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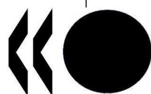

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ROUNDTABLE ON REGULATING MARKET ACTIVITIES BY PUBLIC SECTOR

-- Note by Turkey --

This note is submitted by the Turkish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting (8-9 June 2004).

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1. Introduction

1. Turkey has chosen an economic system based on market mechanism and free competition and it has pursued to establish this economic system with all its elements both in institutional and legal perspective since 1980. Generally in market-oriented economies, the state is expected to stop producing goods and services, which can better be done by private undertakings. The state is regarded to be a referee not a player. However, unlike what is known, in many countries including Turkey, which accepted market economy, the public sector has a significant role in the production of goods and services.

2. It can be argued that for the establishment of a well-operating free market economy, the state should not have a role in the production of goods and services to be served by private undertakings more efficiently, and it should only suffice with the role of regulator in the markets. However, what is known well in theory cannot be transformed into practice easily. In this juncture, having a role of referee or regulator (legislative, executive and judiciary role), the state is in a position to play against private undertakings. This seems to be very strange, and certainly creates what is called conflict of interests.

2. The Role of Public Undertakings in the Turkish Economy

3. In Turkey, public undertakings are still key players in some sectors, such as banking, petroleum refining[1], cigarette[2], mining; the management of those entities is approaching market conditions. State economic enterprises account for about 5% of GDP and about 19% of the value added in the manufacturing sector. State banks account for about 1% of GDP, but make up nearly one third of the value added in the banking sector alone. In the manufacturing sector fully state-owned undertakings still account for about a quarter of the sector's value added and for about 12% of the sector's employment[3].

4. In terms of employment, staff in public undertakings and state banks accounts for about 450.000 persons (2,5% of total employment). The number of staff in those undertakings has declined by nearly 10% during the last year mainly within the process of privatisation[4].

5. The above-mentioned figures show the place of public undertakings in the Turkish economy. Despite the declining trend, public undertakings still have an important role in the production of goods and services. The existence of state as a manufacturer in the economy is a crucial source of criticism. The basic issue is mainly about the distortions arising from the state's economic activities.

6. "Platin[5]", a respected Monthly Journal published an interview with Mr. Mustafa Parlak, the President of the Competition Authority. The title of the interview is an excerpt from Mr. Parlak: "*The state is the main actor which distorts competition*". Actually this excerpt explains very well the importance of competition distortions arising from the activities of the state with the roles of both regulator and player. It also demonstrates very well that the TCA is well aware of this fact. However, that does not mean that in Turkey the state disregards the importance of competition fully. It is aware of the significance of the establishment of a competition culture and a competitive environment considering the virtues of competition for the welfare of the country. However, as is known, it is not an easy task to transform an economy.

7. As is stated above, since 1980, Turkey has set her direction towards the establishment of free market economy within the country, and there has been a continuing process of restructuring and reforming the prevailing rules and procedures in order to achieve this end. Up until today, Turkey has achieved a great job in establishing the constituent element of a market economy. However, these achievements can be regarded insufficient, and further steps might need to be taken. Despite substantial moves toward liberalisation, some state monopolies remain.[6]

3. The Competitive Neutrality and the Privileges of Public Undertakings

8. An important concept introduced for the discussions of these roundtables is "competitive neutrality". In a *policy statement* regarding competitive neutrality by the Government of South Australia, the concept of competitive neutrality was explained as follows:[7] "*The objective of competitive neutrality is the removal of net competitive advantages for significant government business activities, arising simply from the fact that they are government owned. It questions how significant government business activities are run, and whether they have an advantage from not paying taxes; having cheap government finance; or not being covered by the same regulations as the private sector.*"

9. According to this policy statement, unfair competitive advantages such as these can lead to resource allocation distortions, resulting in the society's resources not being used in the most efficient way. In the *policy statement,* it is argued that people might tend to choose the product of the government business activity because it may be artificially cheaper, rather than because it may be inherently better or produced more efficiently. Therefore, competitive neutrality policy aims to eliminate resource allocation distortions arising out of public ownership of entities engaged in significant business activities[8].

10. Importantly, in the *policy statement* it is accentuated that "competitive neutrality policy and principles are intended only to apply to the business activities of government, not all activities of it"[9].

