# COMPETITION ASSESSMENT GUIDELINES

## INTRODUCTION

Competitive structure is very important for achieving the expected benefits of the market economy system chosen by Turkey. Within that context, one way of ensuring a competitive structure is to implement the rules of competition law, which may be explained as the prevention of anti-competitive behavior by undertakings and the control of concentrations. However, restrictions of competition are not simply limited to the conduct of undertakings. Public authorities may also cause competition restrictions in the markets through certain regulations and transactions they implement.

As known, Regulatory Impact Analysis (RIA) is an governance tool which aims to systematically examine the positive and negative effects of existing and/or forthcoming regulations. When assessing relevant regulations with RIA, the goal is to correctly define the problems causing the regulation, measure the effects of the relevant regulation on the economy, environment and social structure, ensure wider participation in the preparation process for the regulation, and monitor and assess the implementation of the regulations put into effect.

An important assessment criterion in measuring the economic effects of regulations is to measure the effects of regulations on competition. This is because legislation issued by the government when fulfilling its regulatory role may sometimes introduce drawbacks in relation to the structure of the markets affected by the legislation concerned. Competitive effect assessment is necessary in order to eliminate these drawbacks and to ensure better regulations.

In Turkey, RIA does not have a very long history. Turkey has started to take steps to improve its "regulatory framework" within the scope of the "Better Regulation Studies," started in 2000, under the Lisbon Strategy in the membership process for the European Union (EU). The first of these steps, taken in parallel with the EU member states, is the "Regulations on the Principles and Procedures for Preparing Legislations," issued in 2006. In accordance with article 24 of these Regulations, it is specified that a RIA should be conducted for public regulations in Turkey[1].

[1] The relevant article is as follows:
**"Regulatory impact analysis**
**ARTICLE 24 -** (1) Conducting regulatory impact analysis is mandatory for draft laws and statutory decrees whose effects are estimated to exceed ten million YTL in case they are put into effect. This amount may be re-determined by the Prime Ministry if necessary.
(2) Prime Ministry may request a regulatory impact analysis for acts and statutory decrees whose effects are below ten million YTL as well as other regulatory transactions regardless of the affected amount.
(3) Regulatory impact analysis shall not be conducted for subjects concerning national security or final account draft laws.
(4) Regulatory impact analysis shall be conducted by the ministry or public institution and organization to introduce the proposal.

In addition, official RIA principles were issued with a Prime Ministry Circular in April 2007. The aforementioned Circular explains the Regulations, and the "RIA Guidelines" attached to the Circular includes principles to be followed by regulators and states that the Competition Authority should assist with competition assessments[2]. These Guidelines are prepared in order to instruct those authorities and organizations preparing regulations.

However, it should be noted that the principles set out in these Guidelines should also be taken into consideration for those regulations and transactions falling outside the legislations for which conducting a RIA is obligatory. In other words, these Guidelines present a framework which can be used for primary and secondary regulations as well as administrative actions which fall outside of the scope of the RIA and which have the potential to lead to negative effects on competition. For instance, an arrangement made through an act or a regulation to protect the environment may result in undue necessary restrictive effects on competition. For that reason, it would be beneficial to adopt a competitive approach in the preparation of all types of draft regulations.

The observations presented in the Guidelines are generally based on the "Checklist" included in the "Toolkit[3]" published by the OECD as well as on the 17-year experience of the Competition Authority. The Guidelines includes a checklist comprised of three main sets of questions. The items given in the Checklist mainly correspond to a particular competition restraint and they are explained in the Guidelines through examples based on the practices of the Competition Authority.

(5) Regulatory impact analysis includes the points indicated in Attachment-1. Existing statistical data will be utilized when conducted regulatory impact analyses."

[2]Prime Ministry Circular no 2007/6 includes the following phrases:
"The effect on competition: It should be assessed whether the regulation strengthens the positions of the firms or puts them in a dominant position, whether it decreases or increases the number of firms, whether it restricts competition and whether it reinforces the level of competition. This process must be conducted in cooperation with the competition authority."

