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TRANSPARENCY OF THE REGULATORY AUTHORITIES IN TURKEY

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FOREWORD

Although this study is dedicated to the transparency of competition investigations in Turkey, it concerns issues highly relevant to other legal systems. Transparency is an essential element of rule of law since transparent, clear and consistent rules of law and practice create important conditions for efficient protection of rights of citizens. Transparency of the enforcement process of competition helps to establish the balance between the needs of interference of State into economic activities of undertakings, on one hand, and protection of economic freedoms, on the other. Transparency facilitates the access to important economic and legal information, clarity of regulations and predictability and consistency of administrative decisions. At the same time, ensuring transparency of competition investigations is not an easy task because it is linked with certain inevitable discretion of administrative bodies in the decision making procedure and protection of confidentiality of economic data of enterprises. Research conducted by the authors of this complex study shows that competition investigation in Turkey is facing similar problems as the competition investigation and enforcement in the European Union and the EU Member States: accessibility of investigation information, predictability and consistency of competition enforcement practice, etc. It is linked with the fact that that Turkey has chosen the same model as the model of competition law of the European Union and is transposing the rules of the EU competition law into Turkish national legal system. The European Commission in Turkey 2016 Report concluded that Competition Authority's enforcement capacity is adequate and implementation of competition law is overall effective. The authors of this study also found that the legislation of competition and the Competition Authority are quite transparent in comparison with other fields of law and agencies in Turkey. At the same time, the study shows some uncertainty concerning accountability and predictability of the enforcement of competition regulations in Turkey. On the basis of the findings of this study, some recommendations that would improve the transparency of investigation processes are formulated.

Research made by Murat Çokgezen, Ali Ilıcak and Fevzi Toksoy in collaboration with Bulut Girgin is devoted to transparency of regulations in the field of competition in Turkey in general. It is also specifically focused on two questions: first, how rules and policies to sustain competition are clear, open and accessible; and second, on transparency of the investigation process. The result of research is an interesting and comprehensive study which is no doubt the result of an extensive analysis. The

survey was conducted among staff members of the Turkish Competition Authority, lawyers, academics and other legal experts involved in competition law and practice. Respondents were asked to evaluate competition law applications in general and the transparency of the investigation process in particular. Special attention was given to the opportunities of the parties to be heard or to present their observations and information to the Competition Authority.

One of general findings of this survey was that transparency is a universal value and that all competition authorities pay attention to it. Another important finding was the compatibility of transparency practices in countries with different systems. The survey results indicate a general consensus that more transparency would allow more effective competition regulations, and the boundaries of transparency end where the principle of confidentiality begins. In Turkey, as the study shows, one of the most important problems in the functioning of these regulatory laws and agencies, within an institutional structure that does not support these laws and agencies, is the emergence of differences between written rules (de jure) and the rules in practice (de facto). Turkey's performance on the rule of law in general, and specifically with regard to regulations, is changing for the worse. These characteristics make Turkey a country that deserves to be analysed within the context of regulations and transparency in general and transparency in general, and the transparency of competition investigations. Transparency in general refers to the availability to the public of information on competition laws and guidelines, investigation processes and practices, investigation timelines and agency decisions. From this perspective, the study raises the questions whether undertakings could achieve clear, open and easy access to information about the compatibility with the current competition regulations of the actions they have already carried out or are planning to do and, if not, what the consequences would be. The investigation of specific transparency is related to the transparency of the process following the decision of a competition authority to open an investigation. The answers of the participants of survey indicated that the Competition Authority is less transparent in investigation-specific issues than in general issues. In other words, the Authority is more generous in informing the public in general, but when an investigation is initiated, it does not demonstrate the same level of transparency. Within the context of this section, respondents attributed the highest score (3.56/5) to the Authority in the statement 'agency discloses the legal basis of the possible violation under investigation and applicable legal standards for the investigation to the parties' and the lowest score (2.37/5) in 'agency's disclosure of the economic theories of harm under consideration to the parties under investigation'. On the other hand, the disclosure of economic theories of harm is a difficult task because in competition law and practice the evidence of harm is not needed to prove an infringement: certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. It is established case-law in many jurisdictions, and first of all in the EU, that there

is no need to take account of actual effects of infringement once it is apparent that its object is to prevent, restrict or distort competition within market.

Competition lawyers, consultants and interested academics who were interviewed within the scope of this study expressed their opinion that, despite the fact that competition regulations are transparent in comparison with other fields of law in Turkey, problems occur in the implementation processes.

Interesting point of study is that in the process of investigation there is no clear indication as to which concrete factors should be taken into account regarding the initiation of an investigation/second-phase review following a decision on a preliminary investigation or a merger/acquisition filing. The authors also stressed that the standard of evidence in the decision-making process of the Competition Board when assessing whether to launch a preliminary investigation, an investigation, or when taking a merger filing into a second-phase review, is not clear.

Maintaining a high level of transparency in Competition Board investigations is of particular importance in ensuring fundamental right to a fair trial. Study showed the necessity of sharing of preliminary investigation reports with the undertakings for the purposes of ensuring the right of defence and to avoid that first written defence becomes a formality rather than an important stage of the investigation. Authors underline that it is extremely important to share with the parties this research including economic analysis forming the basis of the Competition Board's decisions in order to be transparent and objective, as well as to ensure undertakings' rights of defence. However, in practice, it is observed that the analysis technique and sets of data have not been shared with the parties in some investigations and/or final examinations. Study contains interesting and important analysis of regulations and practices concerning confidentiality, timing and length of investigation procedure, leniency and imposition of fines.

Study of transparency of competition investigations in Turkey very well reflects the main points the development of competition regulations and competition enforcement in Turkey, and general problems of transparency which are typical also to other legal systems based on the model of competition law of the European Union.

Prof. Dr. Vilenas Vadapalas

Former Judge of the General Court of the European Union

TRANSPARENCY OF THE REGULATORY AUTHORITIES: AN ANALYSIS OF TRANSPARENCY OF COMPETITION INVESTIGATIONS IN TURKEY

Murat Çokgezen
Ali Ilıcak
Fevzi Toksoy
(In collaboration with Bulut Girgin)

This research analyses the transparency of regulations in the field of competition. Although the topic is on regulations in the field of competition in general, the research is specially focused on: 1) how clear, open and accessible the rules and policies to sustain competition are, and 2) the transparency of the investigation process commenced by the regulatory authority on enterprises. Two different methods were applied to evaluate the transparency of these two fields. First, a survey was created with questions regarding transparency and applied to staff of the regulatory authority, academics, and legal experts dealing with competition law. Surveyees were expected to evaluate the transparency of each specific field. Second, by examining current laws, regulations, decisions of the regulatory authority, and all types of communication channels to inform the public, problems with regard to the transparency of current rules and their enforcement were assessed. The experiences of the researchers as well as a workshop with the practitioners and legal experts dealing with competition law helped determine the problems in the field. The first method aimed to measure the perception of stakeholders, while the second method aimed to determine the specific problems based on concrete facts. The following outline the general findings of the research: 1) The legislation of competition and the Competition Authority are quite transparent in comparison with the other fields of law and agencies in Turkey; 2) Those who are obliged to provide information about the competition regulation and those who use this information understand transparency in competition regulations differently; 3) The Competition Authority places less importance on sharing information with third parties and the public than sharing information with parties of the investigation; 4) Problems with regard to transparency in competition are mostly caused by the enforcement of the current rules. The two basic problems regarding enforcement were determined as: (a) not sharing current information with parties due to “confidentiality” or “internal correspondence” and (b) the board’s inability to develop consistent practices on issues that are not clearly regulated by the laws.

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CHAPTER ONE

1. Rise of the Regulatory State and Rule of Law

In the last quarter of the 20th century, the state's direct interference in the economy decreased considerably. In many parts of the world, the state no longer interfered with prices or engaged in production as it had done in the past. However, this does not mean that the state withdrew entirely from economic life. In this new period, to achieve economic efficiency, the state has been enacting rules (regulations) and establishing agencies (regulatory authorities). This tendency that began in the USA and spread to Europe and other parts of the world is defined by researchers as the "rise of the regulatory state."[1]

The most important structural difference of this new type of intervention by the state compared to the previous one is the instrument used for intervention. In the previous period, because the basic function of the state in economics was defined as redistribution of income/wealth and macroeconomic stability, the most significant instrument of intervention by the state was revenue (tax, borrowing) and spending policies. In the new period, it is assumed that markets will create more efficient results in achieving economic goals compared to the direct interference of the state. Furthermore, the role of the state is limited to correcting market failures. Policy instruments in this new era include formation of rules in failed markets, enforcing these rules, and penalizing those who fail to follow them (Majone, 1997).