11. When closely examined, it can be easily seen that this concept is an important and complementary aspect of creating a competitive environment in markets. In short, this concept adds up to that *any market activity by public sector should not be treated in a manner to provide more advantage against private competitors only since it is public undertaking*. These advantages of public undertakings can take place in many ways such as lower taxation, providing advantageous position for state tenders, attaching priority for government procurement, no possibility of bankruptcy in case of financial difficulty, pricing not based on true costs etc.

12. These advantages of public undertakings come from just the fact that they are publicly owned. Not only national public undertakings do have such privileges, but also undertakings of local governments possess such privileges, which bring them in a better position in compare to their competitors.

13. In Turkey, the above-mentioned privileges (either *de jure* or de facto) have always been a source of criticism against economic activities by public undertakings. Competition distortions resulting from public undertakings are fundamentally associated with these privileges. However, the legal privileges explain the problem only to a certain extent. An important issue is the fact that public undertakings do not feel competitive pressures upon them as they can be financed easily from the government budget if necessary. In many cases, these undertakings are overstaffed and inefficient. Prices are only partly cost-recovering. In other words, these undertakings are not subject to the market discipline relevant for private undertakings. The inefficiency of public undertakings cause not only direct competition distortions but also as these undertakings mainly produce inputs to the manufacturing sector, price distortions can spread through the whole economy.

14. It could be argued that Turkey does not have a direct policy for introducing and advocating a competitive neutrality policy. At first sight, this argument might be regarded to be relevant for Turkey. However, the acceptance of this proposition in an absolute way would be unfair taking into consideration some significant steps taken in Turkey in eliminating the public competition distortions.

15. The policy of privatisation together with liberalisation, and the introduction of competition law have jointly become two significant and inter-related pillars of the efforts to make economy liberal and market-oriented. The main concern is the establishment of competitive structure free from artificial

distortions in markets for goods and services. In this regard, the privatisation policy and competition policy can be considered to be associated with the concept of competitive neutrality.

16. In this context, privatisation and liberalisation are regarded as important policy tools in the elimination of these advantages. In other words, privatisation and an accompanying liberalisation are the main instruments to reduce the role of the state as player in the economy and to eliminate distortions arising from the presence of public undertakings. Through privatisation, it is aimed to confine the role of the state in economy to supervision and regulation by minimising its activities in producing goods and services, and to establish international standards in the Turkish economy. Accordingly, privatisation has been one of the essential elements of the economic program with the aim of full integration into world markets, ensuring free market conditions, and increasing the efficiency and competitiveness of economy.

17. For the last twenty years, the role of public administrations in economic life has been profoundly discussed. Just like in any other country, in Turkey as well, governments save a particular place for privatisation. In the general sense, privatisation may be defined as transfer of undertakings, directly or indirectly controlled by the state, to private sector. The main target in privatisation is the increase of economic efficiency. The income received by the State through privatisation may only be the secondary target. The main way to increase economic efficiency is the establishment of competition in the market. In order to achieve this, first of all, state monopolies should not be turned into private monopolies. For instance, due to natural monopoly, it is necessary to subject private monopoly to regulation where not possible. In the short run, privatisation may decrease employment. This may be overcome via creating competitive markets and in the long run, entry of high number of companies into the market[10].

18. The main philosophy of privatisation is to confine the role of the state in the economy in the areas like health, basic education, social security, national defence, large scale infrastructure investments; provide legal and structural environment for free enterprise to operate and thus to increase the productivity and the value added to the economy by ensuring more efficient organisation and management in the enterprises that should be commercialised to be competitive in the market[11].

19. Public undertakings under privatisation can be examined in two sub classes:

- Undertakings operating under competitive circumstances,
- Undertakings operating under monopoly circumstances,

20. It is not possible to arrive at a general conclusion that privatisation increases economic efficiency in any case. The reason is that in this relationship, we face the market structure as an important variable, and the impacts of privatisation on economic efficiency vary in different market structures. In competitive markets, sufficient technical and de facto bases are present in order to put forward that privatisation leads to an increase in economic efficiency.