[3] Competition Assessment Toolkit, OECD. http://www.oecd.org/competition/assessment-toolkit.htm

**Checklist**

**1. Does the draft limit the number and location of undertakings operating within the market?**

The following may be listed as circumstances that particularly affect the number and location of undertakings:

a. Granting exclusive[4] rights to an undertaking to provide goods or services

b. Introducing a condition to obtain a license, permit or authorization in order to operate in the market,

c. Restricting the ability of some undertakings to offer goods or services,

d. Significantly increasing the costs of entering or exiting the market for undertakings,

e. Introducing certain regional restrictions to provision of goods and services by undertakings,

f. Making regulations in a way that would cause uncertainties for new entrants to the market.

**2. Does the draft limit the competitiveness of undertakings operating within the market?**

The following may be listed as circumstances that particularly affect the competitiveness of undertakings:

a. Regulations which directly or indirectly affect the free determination of the prices for goods or services according to the market conditions,

b. Preventing the marketing of goods or services (advertisements, etc.),

c. Introducing standards that provide relative advantages for some undertakings,

d. Differentiating between new entrants to the market and incumbent undertakings.

**3. Does the draft reduces the incentives to compete for undertakings operating within the market?**

The following may be listed as circumstances that particularly affect the incentives of undertakings to compete:

[4] See p. 5

a. Granting undertakings or associations of undertakings the power to make regulations in the market in which they operate,

b. Making arrangements to have undertakings disclose their price, cost, sale and production amount, etc. information,

c. Undermining the application of competition rules by various exemptions and exceptions introduced for certain sectors or undertakings,

d. Making regulations to limit the freedom of consumers to switch the undertaking from which they procure goods or services.

The above questions included in the Checklist and the circumstances listed beneath will be clarified below with examples, Competition Board Opinions or Competition Board Decisions. Drafts of regulations, which include similar circumstances, should be referred to the Competition Authority for opinion.

## Chapter I

### Granting exclusive rights to an undertaking to provide goods or services

The most well-known example for various circumstances that may affect the number and location of undertakings in a market is the establishment of exclusive rights which allow only a single undertaking to operate in the market. Granting exclusive rights to a single undertaking leads to a "legal monopoly" and prevents new entries into the market. In other words, "competition within the market" will be eliminated. Within this framework, some example opinions rendered by the Competition Authority in relation to the grant of exclusive rights to an undertaking for providing goods or services are given below.

The "Opinion Submitted to the Office of the Prime Minister in Relation to the Repeal and Amendment of Some Laws" dated 29.12.2005[5], examines the phrases included in *"Article 2 of the Act no 2840 Regulating the Operation of Boron Salt, Trona and Asphaltite Minerals and Nuclear Energy Raw Materials and the Return of Some of the Lignite and Iron Fields" as well as "Article 49 of the Mining Law no 3213,"* and noted that Eti Holding was granted legal monopoly rights for the whole process starting with the mining of the boron mineral to the manufacturing and marketing of the final product. The opinion states that the relevant articles

[5] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus43.pdf

of these laws constituted barriers for entry[6] into the market and were in conflict with the general principles of competition law.

Another example on the subject is the Competition Authority opinion dated 27.9.2006[7]. In this opinion, which examines the *"Draft Law Concerning the Amendment of the Law on Pharmacists and Pharmacies,"* emphasizes granting exclusivity to certain undertakings instead of a single one. The draft specifies that, without exception, drugs, drug-like products and supplements must be exclusively sold by pharmacies. The aforementioned opinion states that this provision should be amended since it essentially prevents cheap and widespread access by consumers to those products, which do not have a legitimate reason for being sold exclusively by pharmacies. Consequently, a competitive examination must be conducted into provisions granting exclusivity to certain groups, in addition to the provisions that allow legal monopolies. It can be said that such an approach should only be adopted for valid public policy reasons, under exceptional circumstances.

Another regulation on which the Competition Authority issued an opinion to correct a situation found problematic in terms of competition law was "*The Draft Regulation for the Control of Scrap Vehicles*," which allowed a single undertaking to operate in the market. The Draft defined a single authorized organization for all manufacturers and importers; yet the opinion submitted by the Authority emphasized that the authorized organization envisaged would most likely become a monopoly, and stated that the relevant definition should be removed from the Draft in order to allow the existence of more than one authorized organization.

