

Competition Law in Turkey: the Next 20 Years

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It has been 20 years since Turkey introduced competition law, and with it, the Turkish Competition Authority (TCA). During these past two decades, Turkey has experienced for the first time an institution that is supra-sectoral, independent and granted broad legal authority. And although it is an administrative agency, the Competition Authority has always been positioned as an extension of the judiciary. Indeed, today the Competition Authority is seen as a quasi-judicial agency, which can launch investigations on its own authority as well as acting on complaints received. Given that the TCA has the authority to impose fines up to 10 percent of a company's annual turnover, its potential to affect the market is clear.

To determine the impact of the Competition Authority over the past 20 years, it is necessary to assess both the legal framework governing competition in the Turkish market and the TCA's implementation of it. If we compare competition in the market to a sports match, then competition law represents the rules of the game, while the Competition Authority is the referee, defending the rules to ensure a fair game.

From the perspective of what the TCA was established to do, it can be said that the Competition Authority's application of the legal framework is above the average standards in Turkey. For two decades, the TCA has opposed cartels and anti-competitive behavior by dominant players, as well as analyzing the impact of proposed mergers. Thus, the TCA has produced a successful body of work in terms of both law and practice. The Competition Board, which is positioned as a decision-making structure within the TCA, has made thousands of decisions that have affected the market during the past 20 years.

The secondary task of the TCA is advocacy. In this regard, the TCA has the authority to issue advisory opinions about privatizations, proposed legislation, and practices by other government agencies that may discourage competition. The TCA has evidently succeeded in implementing this advocacy function.

Where did the rules of competition come from? How did they get onto Turkey's agenda?

All competing entities should conduct their economic activities fairly. The ideal result of fair competition in every economic activity is that companies offer better products and services at lower cost to consumers. Unfortunately, fair competition does not guarantee maximum profitability or market share, which are the main objectives of every company operating in a market economy. And because these are their objectives, companies may try to restrict competition. In other words, they may resort to rigging the game in order to reduce or eliminate the uncertainties of a competitive environment. To prevent companies from yielding to this temptation, competition laws have been adopted all around the world. In their simplest form, these laws contain two main rules: first, you may not conspire with your competitors to eliminate competition; and second, you may not abuse your power in the market.

These two rules were first introduced in their simplest form in the United States in 1890. At that time, giant conglomerates known as trusts controlled whole sectors of the US economy, such as oil, steel, railroads, and sugar. Standard Oil Company and Trust, run by John D. Rockefeller, controlled 90-95% of the production, processing, marketing and transportation of oil in the United States. Although trusts' economic impact on society was not fully known, their political influence was becoming evident: believing it was their right, trusts were interfering with the rules of the game.

Responding to public demand to "bust the trusts," Ohio Senator John Sherman introduced antitrust legislation which, essentially, aimed to break the political influence of the concentration of capital. The Sherman Antitrust Act was America's first competition law, and still retains its original essence and validity (When the US government sued Microsoft in the late 1990s, it used the Sherman Act, by then over 100 years old). It banned trusts, monopolies, price fixing, and other activities that restrain trade or commerce.

In the belief that competition must be regulated to achieve a healthy economy, the rules of the game have been rewritten according to the modern economy. After the Second World War, these rules were exported to continental Europe, where they were accepted as a cornerstone of the European Union single market.

With Turkey's EU adventure in the early 1960s, these two rules, which were coming closer to our land day by day, got onto Turkey's agenda concretely. Competition rules, which had been a low priority for Turkey, jumped to first priority during the Customs Union process in the 1990s, with the driving force of integration with the EU and the development of our industry. Finally, with the enactment of the competition law in 1994 and the establishment of the Competition Authority, which began working in 1997, these two rules became applicable in Turkey.

The discussion about the purpose of competition rules

Attempts to define the purpose of competition rules, which emerged as a derivative of the rules regulating the relationship between capital and politics, have been made from different perspectives during the past century. Although the view is widely accepted that the main goal of antitrust law was to protect consumers, the majority holds that consumer welfare was a consequence rather than an objective. From the perspective of industrial policy, the discussion has included objectives such as protecting small business and promoting strong national champions. More recently, however, the impact of globalisation, the convergence in the structure of capital, and its tendency to concentrate has shifted the axis of competition rules. This trend can be seen clearly, especially in digital economies. With a business model that transcends (usually avoids) regulations in areas such as transportation, accommodation, and social networks, mega-economies have begun to form that are beyond the reach of competition law and national mechanisms such as tax and professional regulations. These structures, unlike traditional multinational companies, have been implemented by a new kind of management and institutionalization that is central but with a worldwide spread of agents and consumers.

Today, with its application confined by national boundaries or economic blocs, traditional competition law cannot keep pace with such a cross-border expansion of capital. The fact that Facebook has become a target of investigations in the US Congress shows the political result of its uncontrolled growth, much like the case of Standard Oil in the early 1900s. While Standard Oil developed before US antitrust laws existed, in the case of Facebook, authorities chose not to apply competition policies while Facebook grew to unrivalled status. And like the case of Standard Oil, authorities only began to react after the company's political influence created discomfort. As a matter of fact, although there was relatively little mention of antitrust rules during five hours of hearings about Facebook in the US Senate, the real issue is the lack of enforcement. This indicates that the competition rules that were created to stop companies like Standard Oil from gaining too much power, cannot prevent the same mistake from happening again. In this regard, either the misapplication of competition rules (or a preference for not applying them) or the inadequacy of the existing competition rules is a point for further discussion. In my opinion, national application of competition rules is insufficient to meet the challenges of the new global economic order created by the development of technology. In other words, things have gotten out of control.