21. With regard to public undertakings operating as legal or natural monopoly, for the privatisation to be successful, in it should be accompanied by a policy based on deregulation of services provided via the infrastructure of the incumbent public undertaking. In this way, if the market can be opened up to free competition, this should be pursued as a policy option together with privatisation. However, if there are some inherent impediments such as natural monopoly, which may inhibit the introduction of free competition totally or partly, the policy should be the introduction of re-regulation. This re-regulation requires the establishment of independent regulatory authorities to control regulated industries. This is the case in Turkey for telecommunications services and electricity which are defined as natural monopoly industries as they are based on an infrastructure, duplication of which is almost impossible or economically irrational.

22. A liberalisation process accompanies privatisation process in particular for the industries previously under state monopoly. The purpose of liberalisation is basically to create a more competitive environment in the market during the post-deregulation period and to dismantle any privileges assigned to the undertaking in question. Generally, liberalisation is an important policy to create a healthy environment in the post-privatisation period. Therefore, it is a general proposition that before privatisation takes place, there should be a liberalisation policy in order to fully achieve the expected benefits.

4. The Problem of Conflict of Interests

23. Conflict of interests is an outstanding issue that leads to competition distortions by public undertakings. This is the case in particular in markets under regulation[12] by government agencies. This regulation may be the case at national and local levels. However, the main problem emerges if the state has an economic activity in these markets, and in particular if the economic agent of the state has also the role of regulator for these markets. As it can easily be seen the logical corollary of this emerging conflict of interests will certainly be a competition distortion.

24. This issue of conflict of interests is also an important aspect of privatisation and liberalisation. During the process of liberalisation, an important purpose is to eliminate such a dual role and resulting conflict of interests.

25. TEKEL is a good example in demonstrating very well the issue of conflict of interests and how to overcome it. The conflict of interests has been until recently an important problem in particular with regard to TEKEL (The Turkish Alcohol and Tobacco Monopoly). However, following the initiation of double processes of liberalisation and privatisation, this problem was skilfully solved. Before the initiation of liberalisation process, TEKEL had double role in the alcohol and tobacco markets. On the one hand, it was a player in these markets; on the other hand, it was the regulator of these markets. This dual role of TEKEL created the problem of conflict of interests. It had certainly a privileged position against its competitors as the regulator of them.

26. Together with this problem of conflict of interests; the pricing policy of TEKEL, which did not reflect true costs, was criticised as it allowed TEKEL to have a relatively advantageous position vis-à-vis its competitors.

27. The problem of conflict of interests was solved by the Act numbered 4733[13]. This Act gave an end to all regulatory powers of TEKEL. The main purpose of the Act is to restructure TEKEL in order to prepare it for privatisation, and to establish a Regulatory Body to fulfil the regulatory powers of TEKEL together with other duties assigned to it.

28. The Tobacco and Alcoholic Beverages Board was established to transfer the regulatory powers of TEKEL. In this way, an important problem for these sectors was eliminated with a view to create a more competitive market structure. The Act No.4619 which amends the Act No.4250[14] brought an end to all exclusive rights of TEKEL, removing its monopoly position in alcohol and alcoholic drinks industry. In particular the monopoly position of TEKEL in the production of famous Turkish alcoholic beverage Raki has been eliminated and the market for raki is open to private-sector competition.

5. Economic Activities of Local Governments

29. Local governments are generally considered to be important for democracies as the local governors are closer to people as compared with central governors. Having significant executive and legislative powers, local governments have economic activities within local markets under their regulation. In this regard, considering the issue of conflict of interests, markets under the regulation of local governments such as municipalities are good examples. Municipalities have significant authorities in

regulations of certain local markets, arising from the Act No.1580 on Municipality. However, together with their role to regulate these markets, municipalities might have economic activity as player in these markets. Municipalities have economic activities in local transportation, bread production, retailing etc. in competition with private undertakings. In particular, markets for bread and transportation have faced this issue of conflict of interests significantly in recent years. Municipalities have significant regulatory authorities regarding these markets including the interference with the prices. This interference might be reasonable. However, the issue is complicated by the fact that these local governments are also player within these markets.

30. Together with the issue of conflict of interests, there exist the problems of subsidy and not being subject to market discipline relevant for private undertakings. In other words, these economic activities are either inefficient or substantially subsidized from the financial resources of local governments. The immediate result of the existence of local government as a player in the markets is the pushing private undertakings out of the market. At first sight, economic activities of local government can be justified on the basis of providing cheap food for those living under poor circumstances. However, the resulting competition distortion creates further problems by substantially influencing the dynamics of the markets in question. It could be argued that instead of having direct role as player in these markets, some other policy options could be developed, if the purpose is to help the poor.