**Introducing a condition to obtain a license, permit or authorization in order to operate in the market**

Some regulations may require obtaining a license, permit or similar authorization to operate in a market and thus limit the number of undertakings competing in the market by creating a barrier to entry.

[6] Barriers to entry seek to prevent the entry of new undertakings into the market. There are two types of barriers to entry. Structural barriers and strategic barriers. These may also be called economic barriers and behavioral barriers, respectively. Structural barriers result from the intrinsic characteristics of the market, such as technology, cost, demand, etc. Strategic barriers, on the other hand, result from the conduct of incumbent undertakings. For instance, an incumbent which invests heavily in capacity to threaten any new entrants with a pricing war is a strategic barrier to entry. Generally, barriers which make it difficult to leave a market are also considered to be entry barriers. In addition, governments may also create entry barriers in a market through various transactions and disposals. Such barriers are called legal barriers to entry.

[7] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus25.pdf

Related to the subject, the Competition Authority opinion dated 7.5.2001[8] evaluated the "*Draft Law concerning the Establishment of Large Stores Engaged in the Sales of Consumables and Necessities*". As a result of the examination conducted, the concern expressed was that requiring approval for or restricting the establishment of large stores, or forcing them to the suburbs would prevent internal growth and restrict competition by preventing new entries to the market.

Within this context, the relevant perspective must be taken into account when preparing regulations with provisions which directly restrict the number of undertakings that could operate in a market, such as those specifying how many taxis could work and how many pharmacies or hospitals could be opened in a geographical area.

**Restricting the ability of some undertakings to offer goods or services**

The restriction of the ability of undertakings to offer goods or services is seen particularly in public procurements. Competition could be lacking if some undertakings were to be prioritized in public procurements for goods or services. Especially in some markets where the public is the only buyer, undertakings that are unable to offer their goods or services to the public due to regulations may be forced out of the market and a loss of welfare may occur due to a lack of competition.

Competition Authority opinion dated 13.06.2008[9] examines the "*Draft Communiqué on the Procedures and Principles to Follow by Production, Filling, Sales and Distribution Companies of Industrial and Medical Gases as well as Authorized Dealers and Users*". The assessment conducted stated that the regulation could force dealers in the industrial and medical gases market to do business with a single producer. As a result, the regulation preventing dealers from selling to two or more producers was seen as incompatible with the market structure and an amendment to the article was proposed.

**Significantly increasing the costs of entering or exiting the market for undertakings**

Another example for barriers to entry into the market is maintaining high costs for entry into or exit from the market. Especially arrangements which include conditions such as requiring a minimum amount of capital, specifying a particular area size for operation facilities or requiring personnel with specific qualifications or numbers will increase entry costs.

[8] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus73.pdf
[9] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus86.pdf

The *TÜRSAB decision* of the Competition Board may be given as an example on the subject[10]. As known, some professions require membership to the relevant professional association in order to start operations. The aforementioned decision is connected to this requirement. The Competition Board stated that the high admission fees set by the professional associations raised the costs of entry into the market.

In addition, the Competition Authority opinion dated 11.08.2005[11], on the "*Insurance Draft Law*," states that the relevant regulation should include provisions to ensure that the Turkish Insurance Experts Association and Turkish Association of Insurance Agencies admission fees are determined so as not to create barriers to entry.

**Introducing certain regional restrictions to provision of goods and services by undertakings**

Provisions introducing geographical barriers to offering goods and services in different regions may result in an artificial shrinking of the market as well as a decrease in competition. For instance in some professions such as cab services, a practitioner may only operate within the border of the region in which he is registered and may not work at other regions.

Competition Authority opinion dated 22.1.2008[12] focuses on "*The Draft Law concerning Amendments on the Customs Law*". According to the aforementioned draft law, a customs broker could not offer his services to an undertaking outside the activity area of the association with which he is registered The opinion in question emphasized that these provisions should be removed from the draft.

**Making regulations in a way that would cause uncertainties for new entrants to the market**

Another factor that reduce undertakings' incentives to compete is the adoption of regulations which cause uncertainty for new entrants into the market. In other words, regulations for new entrants must be clear and straightforward. Otherwise, this could make it harder for the undertakings in question to compete and may lead to potential competitors refraining from entering the market.