The authority using the instrument changes in parallel with changes in the instruments of intervention. The implementation of redistribution and macroeconomic stability requires a high level of centralization. For this reason, parliaments, ministries, and central bureaucratic agencies were the main administrative institutions of the previous period. The new method of intervention necessitates more flexible and autonomous authorities with a high level of expertise for decision-making. To meet

1. On this subject, you may also read: (Levi-Faur, 2011) and (Majone, 1997).

this necessity, autonomous regulatory agencies, independent from the central authority, were established (Majone, 1997).

While interventions through such regulations were initially interpreted as a decrease in the role of the state over the economy, the number and role of these rules (regulations) and regulatory agencies necessary for implementing these rules increased rapidly over time.[2] The increasing role of regulations triggered discussions regarding the effectiveness of enforcing these regulations, their independence from private and political interests, and, more generally, their compatibility with the principles of "rule of law." Economist John Cochrane expressed his concerns over the rise of the regulatory state at a conference organized by the Hoover Institution as follows:[3]

"The United States' regulatory bureaucracy has vast power. Regulators can ruin your life, and your business, very quickly, and you have very little recourse. That this power is damaging the economy is a commonplace complaint. Less recognized, but perhaps even more important, the burgeoning regulatory state poses a new threat to our political freedom.

....

The agencies demand political support for themselves first of all. They are like barons in monarchies, and the King's problems are secondary. But they can now demand broader support for their political agendas. And the larger partisan political system is discovering how the newly enhanced power of the regulatory state is ideal for enforcing its own political support.

The big story of the last 800 years of United States and British history, is the slow and painful emergence of our political institutions, broadly summarized as "rule of law," which constrain government power and guarantee our political liberty. The U.S. had rule of law for two centuries before we had democracy, and our democracy sprang from it not the other way around.

This rule of law always has been in danger. But today, the danger is not the tyranny of kings, which motivated the Magna Carta. It is not the tyranny of the majority, which motivated the bill of rights. The threat to freedom and rule of law today comes from the regulatory state. The power of the regulatory state has grown tremendously, and without many of the checks and balances of actual law...

Yes, part of our current problem is law itself, big vague laws, and politicized and arbitrary prosecutions...

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2. Majone (1997) explains its reason in a comparative way: In the previous period, the limits of intervention were determined by state's budget. In the new period, there is no limitation for making of laws. Cost of increasing regulations are borne by those who have to comply with these regulations, not by the regulators (p. 149).

3. You may access to Cochrane's speech from http://johnhcochrane.blogspot.com.tr/2015/08/rule-of-law-in-regulatory-state.html (access date 02.12. 2015)

Use of law and regulation to reward supporters and punish enemies is nothing new, of course... But the tool is now so much stronger."

Worries mentioned by Cochrane are not limited to the US or even Western countries in general. The rising power of the regulatory state brings concerns about the rule of law in other parts of the world as well. In the west, the problem is more about the rising power of these autonomous regulatory agencies. However, in other parts of the world, the concern is the increased power of political authorities through these agencies. Although it manifests itself in slightly different ways in different political and legal structures, a recurring theme across different regions is the concern that increasing regulation (i.e. state intervention through laws) undermines the principle of the rule of law – regardless of who is actually wielding or benefitting from this regulatory power. In this context, the question that needs to be answered is how can the rising power of regulations and regulatory agencies which harm the rule of law be avoided.

In order to answer this question, we should first define the concept of the "rule of law." The World Justice Project defines the rule of rule of law with four universal principles:[4]

1) Governments, their staffs and representatives are accountable.

2) Laws are clear and understandable, the public is informed about these laws, they are fair and enforced equally for everyone, and protect basic rights (individual security and property);

3) The enactment, administration and enforcement of the laws should be fair, efficient and easily accessible.

4) It must be ensured that justice is dispensed by competent, ethical, independent, and neutral representatives. These representatives should be sufficient in number, they should have sufficient resources, and they should have the ability to represent the community they serve.

Reformulating regulations based on the abovementioned basic principles would prevent increased regulations from violating the rule of law. The steps taken in this direction constitutes the core of the recent reform attempts, especially in developed Western countries.

2. More Transparency for a Better Regulatory System

Regulatory rules and autonomous regulatory agencies for enforcing these rules are formed to correct market failures that obstruct the efficient allocation of resources in an economy. However, over time, it became apparent that governing the economy through laws also has costs and, contrary to the expectations of these regula-

4. http://worldjusticeproject.org/what-rule-law

tions, such regulatory costs could lead to a decrease in wealth (Parker & Kirkpatrick, 2012). This situation – which is defined as government failure in general, or as regulatory failure in specific cases – causes the loss of economic welfare, while simultaneously causing negative effects on a country's legal and political system, as was briefly explained in the previous chapter.

Two solutions have been proposed to solve the problems that occurred parallel to the rise of the regulatory state: abandon regulations totally or regulatory reform. The first opinion has found limited support while the second has attracted more attention. Academic studies argued that reforms in regulatory systems would help increase economic wealth and stability (Parker & Kirkpatrick, 2012). Based on these findings, a succession of regulatory reforms was enacted, especially in Western countries.

The goals of the regulatory reforms are as follows:

Limit interventions to a minimum by taking into account not only their advantages, but also their risks and costs (proportionality).

Regulators should justify their decisions, and the decisions should be subject to public scrutiny (accountability).

Rules and standards should be compatible with one another and be implemented fairly (consistency).

Regulators should be more transparent and ensure that regulations are simple and user-friendly (transparency).

Regulations should focus on the problem and aim to minimize their side-effects (targeting).

Although the abovementioned objectives were taken from a report by the Better Regulation Commission formed in the United Kingdom (Better Regulation Task Force, 2003), similar attempts in other parts of the world to improve the effectiveness of regulations share similar objectives, even if they are worded differently. Transparency always takes place in these interrelated reform objectives.[5]

Ensuring fair and effective regulatory enforcements is only possible with "transparent" legal regulations. What is meant by transparency is determining the level of necessary information that allows interested parties to understand the current situation and estimate how their actions could change the current situation.[6] In the context of regulations, transparency refers to accessibility of information on legal regulations by interested parties, clarity of available information, and predictability of decisions based on these legal regulations.

5. See (Parker & Kirkpatrick, 2012; OECD, 2002; Bertolini, 2006)

6. This definition was adapted from Buijze's (2013) definition of transparency. The author provided a more sophisticated definition, supposing that excess information would lead to unnecessary confusion and decrease transparency. Although this is a realistic assumption, here, a simpler version was preferred, as our basic issue is about problems related to insufficient information.

There is a consensus on the relationship between transparency and information. This can be seen in the studies regarding transparency of regulations, as definitions given are directly or indirectly related to almost all targets mentioned above on reforming the regulatory system. Particularly, transparency and accountability are often used together. For this reason, instead of confining the definition of transparency to a few short sentences and thereby risking the exclusion of some important elements, our research is focused on a broader definition of this concept by evaluating debates on what should be done to increase transparency. Bertolini (2006) mentions the following suggestions for rendering regulations more transparent:[7]

Clarity: Roles and goals of the responsible regulatory agencies and rights and obligations of the regulated units should be determined clearly by laws and contracts.

Predictability: In order to consolidate the trust of stakeholders, regulatory decisions should be determined according to set rules, methods, and processes.

Autonomy and Accountability: Regulators should be independent from politicians and private interests. However, autonomy should be balanced with accountability.

Participation: Stakeholders should participate in decision-making processes.

Open Access to Information: There should be easy and low-cost access to laws and other legislations, regulatory decisions, consultative work, and similar information.

Further, in this study, the borders of the evaluation of transparency are drawn by the clarity and predictability of regulations, the autonomy and accountability of regulatory agencies, stakeholders' participation in decision-making processes, and access to information on regulations.

Transparency has been the most important component of regulatory reforms in all countries. Particularly in OECD countries in the early 2000s, regulatory reform policies were initiated by placing special emphasis on transparency. Although there were certain shortcomings, some of these countries achieved significant advances in transparency.[8] Similar progress has occurred in European Union countries, as well. Over time, the winds of reform reached developing countries and they began implementing comparable policies.[9]

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7. For similar criteria see Nick Malyshev, The Evolution of Regulatory Policy in OECD Countries.

8. A number of evaluations have been published on these policies. An addition to the existing references to the topic, see OECD Regulatory Reform Reviews Series and Deighton-Smith (2014)

9. For example, Tomic et al. (2015) evaluated the transparency of the regulatory institutions in five different fields in Macedonia and Serbia based on the information provided in their websites. They found significant differences in the levels of transparency among them. They couldn't locate the underlying reasons for the differences. They were transparent only to the extent that the laws required them to be, but had no effort to take it further.