31. Generally, some services with the characteristics of natural monopoly (such as water, sewerage and natural gas supply) are run by local governments in Turkey. An important criticism against the provision of these services by undertakings under the control of municipalities is related to inefficiency. In this case, the issue is related to the monopoly position of these governments. As they operate under monopoly conditions, they may easily disregard any competition concerns and this might result in inefficiency. This inefficiency is associated with discretionary pricing, low service quality and high cost.

32. The above-mentioned issues concerning services provided by local public undertakings are addressed considerably within the report[15] on local governments, prepared within the framework of the 8th five-year development plan under the auspices of the State Planning Organisation. This report is a part of a master plan to be followed by the Central Government. Therefore it is very important.

33. Within this report, the problems of conflict of interests and inefficiencies associated with local public undertakings are dealt with extensively. Importantly, regarding how to overcome these problems, the Report has introduced reasonable solutions which are as follows:

- Privatisation policy where services can be provided by private undertakings better (this will serve to cure the problem of conflict of interests),

- Disciplining the pricing policy of these undertakings in a manner to reflect true cost (this will serve to cure the problem of inefficiency of undertakings and it will also eliminate distortions which threaten private competitors),

- Re-structuring policy in order to make public undertakings work efficiently (this will be important in particular for natural monopolies).

34. It is certain that the above-mentioned proposals would help the introduction of a competitive neutrality understanding for market activities of local public undertakings. Importantly, the perception of importance of competitive neutrality at local or regional level is to contribute to efforts in establishing a competition culture in Turkey.

35. However, it should be accepted that the introduction of competitive neutrality via the above-mentioned reforms is not an easy task, taking into consideration some significant problems faced by local governments. Therefore, it is important to approach the issue with a global perspective supported by the Central Government. Recently, the current Government (AKP) has brought a new package of reforms for public administrations before the Parliament. And a significant part of this reform is related to local governments. This reform process for the local government can also present an opportunity in order to establish the concept of competition neutrality. In this context, it could be argued that the TCA should have a priority of competition advocacy with a view to introduce competition for the provision of local services.

36. Also, the recent discussion on "water and sewerage regulation" within the framework of the OECD and an expected process of liberalisation seems to be presenting another important tool for the TCA in advocating competition at local or regional level as these services are completely provided by the local government in Turkey.

6. The Position of the Turkish Competition Authority

37. The concept of competitive neutrality has three facets regarding the state-origin competition distortions for the TCA to deal with:

1. The role of the TCA in privatisation,

2. The issue of whether competition rules can be applied against anticompetitive practices of public undertakings,

3. The advocacy role concerning some measures, which saves public undertakings against private competitors.

6.1. The Role of the Turkish Competition Authority in Privatisation

38. The Competition Authority adopted a "Communique 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".

39. This Communiqué has the purpose of regulating the procedure of cooperation between the TCA and the Privatisation Authority, 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 Communique, 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 privatisation.

40. 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 privatisation 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.

> "…For procedures of acquisition via privatisation under the scope of this Communique, 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 privatisation in the relevant market, the condition of judicial or de facto privileges –if any- of the undertaking to be privatised after privatisation 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…"

41. 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…*"

42. 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.

6.2. The Enforcement of Competition Rules and Public Undertakings

43. The substantial articles of the Turkish Competition Act are in line with those of the EC competition rules. However, the Turkish Competition Act does not contain any specific article which is comparable to Article 86 that governs anticompetitive practices of public undertakings.

44. As is known, the Treaty of Rome has a special article regarding the application of competition rules against public undertakings. According to article 86, "*public undertakings*" do not escape the application of competition rules. The article has two paragraphs, which explains the applicability of competition rules with regard to public undertakings. In other words, the article envisages two kinds of particular undertakings:

1) Undertakings to which member states grant special or exclusive rights (article 86.1);

2) Undertakings entrusted with the operation of services of general economic interest (article 86.2).