## Chapter II

[10] Competition Board Decision dated 17.12.2003 and numbered 03-80/967-397.
[11] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus39.pdf
[12] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus82.pdf

**Regulations which directly or indirectly affect the free determination of the prices for goods or services according to the market conditions**

In market economy, undertakings are expected to set the prices for the goods or services they offer according to the market conditions. However, sometimes prices may become the subject of regulations. Such regulations may be direct, through the establishment of minimum or maximum prices, or they may be indirect. Regulations which set prices or which grant an organization, undertaking or association of undertakings[13] the power to set any type of prices (maximum, minimum, recommended, etc.), price ranges or discount rates fall under this framework

The aforementioned Competition Authority opinion, dated 29.12.2005[14], also assesses the "*Legal Practitioners' Act no 1136*". The provision of the Legal Practitioners' Act allowing bar benches to prepare minimum legal fee tariffs was found to be in violation of the Competition Act. In the same opinion, Competition Board also expressed its adverse opinion on the power to set prices granted to chambers with "*The Act no 5362 on Professional Associations of Merchants and Craftsmen*".

The "*Turkish Pharmacists' Association Law, no. 6643*," granting Turkish Pharmacists' Association the power to set minimum sales prices, was also found to be in conflict with the general principles of competition law.

Another regulation, which was found to be in violation of the general principles of competition law, was the "Draft Regulation on the Qualifications of Environment Measurement and Analysis Laboratories". Competition Authority opinion of 18.10.2011[15] concerning the aforementioned draft states that the regulation, which grants the Ministry of Environment and Urban Planning the power to set minimum prices, introduced undue restrictions on competition and recommended that the relevant provision be removed from the text of the Draft. The opinion also states that the price is the most important instrument of competition but the aforementioned regulation interfered with undertakings setting their own prices on the basis of free-will. In case minimum price tariffs were determined by the Ministry, more efficient undertakings in the market would be unable to reflect that efficiency to their prices, which would result in a loss of

[13] Associations of undertakings, as the name suggests, are associations formed by undertakings. Associations may be formed under an association structure, or under the structure of a foundation or any other structure.

[14] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus42.pdf

[15] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus156.pdf

welfare for customers. Afterwards, the opinion emphasized that if a regulation concerning prices was to be made despite all the drawbacks that regulation should take the form of recommended or reference prices.

**Preventing the marketing of goods or services (advertisements, etc.)**

In market economy undertakings are free to market or advertise the goods and services they offer, but some regulations may eliminate or restrict such abilities of undertakings.

The Competition Authority opinion dated 3.4.2008 [16] examines the *"Draft Law concerning the Amendments to the Act on the Protection of the Consumers"*. The draft law in question aimed to mandate the submission of the inventory of the products to be sold at a discount to the relevant chamber of commerce and gaining the authorization of the chamber before an undertaking can make discount sales due to liquidation. It was also specified that liquidation discount sales should be concluded within six months following the authorization, with the provision that the duration of the discount sale may be no longer than two months. In the assessment concerning these provisions, the Authority emphasized the freedom of undertakings to determine their marketing strategies freely depending on the competitive conditions within the market and on periodic economic conditions as well as their freedom to hold discount sales; it was stated that the draft should exclude any intervention in these freedoms which have significant positive effects on competition in the market.

**Introducing standards that provide relative advantages for some undertakings**

Even though technical and quality standards are a subject of frequent regulation, sometimes these standards may lead to asymmetric effects between existing undertakings. For instance, financially large undertakings may be able to meet certain high-cost standards immediately, while other undertakings may need time to ensure compliance with them and this may negatively affect competition. Thus, regulations introducing technical and quality standards that may provide advantages to one or more undertakings must be avoided to the extent possible.