3. Transparency of Regulations on Competition

In general, reform attempts to increase efficiency in the field of regulation impacted the field of competition. New studies questioned and sought ways to increase transparency in the field of competition, primarily in the developed Western countries.

It would not be wrong to claim that the OECD is the organization that puts forth the most extensive effort to improve transparency of regulations in general and specifically on competition. OECD's activities in the area of competition generally focus on improving the existing regulations, although in particular cases they may involve proposing specific new regulations regarding competition. For instance, in 2010 and 2012, three roundtable meetings were organized, specifically focusing on the transparency of the regulations on competition.[10] In these meetings, participants reached a consensus on the importance of transparency and the necessity for its development in the field of competition. They also shared their views on the current state of transparency and possible ways to develop it.

The International Competition Network (ICN), which was established to develop cooperation among competition authorities of different countries, organized a roundtable meeting in 2014 in order to enhance the effectiveness of competition authorities' decision-making and ensure the protection of procedural rights. At these meetings, participants agreed that transparency is one of the essential components of effective competition regulations; that the level of transparency depends on the type of case (merger, acquisition, cartel, etc.); and that conducting the investigative process based on written guidelines contributes to ensuring procedural fairness.[11]

In 2007, the leaders of ASEAN agreed on the establishment of an institution similar to the European Community, namely the ASEAN Economic Community, which would promote the free movement of production factors in the countries of the region. One of the goals of this institution was to make regional economies more competitive and integrated into the world economy. Based on this target, ASEAN published the ASEAN Regional Guidelines on Competition Policy in 2010. These guidelines, which were prepared based on the experiences of countries that have a longer history of competition authorities and competition law, report that transparency is a must for effective competition regulation. In several chapters of the guideline, the importance of transparency within both the competition authority and the enforcement of competition law was mentioned (ASEAN, 2010).

ICN conducted a survey in 2010 in 36 member countries having different competition regulations to evaluate its members' transparency practices (ICN, 2013). One of the most important results of this survey was that transparency is a universal value and all competition authorities pay attention to it. Another important result was the compatibility of transparency practices in countries having different systems. The

10. For the summary of these meetings see (OECD Competition Committee, 2012)

11. Concerning this subject, please see (ICN Agency Effectiveness Working Group, 2014)

survey results indicate a general acknowledgment that more transparency would allow more effective competition regulations and that transparency ends where confidentiality begins. It was observed that apart from the compromised points, there are different approaches concerning the maintenance of transparency.

Tomic et al.'s (2015) study on the transparency of regulatory authorities in Serbia and FYR Macedonia included the competition authorities of these two countries, as well. The results revealed that Serbian competition authorities were transparent in four of the five evaluation criteria. The transparency of FYR Macedonia's competition authority was found to be "limited," only partly fulfilling two of the five elements of transparency.

No doubt the studies in this realm are not limited to those mentioned above. In the last decade, an increasing number of studies, meetings, and policy recommendations on advancing regulatory transparency have been performed in countries all over the world that have longer regulatory experience. However, there is still room and need for further studies, particularly for countries in which the history of regulations is not so long.

4. Studies on Regulations and Transparency of Regulations in Turkey: An Overview

In accordance with developments around the world, Turkey also underwent a period of structural transformation in economic policies during the 1980s. Import substitution policies that had been followed until the 1980s were replaced by market-oriented policies, limiting the role of the state in the economy. The import regime was liberalized, the state's price controls were abolished, and debates on privatization of state enterprises was initiated. As the active role of the state in the economy was restricted and the private sector and market mechanism started to play a more active role in the allocation of resources, regulatory legislation and agencies were introduced to the new system. The first regulation was made in capital markets in 1981. The Capital Market Board (CPM) was established to ensure confidence and protect investors' rights in the newly established stock exchange. After a long silence in the area of regulation following the establishment of CPM, regulatory reforms once again gained pace in 1994 as new legislation was enacted concerning competition and radio/television broadcasting. These were followed by regulations on banking (1999), telecommunication (2000), energy (2001), sugar (2001), tobacco products (2002), and public agencies (2002).

Turkey's relationship with the West had a significant effect on the expansion of regulations. Commitments to the World Bank and IMF that were made by the Turkish government following the economic crisis in the 1990s accelerated the implementation of the new regulations. In harmony with Turkey's accession goal to the Eu-

ropean Union, regulatory laws and agencies were often taken from EU practices. Despite importing regulatory laws and agencies from the West, the inconsistency between Turkey's laws and the agencies and rules brought about by the imported regulations created uncertainty that obstructed the effective functioning of the regulatory system. This was widely due to the fact that, in Turkey, there was no established regulatory tradition. (Çetin, Sobacı & Nargeleçekenler, 2016). Due to the inconsistencies and uncertainties surrounding regulations in Turkey, the independence and accountability of its regulatory authorities was controversial.

It took decades for the West to create these rules and regulations. Importing them into an insufficient regulatory infrastructure led to an important problem: a discrepancy between the written (de jure) rules and the rules in practice (de facto). For instance, a study (Zenginobuz, 2008) that evaluated the de jure independence of regulatory agencies in Turkey found the independence of these agencies to be quite high – even higher than those in the west in some cases. However, in practice, politicians are always eager to control these agencies because they have power over approximately 60% of the economy (Emek, Zenginobuz, & Acar, 2002). Governments have always intervened in the appointment of the administrators and boards of these agencies. Sometimes, they even changed certain legislation restricting their intervention.[12] Particularly decrees numbered 643 and 649 that passed in 2011 increased the influence of politicians on these authorities and restricted the independence of regulatory authorities significantly (Çetin, Sobacı & Nargeleçekenler, 2016). There has been growing criticism of some regulatory agencies which are considered to be part of the projects of political authorities in the last decade.[13]

Another significant problem among regulatory authorities is accountability. There are three levels of accountability for regulatory authorities: upward accountability (towards the three main organs of the state: legislative, executive and judicial); horizontal accountability (towards the autonomous monitoring agencies, auditing agencies, and ombudsman); and downward accountability (towards consumers, interest groups, etc.). The only study on the accountability of regulatory authorities in Turkey (Sosay, 2009) indicates that the legal framework of upward accountability was formulated more rigorously than horizontal and downward accountability. Although some mechanisms of horizontal and downward accountability, like transparency and representation of some interest groups, formally exist, these mechanisms do not function well due to legal uncertainties and problems in enforcement.

Apart from accountability, the study also mentioned transparency – a topic closely

12. For example, the Public Procurement Law has been changed 32 times since 2002. http://www.aljazeera.com.tr/haber/kamu-ihale-kanunu-yine-degisiyor

13. For some of the critiques in the media, see http://www.hurriyet.com.tr/bagimsiz-kurumlar-bunlar-olmasin-diye-kurulmustu-9897015, http://www.meydangazetesi.com.tr/aktuel/bddk-siyasi-baskiya-boyun-egdi-bank-asya-yi-tmsf-ye-devretti-h5534.html, http://www.zaman.com.tr/yazarlar/turhan-bozkurt/bankalara-derin-darbe-kurumu-bddk_2278866.html

related to accountability (Sosay, 2009, p. 352). The study found that, although importance of informing the public is mentioned in almost all founding laws of the regulatory authorities in Turkey, there is no consistency in the specification of requirements of transparency included in these laws. There are also differences regarding the transparency of individual agencies. The transparency conditions of the Central Bank, Banking Regulation and Supervision Agency, Competition Authority, and Public Procurement Agency were defined in a stricter sense than other agencies. In these agencies, decision-making processes, content of decisions, reasons for decisions, time periods during which decisions should be reached, announced, and appealed, as well as fees and penalties were specifically defined. Although these agencies also publish decisions, communiques, bylaws, bulletins etc. to inform stakeholders, their effectiveness is debatable because of the absence of a clear statement format.

Apart from the limited number of studies on independence and accountability, which are related to the transparency issue, no other studies on the transparency of Turkish regulatory agencies were found.

5. Purpose and Context of the Study

This study was geographically restricted to Turkey. Turkey is a country on the south-eastern edge of Europe with a population of 75 million. As one of the 20 largest economies in the world, Turkey belongs to the upper-middle income group based on income per capita. In comparison to its current economic potential, Turkey's position on "the rule of law" is far behind similar countries and the world average. According to the rule of law index, which was developed by the World Justice Project,[14] in 2015 Turkey was 80th of 120 indexed countries, 29th of 31 countries with same income group, and 12th of 13 countries in its region. In a sub-component of the same index that measured the fairness and effectiveness of the regulatory applications of countries in the same year, Turkey was ranked 46th of 102 indexed countries, 12th of 31 countries with same income group, and 5th of 13 countries in its region. In addition, since 2012 Turkey's score has followed a downward trend in the rule of law index and in the index about the fairness and effectiveness of regulations.