45. Concerning public undertaking falling under paragraph 1, the state is expected not to maintain in force any measure contrary to the rules of competition. However, concerning public undertakings falling under paragraph 2, competition rules are not applicable only if the application of such rules obstruct the performance in law or in fact of the particular tasks assigned to them.

46. The scope of the Turkish Competition Act is defined in Article 2 as follows: "Agreements, decisions and practices which prevent, distort or restrict competition between the **undertakings** which operate in or affect goods and services markets in the territory of the Republic of Turkey and the abuse of dominant position by those undertakings which are dominant in the market and all kinds of operations and practices which are considered to be a merger or an acquisition by which competition in the market is significantly impeded, and all operations concerning the measures, decisions, regulation and supervision for the protection of competition are within the scope of this Act".

47. To answer the question of whether this scope covers public undertakings, we have to examine the meaning of undertaking which is defined in Article 3 as follows: "*any natural or legal person who produces, markets or sells goods and services, and who forms an economic whole, capable of acting*

independently in the market". This definition is very important with regard to anti-competitive practices of public undertakings as it does not make any distinction between the private and the public. Therefore, public undertakings cannot escape the coverage of the Competition Act just because of their public ownership.

48. Correspondingly, an important aspect of competitive neutrality is related to the fairness of Competition Authorities in applying competition rules. In other words, the competition authorities should not treat differently public sector undertakings just because of their public ownership. In Turkey, the TCA has sometimes faced such criticism that it discriminates in applying competition rules in favour of public undertakings.

49. In some cases, the TCA faced the problem of how to interpret the meaning of undertaking as defined in article 3 with respect to public undertakings In particular the issue is about whether the undertaking in question meets the condition of "*capable of acting independently*". The interpretation of this definition in Sugar case[16] caused the TCA to stop the investigation against allegedly anticompetitive pricing of the public undertaking with a dominant position in sugar market. The evidence found during the inquiry showed that the pricing policy of this undertaking had been based on a ministerial order. If a minister has the power to determine the price, or simply endorses the price as a formality, then the enterprise is not considered to be an undertaking. Thus the Board had to drop the complaint against the state sugar firm, for abusing its dominant position to push other firms out of the business, because the public enterprise's prices and policies were determined by the government. Dependence on ministerial direction, rather than public ownership, determines the issue[17].

50. Related to the case mentioned above, another important issue in Turkey is related to some privileges assigned by an Act. When the practice of a public undertaking is based on a specific power arising from and Act, then competition rules may not be applied in these cases.

51. Therefore, the problem is not the inefficiency of the TCA. However, in such cases what the TCA should do is to advocate competition to remove such legal powers in order to enable a market structure in which the public undertaking does not have any privilege. At the moment the TCA has already established a committee of experts to examine and determine such legal privileges assigned to public undertakings. However, the TCA is well aware of the fact that some of these legal privileges are crucially important, and the rationale behind them outweighs any benefit accrued from a competitive market structure. As soon as the Committee finishes its work, then the TCA will determine a master plan via which it will pursue an extensive advocacy policy to eliminate these legal privileges to the extent the public interest allows.

52. However, the TCA decided vigorously against public undertakings where there are no legal privileges, which may inhibit the application of the competition rules. In applying the competition rules, there is no discrimination between national and local government economic agents. In this context, the Belko decision and the TTAŞ decision will be important in explaining the position of the TCA. In these cases, public undertakings in question were decided to infringe the competition rules by abusing their dominant positions and therefore were fined by the TCA.

BELKO Decision

53. Belko Ankara Kömür ve İhtiyaç Maddeleri Dağıtım Ltd. Şti. (Belko) is an undertaking controlled by Ankara Metropolitan Municipality. In the city of Ankara, the right to import and sell coal was granted to Belko, and the coal sale of other coal importing undertakings was prohibited, thus leading to monopolisation in the coal market of this city. The claimed infringement was that Belko applied exorbitant prices in the retail sale of coal. Following the investigation, the Competition Board decided that *in the "market for imported fragmented coal for heating purposes in the centre of the city of Ankara and its*

neighbouring areas", Belko Ankara Kömür ve Asfalt İşletmeleri Sanayi ve Ticaret Ltd. Şti. abused the privilege of monopoly granted to it in a way to prevent selling by other undertakings, by means of leading to costs realised at levels higher than due during purchasing coal and afterwards, and applying excessively high prices for this reason, thus infringing article 6 of the Act on the Protection of Competition No. 4054.

