise later, and as regards the requirements of momentum and legal certainty needed by the liberalization process to which privatization is also expected to contribute.

17. With regard to the privatization of at least 51 % share of the Turk Telekom A.Ş, the Competition Board² concluded that performing privatization in the line of the following would be beneficial for ensuring that a more competitive market structure be created in the future:

1. The infrastructure of cable TV be rendered a separate legal personality together with all rights related to the ownership and operation of this infrastructure, such that it shall be completed within the period of one year at the latest, following the transfer transaction of the Turk Telekom A.Ş, and the control of this legal personality be transferred,
2. The service provision activities of the TTNNet be made to have a legal personality which is separate from the other business units, such that it shall be completed within the period of six months at the latest, following the transfer date of the Turk Telekom A.Ş,
3. The undertaking which is dominant in the market for GSM mobile telecommunications services not be allowed to participate in a tender alone; the likelihood for this undertaking to participate in a tender within any consortia be only possible in case this organization does not have a direct or indirect controlling right over the Turk Telekom A.Ş; the likelihood for persons or groups who or which directly or indirectly control this undertaking to participate in the Turk Telekom A.Ş tender alone, together and/or separately within any consortia be only possible in case after the tender, they transfer, to a person outside their economic whole, all means granting a controlling right in this undertaking and/or any undertakings having a direct or indirect controlling right over this undertaking,
4. The inequality which arises between the Turk Telekom A.Ş and operators making use of infrastructures, due to the Special Communication Tax be relieved prior to the transfer.

² During its meeting dated 2.9.2004 and numbered 04-57/797.

18. As seen from the above opinion, the TCA has been aware of the structural separation in order to establish a well-functioning structure in the telecommunication related service markets. It is believed that the envisaged structural separation would enable and help the introduction of full competition in the telecommunication services markets. In other words, this structural separation is considered an integral part of privatization policy accompanied by a suitable liberalization policy.

The Respond of the Privatization Administration

19. As mentioned above, the opinion of the TCA is important for the tender conditions to be determined by the Privatization Administration. An important aspect of the opinion delivered by the TCA is that it is mainly associated with its duty to advocate competition. In other words, it may be that the Privatization Administration might simply ignore the opinion when designing the tender conditions. However, being aware of the significance of the opinion for the future of the industry, the Privatization Administration has declared that it would abide by the opinion of the TCA and design the tender in a manner to separate the Turk Telekom A.Ş. structurally.

Conclusion

20. Considering the opinion of the TCA and the positive approach of the Privatization Administration, it could be argued that Turkey has believed the importance of the introduction of full competition and a structural remedy is an important tool to achieve this objective. It is important to see the recognition by both the TCA and Privatization Administration that without a structural remedy, it may not be possible to establish a thorough competitive market structure within the telecommunication industry, even if a liberalization policy is applied efficiently. In other words, the structural separation, which is an ex-ante remedy, has an important function to avert possible anti-competitive practices to be dealt with by ex-post and time consuming behavioral remedies.