Three important interpretations can be derived from these rankings. One of them is that Turkey's "report card" on the rule of law is fairly bad. This is a negative indicator for a country with such high ambitions. On the one hand, Turkey aspires to be a model democracy in the Middle East, an area to which is has close cultural and geographical relations. On the other hand, Turkey is a candidate for the EU seeking full membership. The second observation is that performance on regulations is

14. http://worldjusticeproject.org/rule-of-law-index

better than performance on the rule of law in general. The most important reason is likely that these regulations and agencies were transferred from the West within the framework of the harmonization programs of the European Union. The third important observation is that, contrary to the expectations, Turkey's performance on the rule of law in general, and specifically regulations, is changing for the worse. These characteristics make Turkey an important case to be analyzed within the context of regulations and transparency.

This study is limited to legislation on competition. Academic studies on regulations could be classified into two groups: studies analyzing more than one area of regulations (often more than one country) and studies focusing on one field. Studies in the first group have generally been conducted using standardized variables and measured perceptions of interested parties or the legal (de jure) condition. Studies in the second group, based on expertise in a certain field, aim to analyze regulations of specific areas in detail and focus more on de facto conditions, rather than written rules. This study belongs to the second group and, due to the expertise of the researchers, it is restricted to the area of competition and aims to analyze de facto transparency of competition regulations and the competition authority.

More specifically, the aim of this research is to analyze the transparency of the investigation process of competition regulations in Turkey. The study includes both (1) perceptions of stakeholders based on a survey, and (2) researchers' findings based on laws and selected cases. Using the results of these two methods, we aim to find answers to the questions related to the problems surrounding competition regulations, how stakeholders perceive these problems, and what to do in order to develop transparency in the field of competition.

6. Significance and Contribution

All around the world, as the problems created by the rise of the regulatory state have begun to be debated more frequently, governments and international organizations have proposed reforms to solve these problems. Greater interest in this issue has also increased academic studies and reports that analyze regulations and their results.

The rising number and power of regulatory agencies in the Turkish economy have sparked debates about the problems associated with them. Turkey, in terms of the efficiency and fairness of its regulations, is not only far behind other countries but it's also getting worse. These facts reveal a need for regulatory reform alongside the studies that evaluate effectiveness of these regulations.

Although there has been a growing interest in regulatory studies in academia, the number of these studies is still limited. No study was found that specifically evaluates regulations in the field of competition. This study aims to contribute to the lim-

ited literature on regulations in general, and specifically on competition regulations. The findings of this study will guide possible attempts to increase transparency on competition regulations.

7. Methodology

In this study, transparency of the investigation processes in competition in Turkey was analyzed in two categories: (1) transparency in general, and (2) the transparency of competition investigations. Transparency in general refers to the availability of information on competition laws and guidelines, investigation processes and practices, investigation timelines, and agency decisions that examine the transparency of rules and policies in order to maintain competition in general. In other words, transparency in general is related to whether information is clear, open and easily accessible, whether the actions of undertakings are compatible with the current competition regulations, and, if not, what the consequences are or could be. Investigation specific transparency is related to the transparency of the process following the decision of a competition authority to open an investigation against an enterprise. Transparency of the investigation processes is expected to be bidirectional; i.e., the disclosure of information to the related parties (parties under investigation, third parties and the general public) by the authority and opportunities for the parties to be heard or present information to the authority. The issue is evaluated from both respects in the section related to investigation specific transparency.

Two different methods will be applied in order to evaluate the transparency of competition investigations in Turkey. First (9th section), a survey formulated using the abovementioned classification was conducted among staff members of the competition authority, academics, and legal experts that deal with competition law. Respondents were asked to evaluate the level of transparency of the regulations. The survey was expected to contribute to the research in two ways: (1) Investigation processes constitute a wide field with different components. For each component, the level of transparency is different. In other words, in some sub-fields the transparency problem might be worse than others. As respondents were asked to weigh the level of transparency for each sub-field, the survey results could provide information about the sub-fields in which the transparency problem is most urgent. (2) Since the survey was answered both by the staff of the competition authority (providers of information) and by law experts and academics on competition law (users of information), the results allow us to observe differences of perception, if any, between providers and users of information.

Secondly (10th section), by analyzing current laws, regulations, decisions of the competition authority, and any related channels of information, current rules – and problems related to the transparency of enforcing these rules – were evaluated. The experiences of researchers, and particularly the workshops conducted with in-

terested academics and law experts, guided the determination of the problems. In this section, for each problem determined in the investigation processes, the problem was first defined and then supported by concrete examples.

The classification and survey used in this study was largely inspired by ICN's study entitled ICN Agency Effectiveness Project on Investigative Process: Competition Agency Transparency Practices (2013). The classification of the mentioned study was adopted with minor changes; some sub-sections were adapted while others were omitted entirely. In the survey (the first method), although the spirit of questions remained the same, some changes were made in the question-answer format of the original survey, simply by changing yes-no answers in the original study with a Likert-type scale, and respondents were asked to assess the transparency of investigations in Turkey for each question on a specific subject.

CHAPTER TWO

8. General Information on Competition Regulations and Formal Structure of Competition Investigations in Turkey [15]

The first legal arrangement in the area of competition law in Turkey came with the enactment of law number 4054, The Law on the Protection of Competition, which came into effect on December 13, 1994. The Competition Authority (CA), which is responsible for the enforcement of the law, wasn't established until three years later on November 5, 1997. The agency's decision-making body is the Competition Board. The board consists of seven members, including one chairman and one deputy chairman. The agency has administrative and financial autonomy. The law clearly states that no organ, authority or person may give commands or orders to influence the final decision of the agency.

Law Number 4054, and the secondary legislation of regulations, statements, and guidelines based on this law, form Turkish competition legislation. The basic legal document that determines the basis and procedures of competition law is Law Number 4054 and the secondary legislation contributes to the law, making it more understandable with higher legal determinacy. Further, the secondary legislation makes the original law more enforceable for the implementer and respondents of the basic document.

The agency is limited to three primary types of competition infringements:

(1) Decisions, agreements and concerted practices which are likely to prevent, distort or restrict competition in a particular market;

(2) Abuse of dominant position; and

(3) Mergers and acquisitions with the intention of forming a dominant position, strengthening the current situation, and lessening competition.

An investigation about an undertaking is commenced upon receipt of a complaint from consumers or other undertakings, or upon the board's own initiative based on the examination of available information about the undertaking. The board may either open a preliminary inquiry to find whether a formal investigation is warranted or immediately launch a formal investigation. If a preliminary inquiry decision is given, a report should be prepared within 30 days to present to the board. The board assesses the report within ten days and determines if the allegations are "serious and sufficient" enough to open a formal investigation. Once the decision to open an investigation is made, the board assigns a reporter under the supervision of the con-

15. In this chapter, data was mainly collected from the Competition Authority's web page www.rekabet.gov.tr

cerned department, and an investigation period of six months begins. In case the parties provide justifiable grounds, the board may extend the investigation process only once for an additional six months.

The decision concerning the initiation of an investigation should be submitted to the concerned parties within 15 days, and the parties are requested to submit their written pleas within 30 days. The time frame for the submission of the first written defense statement granted to the parties begins with the receipt of the board's notification letter, accompanied by adequate information as to the type and nature of the claims. Subsequently, the main investigation report based on the defense statements of the parties and information obtained during the investigation process is issued. The investigation process is concluded by disclosing this report to the board and parties.

Once the main investigation report is served to the defendants, they are requested to send a second written defense statement within 30 days. The investigation committee prepares an additional opinion on the second defense of the parties and reports it to all board members and concerned parties. The parties should respond to this opinion within 30 days with their third written defense statement. Following this written defense, an oral hearing may be held upon the request of the parties or by the ex-officio decision of the board. Following the verbal defense, on the same day or within 15 days, the board renders its final decision. If no oral defense is held, the final decision must be given within 30 days following the completion of the investigation process.

9. Transparency of Investigation Processes on Competition in Turkey from the Stakeholders' Viewpoint: A Survey

There are two basic problems with regard to transparency. The first is related to formal transparency, which refers to the nonexistence of laws (rules) forcing the concerned agency to share specific information with stakeholders. The second is the actual state. In some cases, agencies share information with concerned parties even if there is no formal enforcement. In other cases, despite the existence of formal enforcement, either the agency fails to share information or the shared information is not sufficiently illustrative.