54. An important aspect of the Board decision was the fact that the Board considered high prices resulting from reflecting on prices the increased costs due to inefficient management of the company as an abuse of dominant position under article 6 of the Turkish Competition Act. The remarkable point is that even where there are no excessive profits and even if companies incur losses, prices determined by them may be considered excessive prices.

> The Board also decided that Belko Ltd. Şti. whose establishment was intended to provide residents of Ankara with cheap and quality coal be notified, in accordance with article 9 paragraph 1 of the Act[18], that it was required to ensure that the cost of coal was reduced to the lowest possible levels, and utmost attention needed to be shown to reduce the selling prices of coal to reasonable levels comparable with the prices in competitive markets. The Board decided that under article 27 paragraph (g) of the Article No. 4054[19], Ankara Governor's Office, Ankara Metropolitan Municipality, Ministry of Internal Affairs, Ministry of Environment, Ministry of Health and Ministry Responsible for Economy be notified of the opinions and recommendations of the Competition Board as to how to establish a competitive environment in the relevant market.

55. Accordingly, Ankara Governor's Office Board of Hygiene which had granted Belko the monopoly right in selling coal resolved to abolish the monopoly right granted to Belko with its decision of 2.11.2001, in accordance with the opinion of the Competition Board.

56. Here Regarding the Belko case, it is important to mention the decision of High Council of State which is the appeal court for the decisions of the TCA. In its decision while approving the decision of the TCA which established the pricing policy of Belko an abuse of dominant position. Importantly, High Court of Council evaluated the issue of whether Belko is entrusted with the operation of services of general economic interest, whether the Turkish Competition Act is applicable or not. First of all the Court held that the Act is applicable for public undertakings. Following this, it considered the position of Belko and decided that despite the fact that Belko is entrusted with the operation of services of general economic interest, the competition rules are still applicable with regard to the pricing policy of Belko. Here by reference to the main rationale behind the Article 86 (2) of the Treaty of Rome, the Court concluded that the duty of Belko to provide a service of general economic interest does not allow the Belko to apply a discretionary pricing policy and therefore the finding of the TCA regarding the excessiveness of the prices applied by Belko was correct in deciding an abuse of dominant position.[20]

TTAŞ Decision[21]

57. On 4th October 2002, The Turkish Competition Board imposed an administrative fine on Turk Telekom, the state-owned telecom operator in Turkey, for abusing its dominant position in order to exclude competition in the Internet services market and satellite services market. In 2001, TTNET, Turk Telekom's Internet service provider brand, lowered fees for its customers and set below-cost monthly and yearly access fees; at the same time, however, Turk Telekom, as the only supplier in the market, increased the prices for ISPs accessing Turk Telekom's lines. And Turk Telekom increased the satellite royalty fees by 2.4 to 64 times for satellite operators. Pursuant to the Act No. 406, until 1st January 2004, Turk Telekom had legal monopoly rights for the provision of national and international voice telecommunications and for the establishment of telecom infrastructure except in cases where an infrastructure company was permitted

via a telecommunications authorisation granted by the Telecommunication Authority. Turk Telekom also provides lines to these ISPs over the Internet backbone; however, it is also a competitor to these ISPs via its subsidiary TTNET.

58. In addition to this case, there is an ongoing investigation on TTAŞ regarding the cable modem monopoly it has. On 21, July 2003, after a preliminary inquiry, The Authority initiated an investigation about the practices of Turk Telekomunikasyon A.S. with regard to its cable modem services. The investigation concerns the alleged monopolisation of broadband Internet access services via refusal to deals to access cable modem infrastructure. Currently, the it is the 8th month of the investigation which means, after the extension of the usual 6-month period with another, there remains 4 more months for the Investigation Committee to form their statement of objections.

59. The cases of Belko and TTAŞ examined in further detail above, demonstrate very well the fact that the TCA has applied competition rules against anticompetitive practices of public undertakings regardless of whether they are national or local.

6.3. Advocacy Role of the Turkish Competition Authority, and State Measures Distorting Competition

60. Together with its enforcement role, the TCA has a competition advocacy role with regard to specific state measures which may distort competition in favour of public undertakings. The TCA has attached great significance to following up these sorts of measures in order to eliminate them in a reasonable way.