Competition Authority opinion dated 07.12.2010[17] may be taken as an example. The subject matter of opinion in question is the Interim Storage Facilities Draft Communiqué, which introduced the requirement that all undertakings operating an interim storage facility hold the ownership of the facility concerned, with the exception of those situated in an integrated waste

[16] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus84.pdf
[17] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus140.pdf

disposal facility or in organized industrial zones. As stated in the Authority opinion, the requirement to own the facility could upset competition between undertakings operating in the field of interim storage to the advantage of financially strong undertakings, who would be able to meet that requirement relatively quickly/easily. Within this framework, the opinion suggested that this requirement could become a significant barrier to entry and should be removed from the Draft if it was not based on a sector-specific technical reason; undertakings should not be prevented from operating with leased facilities.

**Differentiating between new entrants to the market and incumbent undertakings**

Regulations which may cause differentiating practices towards incumbents and new-entrants may also have a negative effect on competition. A classic example for this are the so-called "grandfather clauses." This refers to the case where incumbents are subject to the old regulation, while the new regulation is valid for new entrants. Competition restrictions may occur particularly where the regulation for the incumbents are narrower in scope than those for the new entrants or where new entrants face relatively higher costs, In some situations, especially when the market is opened to competition relatively later, a lack of sufficient regulation may also lead to competitive differences and disadvantages between the incumbents and entrants. Consequently, regulations which introduce different practices for undertakings within the market and which may be advantageous for some undertakings should choose those solutions with the least effect on competition.

## Chapter III

**Granting undertakings or associations of undertakings the power to make regulations in the market in which they operate**

The cases under this heading are those which restrict the undertakings' incentives and opportunities to compete and which reduce competition indirectly in comparison to the cases in the first two chapters.

The first of these is granting undertakings or associations of undertakings the power to make regulations in the market in which they operate *(self-regulation)*. Negative effects on competition may be observed in cases of self-regulation by undertakings in the market. For instance, the requirement to get approval from the relevant professional association to operate in certain markets may adversely affect the competitive structure in that market.

**Making arrangements to have undertakings disclose their price, cost, sale and production amount, etc. information**

As known, the exchange of certain information between competing undertakings poses significant competitive risks. In particular, the exchange of information such as prices, inventory and costs which are specific to the undertaking and which constitute the most important instruments of competition between undertakings or disclosing such information to the public could lead to negative effects on competition.

There is an important opinion on the subject, rendered by the Competition Authority. The opinion dated 11.10.2007[18], rendered on the "*Draft Regulation on the Restructuring of the Petroleum Market Pricing System to be Used in the Petroleum Market*" presents the concerns related to information exchange. Among the provisions in the draft, the most important point in terms of competition policy has been identified as the collection and disclosure of certain information provided by undertakings operating in the market. Also, it was emphasized that sharing or publishing information on the sales and production amounts of undertakings and, in particular, certain commercial data such as prices would be problematic in terms of competition law.

**Undermining the application of competition rules by various exemptions and exceptions introduced for certain sectors or undertakings**

Another factor that reduces the competitive incentives of undertakings is the undermining of the application of competition rules. The existence of sectors or companies exempt from competition rules may prevent a healthy application of competition law. The Competition Board opinion dated 29.12.2005 [19] found that the "*Banking Law no 5411*," provision exempting concentration transactions within certain thresholds from the supervision of the Competition Board, was in violation of competition law.

**Making regulations to limit the freedom of consumers to switch the undertaking from which they procure goods or services**

Some regulations may negatively affect competition by blocking or complicating the freedom of consumers to switch the undertakings from which they procure their goods or services. This could restrict competition, especially if it is implemented via regulations.

[18] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus4.pdf
[19] http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKurum%2bG%25c3%25b6r%25c3%25bc%25c5%259f%25c3%25bc%2fgorus42.pdf

## CONCLUSION

In a competitive assessment of regulations issued by public institutions, it would be beneficial to focus on provisions which

- Lead to barriers to entry into the market or discrimination between undertakings,
- Grant the power of setting prices to professional associations which gather competitors together,
- Result in supply restrictions, or in an inability to sell new products or operate in a certain area or region,
- Create drawbacks for an efficient competition policy.

Nevertheless, within the scope of some regulations related to certain policies such as health, security and environment, working out solutions, which would have a smaller restrictive effect on competition, would be preferable in terms of social welfare. For that reason, forwarding reasoned draft regulations to the Competition Authority for its opinion concerning the subheadings listed above would contribute to achieving the desired goal.

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