In order to understand these differences, a survey was conducted to determine both the stakeholders' opinions toward the current level of transparency in the investigation processes of competition and the differences in the perceptions, if any exist, between providers and users of information. The survey is largely adapted from the ICN Agency Effectiveness Project on Investigative Process: Competition Agency Transparency Practices survey by ICN. As the aim of ICN's survey was formal transparency, the survey was conducted on the competition authorities of the

participant countries. Therefore, definite answers were given, such as “Yes” or “No.” Since our study seeks to understand the perceptions of interested parties towards transparency, some changes were made to the format of the original survey questions. Yes-no answers in the original study were replaced with a Likert-type scale, and respondents were asked to evaluate the transparency of investigations in Turkey on each specific issue of each question. In the second stage, the existence of statistically significant differences between providers of information (CA staff) and users of information (independent lawyer/consultant, company legal consultant, academic) was tested.[16]

The survey consisted of two sections. Respondents were asked to evaluate competition law applications in general in the first section (sub-section 9.1) and the transparency of the investigation process in particular in the second section. The first part of the second section (sub-section 9.2) is related to how much CAs inform parties about the investigation process and the second part (sub-section 9.3) is about the opportunities for the parties to be heard or present information to the authority.

Even if it is becoming increasingly more effective, the number of people who are involved in the field of competition law in Turkey is still very limited compared to the other disciplines of law. Although there is no confidential data, it is estimated that a maximum of 350 people are working in positions related to competition law in Turkey (CA staff, independent lawyers/consultants, company legal consultants, academics).[17] The survey was conducted via the internet and the questionnaire was sent to respondents via mail groups, blogs, and websites on which people who are involved in competition law are in regular communication. [18]

Thirty-six individuals responded to the survey (Table 1). According to the rough estimation above, approximately 10% of the statistical population participated in the survey. However, participation was different for all sub-groups. The highest participation was from legal experts and consultants on competition law and the lowest participation was from academics who work in competition law. The lawyer’s relatively greater interest could be explained because they are greater in number and, among stakeholders, they are the most immediately affected group by the results of

16. As the number of data is limited and ordered, in order to understand if there was a statistically significant difference between two groups, the non-parametric Mann-Whitney U-test was used.

17. In 2014, 145 people were working in the expert cadre of CA. With the administrative team, this number increased to approximately 160. It is estimated that the total number of lawyers/consultants who work specifically on competition lawsuits in companies is approximately 90, the number of in-house consultants working for companies is approximately 50 and approximately ten academics are working on competition law as their field of expertise. (Information on the number of experts at the CA was obtained from the CA’s official site. (http://www.rekabet.gov.tr/tr-TR/Personel-Istatistik-Listesi). Other estimations were made according to interviews conducted by the management of law offices. Therefore, this is only a rough estimation.)

18. World of Competition Law group at www.linkedin.com, competition law blog “News from Markets” and Bilgi University Competition Law central mail group.

problems related to transparency. Following the same logic of explanation, the lesser interest of academics could be explained because they are fewer in number and they do not have as close of a relationship with the application processes. It is suspected that CA staff didn't want to weigh in on the survey because of their status as state employees, even though they are the highest in number among the occupations related to competition.

Table 1. Relationship of respondents to competition law

Competition Authority staff	Lawyer/consultant	In-house consultant	Academic	Total
6	20	8	2	36
(17 %)	(56 %)	(22 %)	(6 %)	(100 %)

A slight majority (53%) of the respondents were male. Relatively new stakeholders had greater interest in the survey. Forty-four percent of respondents stated that they had at most five years of experience in competition law. Stakeholders with the most experience showed the least interest in the survey (Table 2).

Table 2. How long have you been involved in the field of competition law?

0-5 years	5-10 years	10-15 years	15+ years	Total
16 (44 %)	10 (28 %)	6 (17 %)	4 (11 %)	36 (100 %)

9.1. Transparency in general about policies and standards

In the first section, respondents were asked their opinions on the disclosure of information on the competition authority's policies, including laws and regulations, investigatory processes and applications, duration of investigations and agency decisions. Table 3 shows a summary of the answers. The table includes the respondents' total evaluation, weighted average of evaluations, and average of the CA staff.

Survey results show that public disclosure provided by the agency, in general, on laws, regulations and investigatory processes is quite sufficient. The average of the responses in this section was 3.3/5. While respondents found the CA most successful (3.97/5) on public disclosure of "Competition laws and agency enforcement guidelines," the lowest score (2.86/5) was given for "Agency officials' speeches and agency policy statements". The reason for the low score in "Agency officials'

speeches and agency policy statements" can be explained either by insufficient effort of the CA in disclosure or low interest of respondents in public disclosures which do not have primary importance for investigations. Nonetheless, the fact that even the lowest score is above the median indicates a positive result for transparency.

Another striking result of this section of the survey is that the CA staff's evaluations are higher than over the overall average on all questions. Moreover, non-parametric test results indicate a statistically significant difference on two issues between the average of the CA staff and that of other professions. This reflects that there is a significant difference in evaluating the quality of the information between providers of information (CA staff) and users of information (competition lawyers and consultants and academics interested in competition law).

Table 3. How transparent is the CA in disclosing the below information to the public? (Is the information easily accessible and clear?) Evaluate from 1 (not transparent) to 5 (transparent).

	1	2	3	4	5	Total Answer	Average	CA Avg
Competition laws and agency enforcement guidelines	1 (3%)	5 (14%)	7 (19%)	4 (11%)	19 (53%)	36	3.97/5	4.67/5
Agency investigative processes, procedures, and practices (such as an agency operating manual or agency rules of practice)	3 (9%)	3 (9%)	9 (26%)	10 (29%)	10 (29%)	35	3.6/5	4.17/5
Typical timing or timelines for different types of investigations	3 (8%)	9 (25%)	8 (22%)	7 (19 %)	9 (25%)	36	3.28/5	4.67/5*
Agency decisions, opinions, and orders	1 (3%)	9 (26%)	5 (15%)	10 (29%)	9 (26%)	34	3.5/5	4.33/5
Reasons for not taking enforcement action after an investigation or decisions to close investigations	2 (6%)	8 (22%)	11 (31%)	11 (31%)	4 (11%)	36	3.19/5	4.17/5*
Agency officials' speeches and agency policy statements	5 (14%)	10 (29%)	10 (29%)	5 (14%)	5 (14%)	35	2.86/5	3.67/5
Agency advocacy submissions to other entities (other government agencies, courts, private organizations)	4 (11%)	10 (28%)	6 (17%)	8 (22%)	8 (22%)	36	3.17/383/55	3.83/5
Explanation of confidentiality protections and treatment of legal privileges during investigations	3 (9%)	9 (26%)	11 (31%)	7 (20%)	5 (14%)	35	3.06/5	3.67/5
Explanation of available sanctions for violations of competition laws and how they are determined	5 (14%)	6 (17%)	11 (31%)	6 (17%)	7 (20%)	35	3.11/5	3.83/5

* There is a statistically significant (5%) difference between the two averages.

9.2. Transparency within the Context of Specific Investigations: Disclosures

The aim in the second section of the survey was to evaluate how transparent the CA is towards the parties of investigations. For this reason, respondents were asked to evaluate the level of transparency of the CA in six major topics of investigations (legal basis, allegations, timing, evidence, parties' access to this evidence, calculation of the economic theories of harm, and staff recommendations to agency decision-makers). A summary of the respondents' assessments is given in Table 4.

As with the previous section, in this section too, the majority of evaluations were above average (2.5/5); however, the general average (2.8/5) is lower than the previous section. These results imply that the respondents think that the CA is less transparent in investigation-specific issues than general issues. In the other words, the CA is more generous in informing the public in general, but when an investigation is initiated, it does not demonstrate the same level of transparency. Within the context of this section, respondents attributed the highest scores (3.56/5) to the CA in response to the statement "agency discloses the legal basis of the possible violation under investigation and applicable legal standards for the investigation to the parties" and the statement "agency's disclosure of the economic theories of harm under consideration to the parties under investigation" received the lowest score (3.56/5).

The second important evaluation of respondents is the different levels of transparency associated with different parties under investigation. The responses indicate that the weighted average to disclose the information to parties is higher than the weighted average of informing third parties and the general public. This means that, according to the respondents, the CA is more sensitive to inform parties under investigation than to inform third parties and the general public.

The third important inference from the responses is the difference between the evaluations of CA staff and other respondents. In this section as well, the weighted average of the CA staff is higher than the weighted average of the others. Non-parametric tests show that the differences in seven of the 17 statements were statistically significant. As in "transparency in general", in issues related to investigations, there is asymmetry between the CA's level of shared information and levels of received information by other parties.