61. However, during the very first years of the TCA, the advocacy role was not understood well. It is thought that only the enforcement of competition rules would be sufficient. However, by the time, it has been seen that the negative effects of some state measures have been worse than anticompetitive practices of private undertakings. Therefore the TCA has begun to perceive and understand that it must have an advocacy role in eliminating the distortions arising from state measures. In parallel to the perception of the TCA, private undertakings have also understood the importance of advocacy role of the TCA in this regard.

62. Since then, the TCA has strived for influencing the public institutions in order to prevent them from taking any measure which distorts competition in markets against either private undertakings or directly the consumers. In this regard, a recent application of the Turkish Union of Banks (TBB) is very striking in understanding the level of appreciation of the competition advocacy role by private undertakings.

63. In the application filed with the Competition Authority by TBB, it was communicated that with the new Banks Act issued in 1999 and the amendments to this act, differences between public and private banks were eliminated, but intervention in the selection of banks where public institutions and organisations would deposit their monies, through the provisions introduced in budgetary acts contradicted with the principle of free competition. It has been stated that efficiency which might be displayed by the banking system in the collection of resources and having them utilised within the market mechanism would be distorted by such interventions preventing the flow of resources, and it would lead to serious negativity in the bank system which was undergoing the stage of reform.

64. It is claimed that provisions introduced in statutory regulations mentioned in the application of TBB, and practices based on such provisions are not compatible with the principles of free competition due to limiting and discriminatory provisions introduced in the entry of public resources to the banking system, and do mean a discriminatory practice between banks which have to operate within same the conditions. In

the same way, the limitation of activities of state economic enterprises, their affiliated partnerships, establishments and undertakings which are supposed to utilise their resources and operate within the system under the conditions of free market presents as distorting competitive conditions in the sector where these undertakings operate. In this context, the claim by TBB that public treasury is required to be conducted by all banks is justifiable in terms of competition policy. Even though it is accepted that the policy-making as to how to incorporate the resources of public institutions into the system would be a political choice, the ability to verify such a choice in terms of competition policy may be possible if it encompasses an equal practice for all actors.

65. As is stated before, with regard to the legislative regulations mentioned and in accordance with the Act on the Protection of Competition No. 4054, the Competition Board possesses the task of notifying that an amendment be made to the relevant legislation, according to article 27 sub-paragraph (g) of the Act, in case the State commits practices distorting competition, through acts and other legislations, or decisions of the Council of Ministers, which is the executive body. The issue was discussed by the Competition Board and it has been considered that for purposes of ensuring the removal of similar provisions in the Budgetary Act and the other relevant legislations as well, it would contribute to the establishment of market competition that the authorised bodies be notified through the relevant Ministry about making a regulation in the intended amendment to the Banks Act, aimed at the elimination of provisions in miscellaneous acts that monies of various institutions be collected in state banks.

66. Importantly, in order to strengthen the advocacy role, the TCA has prepared a new set of proposals, which contains significant amendments with regard to both substantial and procedural articles. The new set of proposals contains the inclusion of a specific Article regarding state measures, which distort competition. The main reason in designing this Article is to further empower the TCA in minimising competition distorting measures by Government agencies.

67. The proposed Article is as follows:

> "*In case, the Board establishes public measures, regulations and transactions having similar effect with cases prohibited in articles 4 and 6 of this Act, it may decide that resort to jurisdiction be made for purposes of annulling a part or all of the regulations and transactions in question.*
>
> *It is compulsory to receive the opinion of the Board concerning the Acts, bylaws and regulations which are prepared by public institutions and organisations, and which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory.*"

68. If the proposed amendment is passed by the Parliament, it could be argued that the TCA will certainly have strong weapons in fighting state measures which distorts competition.