It is easy to see that the world is gaining a new economic movement. Especially the new products and services emerging in developed societies can quickly catch up with classical industrial production methods and outpace them. While doing this, they can spread rapidly all over the world, not limited by national borders and regardless of the development of states.

Even the owners of that capital can be blindsided by how quickly capital accumulates. As the simplest example, the competitive pressure on the conventional auto industry created by Tesla resulted from consecutive studies in the field of electric vehicles (and came perhaps much earlier than planned). It is clear that some developments, such as Industry 4.0, artificial intelligence, and blockchain, affect both production processes and consumer expectations. Inevitably, this situation raises questions about the utility of the classical competition law approach based on consumer welfare.

With all these developments, as an interesting contrast, the 1998 global crisis triggered political trends that have revived nationalism and protectionism. Today, the economic-political situation created by trade wars in the world leads us to question the purpose of competition law from another perspective. Do the increasing protectionist trends of the last five years imprison consumers in an artificial and costly competitive environment in the name of creating national competitive advantage? For example, while the over-protective safeguards imposed by the United States on imports of iron, steel and aluminum (which are just the tip of the iceberg) may protect domestic industries, are they providing a competition-free environment to the consolidated domestic giants in these industries? Is the consumer welfare-oriented purpose of competition laws evolving into a political power orientation, indexed to national interest, despite the consumer? Or let's take the Brexit perspective. Will the effect of the new competitive environment created by Brexit, which can be defined as a consumer choice, have a positive impact on consumer welfare or lead to disappointment? Of course we will see; however, it raises another question, to add to the list of questions above: can consumers make the right political decisions about their own welfare?

So, what about the next 20 years?

In its 20-year experience of applying competition law, Turkey has been able to internalize competition rules in a certain part of the business world, due to the fines that have been imposed on large companies. However, the concept of fair competition has not spread out from there and become part of the common social fabric. Why? Competition rules have been applied in world markets for 100 years: how does their two decades of application in Turkey contribute to realizing their basic objective?

It is necessary to consider the answer to these questions deeply and comprehensively. It may also be useful to revisit the discussion about the purpose of competition rules, which so far has been conducted from the consumer perspective, to examine the issue from the Turkish perspective. I suggest that intensive but one-dimensional implementation of competition rules has led to a rooted perception that they are only relevant to companies. This, and the Competition Authority's rather narrow application of the competition rules, obeys the letter of the law but not the spirit. It undermines the true purpose of competition rules and risks isolating Turkey's practice of competition law.

Whether we adopted competition rules in Turkey because of the pressure of the EU process or they entered Turkey's agenda inevitably as a result of the economic conjuncture of the period, especially in terms of the place of foreign capital in the confidence index, we have a 20-year practice of competition law. Now it is necessary to design what Turkey should expect for the next 20 years. Otherwise, our competition law practice will be carried out in an isolated and self-proclaimed system, like an aquarium.

As I mentioned at first, the competition authority has given a successful practice test. I consider this success as a good start obtained at the end of 20 years. The next objective should be to enhance the role of the Competition Authority in the national economy and thereby ensure that it becomes a reference institution indexed to Turkey's industrial policy.

In order to achieve this goal, I think it is necessary to focus on three macro areas in which quick and concrete progress can be made.

First, the place of competition rules in Turkey's innovation policy should be determined. In the wave of digital transformation within the economy, there is only one reality that does not change: innovation emerges as a result of fair competition.

In the past year, the Competition Authority has attached special importance to the digital economy. It has strived to make the right decisions in this field. These efforts should constitute encouragement of entrepreneurship that can pave the way for entry into innovative markets. That is, in addition to the incentive systems presented to support entrepreneurship, barriers to market entry must also be lifted by the rapid application of competition law. In other words, a fast-acting Competition Authority will expedite entries into the market.

Another issue to be considered is that competition law practices must be coordinated with a country's industrial policy in a way that balances the country's ultimate objectives for competitiveness and consumer welfare. How determination in the fight against cartels or behavior by a domestic industry that has been strengthened by doping in the domestic market

as a result of trade wars impact competition and consumer welfare should be evaluated in this context. Otherwise, in keeping with the analogy above, it would not be possible to regulate competition among the fish that have been taken from the ocean and put into an aquarium. Competition rules are not meant only for products that can enter the region where those laws are applicable. A number of factors, such as the position of that region in world trade flows, free movement of goods and services, and whether technical barriers are linked rationally to industrial policy, influence the welfare of consumers in that region. The Competition Board should clarify the limit of its discretionary power with concrete justification in a way that respects consumer welfare.

Finally, let's ask the following question: Are different agencies that should determine the country's industrial policy aware of the power of competition rules? Regarding this, let's clarify the third assignment of the Competition Authority. The government should use competition rules more effectively. In particular, it is inevitable that the Competition Authority will play a more active role in promulgating and abolishing regulations that restrict competition unnecessarily. As I mentioned, competition rules in our country are still perceived as superficial. It is also a fact that this perception cannot be changed by the actions of the Competition Authority alone. However, it is the duty of the Competition Authority to ensure that the competition game is internalized throughout the government and see that regulations are designed to include the concept of fair competition from the beginning. From this perspective, I am confident that public institutions will benefit from such coordination.

Competition rules should be known by many different elements of society in Turkey. However, if we are to discuss the next 20 years, it is inevitable that the Competition Authority will design a new road map. The concept of fair competition permeating all segments of society is the fairest arbiter of who should carry out economic activities. As such, the Competition Authority should make decisions quickly to pave the way for entrepreneurs, support innovation in particular, address the adverse effects of trade wars on consumers by considering consumer welfare in competition analysis, and finally, explain itself to the public in a way that stands firm against competition-distorting regulations of the government. By adding these objectives to the success of its activity over the past 20 years, the Competition Authority will fulfill its ultimate purpose.