Table 4. Evaluate the statements below from 1 (strongly disagree) to 5 (strongly agree)

Major Topics	Statement	1	2	3	4	5	Total Answer	Avg	CA Avg
Legal basis and legally applicable standards	Agency discloses the legal basis of the possible violation under investigation and applicable legal standards for the investigation to the parties	0 (0%)	3 (8%)	15 (42%)	13 (36%)	5 (14 %)	36	3.56/5	4.5/5*
Disclosure of existence of an investigation and allegations against parties	Agency discloses allegations against parties	0 (0%)	4 (11 %)	14 (39%)	14 (39%)	4 (11 %)	36	3.5/5	4.17/5*
	Agencies disclose the existence of an investigation and allegations against the parties to third parties	2 (6%)	6 (17 %)	20 (57%)	4 (11 %)	3 (9%)	35	3/5	3.83/5*
	Agencies disclose the existence of an investigation and the allegations against the parties to the general public	1 (3%)	8 (22%)	13 (36%)	10 (28 %)	4 (11 %)	36	3,22/5	4/5*
Expected timing of the investigation	Agency discloses the expected timing of the investigation to the parties under investigation	3 (8%)	13 (36%)	6 (17 %)	11 (31%)	3 (8%)	36	2.94/5	4/5*
	Agency discloses the expected timing of the investigation to third parties	5 (14 %)	16 (44 %)	7 (19 %)	6 (17 %)	2 (6%)	36	2,56/5	3/5
	Agency discloses the expected timing of the investigation to the general public	5 (14 %)	15 (43%)	8 (23%)	7 (20%)	0 (0%)	35	2,49/5	2,5/5
Factual basis and nature of evidence	Agency discloses the factual basis and nature of the evidence of allegations under investigation to the parties	0 (0%)	8 (24%)	14 (42%)	9 (27%)	2 (6%)	33	3.15/5	4.17/5*
	Agency discloses the factual basis and nature of evidence of allegations under investigation to third parties	6 (17 %)	13 (37%)	11 (31%)	5 (14 %)	0 (0%)	35	2,43/5	2,5/5
	Agency discloses the factual basis and nature of evidence of allegations under investigation to the public	6 (17 %)	16 (46%)	9 (26%)	4 (11 %)	0 (0%)	35	2,31/5	2,67/5
Disclosure of the economic theories of harm	Agency discloses the economic theories of harm under consideration to the parties under investigation	6 (17 %)	16 (46%)	8 (23%)	4 (11 %)	1 (3%)	35	2.37/5	3/5

Staff recommendations to agency decision makers	Staff recommendations to agency decision makers are disclosed to the parties under investigation	6 (17 %)	6 (17 %)	15 (43%)	4 (11 %)	4 (11 %)	35	2,83/5	3.5/5
	Staff recommendations to agency decision makers are disclosed to third parties	7 (21%)	13 (38%)	10 (29%)	0 (0%)	4 (12%)	34	2.44/5	2.71/5
Access to the evidence obtained in the investigation	Parties can access the evidence obtained in the investigation	1 (3%)	3 (9%)	17 (49%)	10 (29%)	4 (11 %)	35	3,37/5	4.5/5*
	Third parties can access the evidence obtained in the investigation	7 (20%)	14 (40%)	11 (31%)	3 (9%)	0 (0%)	35	2.29/5	2.75/5
	The public can access the evidence obtained in the investigation	9 (26%)	8 (24%)	12 (35%)	5 (15%)	0 (0%)	34	2.38/5	2.75/5

* There is a statistically significant difference (5%) between the two averages.

9.3. Transparency within the Context of Specific Investigations: Opportunities to be Heard by the Agency

In the third section, respondents were asked to evaluate the openness of communication channels with the CA staff for parties under investigation to share their opinions and defense statements. Thirteen statements were provided on six topics. The respondents were asked to what extent they agreed with these statements on a scale of 1 to 5. The summary of the respondents' assessments is given in Table 5.

The general average of this section (3.26/5) is above the overall average (2.5/5). Respondents revealed that the CA is fairly successful in providing opportunities to the parties to present materials (short reports, economic studies, etc.) to support their cases (3.88/5).

In this section, the difference between the CA staff and other professions is more apparent. The weighted average of the CA staff is once again higher than the others; however, apart from one statement, a statistically significant difference was determined in all statements.

Lastly, respondents believe that parties under investigation have easier access to the CA than third parties and the public.

Table 5. Evaluate the statements below from 1 (strongly disagree) to 5 (strongly agree).

Major Topics	Statement	1	2	3	4	5	Total Answer	Avg	CA Avg
Opportunity to meet with the investigative staff	Agency provides parties with the opportunity to meet with the investigative staff	3 (9%)	2 (6%)	10 (29%)	9 (26%)	11 (31%)	35	3.66/5	4.83/5*
	Agency provides third parties with the opportunity to meet with the investigative staff	3 (9%)	5 (14 %)	11 (31%)	9 (26%)	7 (20%)	35	3.34/5	4.5/5*
	Agency provides the public with the opportunity to meet with the investigative staff	7 (20%)	6 (17 %)	12 (34%)	7 (20%)	3 (9%)	35	2.8/5	4/5*
Opportunity to meet with agency leadership or decision makers (Chairman, Board members)	Agency provides parties with the opportunity to meet with agency leadership or decision makers to discuss agency concerns prior to an enforcement decision	4 (11 %)	12 (34%)	11 (31%)	3 (9%)	5 (14 %)	35	2.8/5	4/5*
	Agency provides third parties with the opportunity to meet with agency leadership or decision makers	6 (17 %)	8 (23%)	16 (46%)	1 (3%)	4 (11 %)	35	2.69/5	4/5*
Opportunity to submit materials (Note: This question did not refer to compulsory requests for information in which the agency prescribes what a party or third-party recipient must produce.)	Agency provides parties with the opportunity to submit materials (e.g., "white papers," economic studies) in support of their views	1 (3%)	4 (12%)	9 (26%)	4 (12%)	16 (47%)	34	3.88/5	4.83/5*
	Agency provides third parties with the opportunity to submit materials (e.g., "white papers," economic studies) in support of their views	3 (9%)	4 (11 %)	9 (26%)	7 (20%)	12 (34%)	35	3.6/5	4.83/5*
	Agency provides public with the opportunity to submit materials (e.g., "white papers," economic studies) in support of their views	4 (11 %)	4 (11 %)	10 (29%)	4 (11 %)	13 (37%)	35	3.51/5	4.67/5*

Opportunity to consult with the agency on compulsory requests for information	Agency provides parties with the opportunity to consult with the agency on compulsory requests for information (in other words to negotiate or discuss the scope and timing of requests for information)	2 (6%)	4 (11 %)	11 (31%)	11 (31%)	7 (20%)	35	3.49/5	4.5/5*
	Agency provides third parties with the opportunity to consult with the agency on compulsory requests for information (in other words to negotiate or discuss the scope and timing of requests for information)	1 (3%)	7 (21%)	11 (33%)	10 (30%)	4 (12%)	33	3.27/5	3.83/5
Opportunity to respond to the competition agency's concerns	Parties have the opportunity to identify relevant evidence for consideration and respond to the agency's concerns (for instance, in response to a statement of objections, hearing, etc.) prior to an enforcement decision	1 (3%)	7 (20%)	11 (31%)	9 (26%)	7 (20%)	35	3.4/5	4.67/5*
Opportunity to comment or provide views on proposed remedies	Agency provides third parties with the opportunity to comment or provide views on proposed remedies or settlement commitments	3 (9%)	5 (14 %)	14 (40%)	8 (23%)	5 (14 %)	35	3.2/5	4/5
	Agency provides the general public with the opportunity to comment or provide views on proposed remedies or settlement commitments	6 (17 %)	9 (26%)	11 (31%)	5 (14 %)	4 (11 %)	35	2.77/5	4/5*

* There is a statistically significant difference (5%) between the two averages.

9.4. General Findings of the Survey Results on the Transparency of Investigatory Processes on Competition in Turkey

Despite the differences among the respondent groups and topics, three general comments can be made regarding the survey results.

Firstly, all respondents evaluated the transparency of the CA as above average under each major topic. At the workshop conducted before the survey, participants, who were lawyers, consultants and academics in the field of competition law, provided a similar evaluation, as well. No doubt, the fact that Turkish Competition infrastructure has been adopted from the Western countries, which have extensive experience in this area, is one of the major contributors to these positive evaluations.

The second important result of the survey is the difference between the providers of information (CA staff) and the users of this information. In all articles of the survey, the transparency evaluation of the agency staff is higher than others. In other words, one party claims to have provided the information, while the other claims to have not received it. Bringing the parties together to understand the reasons behind these inconsistencies will contribute to improving the transparency of investigations.