7. Conclusion

69. As a country adopted free market economy, Turkey has taken important steps in establishing an economy free from artificial barriers. In some cases, the state might lead such problems which distort well-functioning of markets. The distortion might be associated with many factors such as, conflict of interests, existence of de jure or de facto privileges and inefficiencies of public undertakings. At the moment it is not possible to argue that Turkey has an extensive policy of competition neutrality. However, that does not mean that Turkey is unaware of its importance. The steps taken towards removing all artificial barriers distorting competition including those resulting from the state, could be considered within the ambit of a competitive neutrality policy. It is important to stress that there are further steps to be taken. An important aspect of this written contribution is the role played by Competition Authorities. In this regard, it is argued that the TCA has contributed to the establishment of a competition culture regarding the state measures and

public undertakings. Hence, the TCA has played a major role in the privatisation process, dealing with anticompetitive practices of public undertakings and advocating competition regarding the state measures which may distorts competition, since its establishment in 1997.

NOTES

1. Privatisation of TÜPRAŞ was concluded in January 2004. That transaction was one of the most important privatisation cases of Turkey since TÜPRAŞ had been holding four (İzmit, İzmir, Kırıkkale, Batman) out of five refineries, thus 86% of the refining capacity of Turkey in hand. Besides, TÜPRAŞ has been a dominant firm in the refinery sector with 74% market share in terms of sales, since the import was very limited due to the legal arrangements. Public shares (65.76% of the total shares) in TÜPRAŞ was sold by block sale to a Germany-based company, namely Efremov Kautschuk GmbH which has been controlled by a Tatarstan based company, namely Tatneft. The TCA authorised the transaction with the condition that investment in capacity increases will be observed by the TCA for the possibility that a vertically integrated structure might have a potential advantage to form an obstacle for potential entrants in the refinage and import markets. The procedure is due to be completed by the Privatisation Authority in early June 2004.

2. Cigarette Division of TEKEL was tendered for privatisation together with the alcohol division. However, the High Board of Privatisation did cancel the tender for the fact that the amount of money offered by the winning undertaking was deemed insufficient. The cigarette division is expected to be tendered for privatisation before the year 2004 ends.

3. Commission of the European Communities, "2003 Regular Report on Turkey's progress towards accession" 5.11.2003 (COM(2003) 676 final) www.deltur.cec.eu.int/english/2003RegularReport.doc, p.51

4. Ibid, p.50

5. Platin, May 2004, p.74-76

6. OECD (2002) "Regulatory Reform and Competition Policy in Turkey", p.7

7. Government of South Australia, "Policy Statement", www.premcab.sa.gov.au/pdf/competition/CNPolicyJuly2002.pdf. p.6

8. Ibid.

9. Ibid.

10. http://www.rekabet.gov.tr/eozellestimeler.html

11. http://www.oib.gov.tr/baskanlik/felsefe_eng.htm

12. Here regulation is mainly the one applied in competitive markets. For example the control of certain markets by the local governments or the regulation of some.

13. The Act No. 4733 on Re-Structuring the Directorate of Tobacco, Tobacco Products, Salt and Alcohol Undertakings and about the Production, Domestic and External Purchase and Sales of Tobacco Products,

in Act No. 4046 and the Law making alterations in Decision 233 which has the force of law, dated 03.01.2002.

14. The Act No:4250 on Alcohol and Alcoholic Liquors Under Government Monopoly dated 08.06.1942.

15. State Planning Organisation, "Report of Special Expertise Commission on Local Governments (Yerel Yönetimler Özel İhtisas Komisyonu Raporu)", OIK544, Ankara-2001. p.83-95

16. The Board Decision, No: 01-57/587-145 and Date: 27.11.2001

17. OECD (2002) "Regulatory Reform and Competition Policy in Turkey", p.21

18. Article 9 is about termination of infringement and 9/1 is as follows: "*Where the Board, either upon a denunciation or a complaint or the application of the Ministry or upon its own initiative, finds that there is an infringement of Articles 4, 6 or 7 of this Law; it informs the enterprise or associations of enterprises concerned by a decision comprising of the conduct to be performed or avoided in accordance with the rules set out in Chapter Four of this Law, for the maintenance of competition and restitution of the situation before the infringement.*"

19. Article 27 is entitled as Powers and Duties of the Board and article 27(g) is as follows: "*To opine, directly or upon the application of the Ministry, on the necessary amendments to be made in the competition legislation*"

20. High Council of State, 10. Division's decision with the case no. 2001/4817 E. and 2003/4770 K. 5.12.2003

21. Board Decision, No: 02-60/755-305 and Date:02.10.2002.