Finally, the survey results show that the CA pays less attention to providing information to third parties and the general public compared to parties of the investigation. It is obvious that parties under investigation are those who need the information the most. The CA's relative generosity towards parties under investigation could be explained by this reason. However, informing third parties and the general public on the investigation process is an indispensable component of transparency. Apparently, stimulating the agency to provide more information to third parties and the general public will improve the transparency of the investigatory processes.

10. Transparency of Investigatory Processes in Turkey in Practice (de facto)

Comprehensive rules are the most important condition of transparency in any area. However, if these rules are not clear, open, predictable, easy to access, and supported by strong enforcement, it would be impossible to avoid arbitrary treatment. Therefore, the implementation of laws is as important as their presence.

In Turkey, a majority of competition laws and secondary legislation was transferred directly from the regulations of the European Union. With regard to the context of legal regulations, Turkey is not significantly different from other countries in the EU. Competition lawyers, consultants, and interested academics who were interviewed within this study expressed that despite the fact that competition regulations are transparent in comparison with other fields of law, problems occur in the application processes.

Therefore, this section analyzes problems that occur during the application processes of investigatory processes on competition in Turkey and the differences between the situation on paper (de jure) and in practice (de facto). While analyzing the problems related to application, concrete cases will be elaborated on by frequently referring to court cases and regulations.

Due to the broadness of the space of analysis, studies dealing with transparency in practice are very limited. Analyzing thousands of court cases and hundreds of articles of laws and regulations and determining practices violating transparency necessitates an arduous and time-consuming effort. In order to overcome this difficulty and to support our arguments by creating a pool of evidence, a workshop was organized on November 16, 2015 at Istanbul Bilgi University's Competition Law and Policy Research Center. Apart from the researchers of this project, ten lawyers, consultants, and academics interested in competition participated in the workshop. For pre-meeting preparation, by using the format of the ICN (2013) report, a draft report was shared with participants and they were requested to share their specific contributions for each title according to this format. At the workshop, participants explained transparency problems in practice, based on their knowledge and experiences with competition by referring to concrete court cases and legal regulations. The project team's knowledge and experiences were combined with the contribution of the participants and a pool of broad sample cases and supportive evidence was formed. The study of these cases aided in the discovery of the practical problems surrounding transparency .

This section consisted of two major topics. In the first topic (10.1), the "general" transparency of competition legislation was analyzed. Under this topic, the extent to which legislation on the investigation process is clear, easy to access, and predictable, or what kind of unpredictability is common, was analyzed by providing concrete evidence. In the second topic (10.2), practical problems in investigation processes were analyzed. In this section, allegations and investigatory processes, access to cases, and uncertainty during enforcement were elaborated by referring to sample cases.

10.1. Transparency of Competition Legislation

10.1.1. Availability of Primary and Secondary Legislation to the Public

Concerning the competition law in Turkey, the primary legislation is the constitution (Article 167) and law number 4054 on the Protection of Competition, which also establishes the Turkish Competition Authority. Similar to other laws and amending legislation, law number 4054 and any regulation amending this law entered into force after being published in the Official Gazette. In addition to these, the secondary competition legislation in Turkey, which includes regulations, communiqués, and

any amendments thereof, is also published in the Official Gazette. Hence, these are all open to the public.

Aside from these, as the competition law involves case law, and given that the borders of basic regulations are too broad to allow differing implementation for each case, indirect sources (Competition Board and court decisions) are as important as primary and secondary legislation. Article 53 of law number 4054 sets forth that the Competition Board's decisions must be published via the authority's official website without referring to parties' commercial secrets and must be reasoned.[19] Based on this provision, the Competition Board's decisions and legal court decisions (particularly administrative court decisions regarding Competition Board decisions) are openly published on the Competition Authority's website.[20]

Accordingly, it can be said that it is a legal obligation for the Competition Authority to announce all regulations relating to the competition investigations to the public. This obligation is performed by the Competition Authority and interested parties are able to easily access such information. However, non-disclosure of certain regulations, which are crucial from the point of competition investigations, could overshadow successful practices in this field.

In this regard, the most important example noticed during our study is the communiqué regulating on-the-spot inspection procedures of Competition Authority experts, which is titled "Regulation of the Competition Board on the Procedures and Principles for On-The-Spot Inspections of the Competition Authority, within the implementation framework of the law number 4054 on the Protection of Competition" (Regulation of On-The-Spot Inspection). This regulation has never been shared with the public and is kept as an intra-authority document.[21] Information concerning existence of the Regulation of On-The-Spot Inspection was gained through the Competition Board member Fevzi Özkan's counter-vote included in the Competition Board's TTNet On-The-Spot Inspection[22] decision.

From the counter-vote, although it is understood that there is a section on the "Rights of Undertakings" on the Regulation of On-The-Spot inspection, there is no definite information as to its content. However, as per the understanding, this regulation sets forth the duties and rights of Competition Authority experts during on-the-spot inspections. As the content of this regulation is unknown by the under-

19. In practice, in order to inform concerned parties and public at the earliest convenience, the decisions regarding procedures such as investigations and second-phase reviews, which are eligible to result in administrative penalties, are published on the website as announcements/short decisions whereas the reasoned decisions are added to the website whenever they are written/prepared.

20. Detailed evaluation concerning the transparency of Competition Board decisions will be provided in the following sections.

21. From the wording included "For Service Purposes", it is understood that this document is an intra-authority document.

22. Competition Board's Decision dated 18.07.2013 and numbered 13-46/601-M.

takings, the Competition Authority experts' compliance with the rules of the determined lines cannot be inspected, and it becomes more difficult to identify potential unlawful practices. It is clear that non-disclosure of regulations relating to fundamental rights and liberties negatively affects the transparency of the Competition Authority.

The fact that the existence of such an important regulation that impacts the fundamental rights and liberties of undertakings and employees came to the public attention totally by coincidence, and the fact that the content is still unknown, trigger questions for the Competition Authority as to whether other "secret" regulations, such as the communique on On-The-Spot Inspection, exist or not. Workshop participants also stated that they had information about the existence of a similar regulation on the evaluation of negative clearance and exemption applications. It's possible that these ideas were merely rumors; however, under conditions without clarity, rumors are inevitable.

10.1.2. Transparency and Certainty of Implementation Processes

The agency that is responsible for the implementation of the current competition law in Turkey is the Competition Authority and its main decision-making body is the Competition Board. The basic duties and powers of the Competition Board are stated in Article 27 of the law. These duties and powers could be classified into two basic groups – "activities relating to the implementation of competition rules", i.e. executive functions such as (preliminary investigations, investigations, decisions on negative clearance and exemptions, review of mergers and acquisitions, etc.), and "duties and powers within the operations of the agency", i.e. administrative functions (determination of budget and staff policies, etc.). Among these two groups, the carrying out of executive activities in line with pre-determined and transparent processes is of critical significance. In absence of well-defined procedures regarding implementation, the emergence of arbitrary and unequal practices among agencies are highly likely.

Turkey's competition legislation clearly determines procedural rules to be followed by the Competition Board as to both executive and administrative functions. Section 4 of Law 4054 clearly set forth in detail the procedures governing basic implementation processes such as preliminary investigation, investigation, second-phase review, evidence collection, defense steps and decision-making. Most importantly, the authority's freedom of decision is restricted to the greatest extent through clearly defining all processes and associated time frames as well as requirements from any relevant and third parties regarding these procedures. The goal of this framework is to prevent ambiguities regarding the implementation processes of competition law.

Although legal regulations are quite advanced, there are ambiguities in practice. Some of them will be evaluated in detail below.

Ambiguities Regarding Time Frames

Although a general frame of clarity and transparency are provided by the legislation, various problems may occur with regard to compliance with time frames. The outstanding example is the timing that passes until clearance for mergers and acquisitions. Within the context of law number 4054, in relation to a merger/acquisition which does not need to be taken to the second-phase of review, following the submission of all required documents to the Competition Authority, a 15-day period is granted for the preliminary review. Further, the law sets forth that, in the event that the Competition Board does not respond to this application and/or does not take any actions, the transaction would be accepted to be cleared after 30 days following the notification. In practice, the Competition Board generally decides on merger and acquisition applications before the expiry of 30 days.

Time frames mentioned start with the duly and complete submission of notification forms prepared in accordance with law number 4054 and communiqué number 2010/4 to the Competition Authority's registry. In the case of a deficient submission, the Competition Authority may demand additional information and documents and, since the application is deemed void until the insufficient information and documents are completed, the 30-day time frame does not start.

Therefore, what constitutes a whole and complete submission gains importance. Yet in some instances, even if the questions on notification forms (annexed to communiqué number 2010/4) are answered fully, additional information that is not included in the forms could be requested from the undertaking's agency in accordance with the features of the transaction and demands of reviewing reporters. It is understood that, if a piece of information not included in the notification form (an item that is typically not asked of undertakings) is requested, time limits stated in the law are not applied and/or processed. This fact can cause ambiguity for undertakings that fully complete the form and assume to have provided satisfactory responses to all questions, only to find out that the Competition Authority has requested information and documents not specified in the forms, thus extending the decision-making process.

Additionally, in relation to instances where the Competition Authority requests information and/or opinions from any third parties or public authorities – apart from the applicant undertakings– it is understood that durations are stopped and not processed until the relevant information and opinions have been submitted to the Competition Authority. In case of deficiency within the application by the applying parties, it may be normal to accept such applications as void and the clock will not start until the deficiency is fixed. However, the fact that information requested from third parties affects the Competition Board's decision-making process in relation to the relevant subject creates an ambiguity from the perspective of the applicants. As a separate note, in practice, the applying parties are informed of neither the pending status of their appli-

cation due to the request of information/documents from third parties nor the fact that a decision will only be made after these third parties' submission.

As there could not be any valid mergers/acquisitions without the Competition Board's clearance,[23] within the context of law number 4054 and in order to immediately clarify the outcome of the merger or acquisition, lawmakers decided that these applications must be approved or must be taken into second-phase review within 30 days. Even though this rule is applied to most of the applications, in certain instances as described above, problems such as suspension of applications for a long time may occur. As might be expected, it is crucially important that time frames for the merger or acquisition process be predicted by the parties beforehand. If the relevant time frames are long and unpredictable, it could have a direct impact over the transaction value and even cause the parties to abandon their application.

Processes and Ambiguities Regarding Processes

Law number 4054 clearly regulates procedures governing preliminary investigation, investigation, and second-phase review work. An undertaking that is subject to a competition investigation (preliminary investigation, investigation, or second-phase review) can gain information about the procedure it is facing simply by examining law number 4054. Apart from this, the Communiqué of the Competition Board on the Working Procedures and Principles of the Competition Authority that came into force on June 21, 1997 clearly regulates these processes in detail. Outside of the written law, there are certain ambiguities in practice. This section will review two of them.

One of the basic issues of uncertainty with regard to the competition legislation in Turkey regards the question of which actions would trigger the implementation of these rules. Competition Law grants full authorization to the Competition Board as to initiate a preliminary investigation, investigation, or take a merger/acquisition application to second-phase review. This situation is common based on the fact that the Competition Board is the executing and decision-making body in relation to the rules introduced by the Competition Law. However, the law did not concretely determine under which conditions the Competition Board could initiate a preliminary investigation, investigation or take a merger filing into second-phase review, granting the Competition Board great freedom. The relevant provision of the Competition Law, Article 42, sets forth that:

"In case the claims put forward in the applications, denunciations or complaints are regarded by the board as serious and sufficient, informers or complainants are notified in writing that the claims put forward have been deemed serious and that an inquiry has been initiated."

23. Mergers and acquisitions within the scope of the "Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, No: 2010/4"

However, there is no regulation on the objective criteria the Competition Board would employ to determine if the claims are "serious and sufficient." The Communiqué regarding Working Procedures and Principles of the Competition Authority does not have an objective criterion on this subject. Therefore, it is possible to argue that there is no clear indication about which concrete factors would be taken into account regarding the initiation of investigation/second-phase review, following the decision on a preliminary investigation or a merger/acquisition filing.

The fact that the criteria necessary to initiate an investigation/second-phase review of the Competition Board are not clearly defined by law could cause various expenditures for companies subject to investigation/second-phase review and this could even stand out as a "sanction" for the companies concerned. Even if the Competition Authority does not impose sanctions at the end of the investigation, initiating such an investigation and second-phase review may tarnish the reputation of the enterprise in the eyes of consumers and the public, harm their relations with investors, affect the value of any merger and acquisition operations of the enterprise, and parties may even forgo such transactions. [24]

Within this context, the decision[25] of the Competition Board regarding the acquisition of Lafarge Aslan Çimento (Cement) by OYAK constitutes a good example concerning the launching of non-transparent investigations. After the decision to sell Lafarge Aslan Çimento to OYAK was made, in accordance with Article 10 of the Competition Law, the merger filing made to the Competition Authority was taken into second-phase review following the preliminary investigation.

The second-phase review was triggered by the definition of the "relevant geographical market" in the narrowest terms, in which negative competitive effects could be observed. The narrower the definition of the relevant market during the acquisition examinations, the higher the market share of the merging parties and possible negative competition effects. Therefore, the possibility of a negative decision by the Competition Board increases. The relevant market in this decision is determined by the implementation of the "10% test" that was also used in previous cement acquisition processes, but with amendments to the concerned rules. In this test, cities to be included in the relevant geographic market are determined in two ways: 1) an undertaking surpasses the 10% market share of the cities in which it makes sales, or 2) the city surpasses 10% of the market share among the sales of an undertaking. Cities that meet one of these conditions are included in the relevant geographic market.[26]

In the OYAK/Lafarge Aslan acquisition, Competition Authority reporters and the Competition Board receiving their advice, stated that the 10% test – which was formerly

24. For a waiver sample, please see the Decision of the Competition Board dated 24.04.2007 and numbered 07-34/351-131.

25. Second-phase review decision dated 18.11.2009 and numbered 09-56/1338-341.

26. The 10% test was used on the decision acquisition of Deniz Çimento by Bolu Çimento, decision dated 24.04.2007 and numbered 07-34/352-132.

used – was applied in the preliminary investigation, and Adapazarı, Sakarya (the primary market) and Bolu (the secondary market) were determined as the geographical market. This means that among the two determined markets, the first includes two cities while the second one consists of only one. When the interim decision, on which no specific detail was revealed under the excuse of protecting commercial secrets, is carefully analyzed, it can be seen that the 10% test was applied differently compared to the other cement cases. In other cases, cities that meet one of two criteria were determined to be the relevant market; however, in this case, cities that meet both criteria were defined as the relevant market. When the method was changed, the relevant market was limited to one or two cities instead of seven or eight, and, thus, the market share of the relevant party appeared to be higher.

In the decision which concludes the preliminary investigation, a scientific explanation regarding why the test was applied differently for the first time and the reason for defining the market in such a narrow way was not shared with the parties. This test was not mentioned in the second-phase review report or within the Competition Board's decision; it was only described in the defense statements section. What's more, the market definitions were made using an assessment that has no proven scientific validity. Designing the test in a way that it can be altered case-by-case and/or significantly changing the application type of the previous tests makes it difficult for parties to form an opinion regarding the evaluation of the acquisition process.

Similar instances arise in the Competition Board's decisions to either initiate or not initiate an investigation and/or second-phase review. A judicial review is possible when the Competition Board decides not to initiate an investigation or give approval, explicitly or tacitly, of merger/acquisition processes (since these represent preliminary investigation decisions). There are many cases in which the administrative courts[27] overturned the Competition Board's decision to not initiate an investigation.[28] In such cases, a company that continues its economic activities following the approval of the Competition Board could be penalized by the administrative jurisdiction because it operated against competition. One of the best examples of such cases is the Turkcell Vehicle Tracking Investigation.[29]

In this decision, the GSM operator Vodafone filed a complaint to the Competition Authority claiming that its competitor, Turkcell, abused its dominant position in GSM vehicle tracking services. However, the Competition Board decided not to initiate an investiga-

27. With Article 63 of Law number 6352, dated 5.7.2012, the judicial authority was changed against the decisions of the Competition Board and administrative court was authorized instead of the Council of State. Because of this change, "administrative jurisdiction" was used to include past and current practices.

28. For these cases see Council of State 13. Chamber's 18.4.2011 dated and E.2008/4519, K.2011/1655; 08.05.2012 dated and E. 2008/8139, K. 2012/963; 2.4.2013 dated and E.2009/4016, K. 2013/901 numbered decisions, Council of State, Plenary Session of the Chambers for Administrative Cases' 20.3.2013 dated and E. 2008/3070, K. decision numbered 2013/982.

29. Competition Board's Decision on Turkcell Vehicle Tracking Investigation dated 19.12.2013 numbered 13-71/988-414.

tion against Turkcell in 2008. While Turkcell naturally interpreted this decision to mean it was not operating against the competition and continued its operations as before, complainant Vodafone appealed this decision, and the Council of State overturned the Competition Board's decision. Pursuant to the Council of State's decision, the Competition Board re-evaluated this issue, and, contrary to the previous decision, the Competition Board initiated an investigation against Turkcell in 2013. At the end of the process, the Competition Board resolved to fine Turkcell "for violating Article 6 of law number 4054 on the Protection of Competition," and "imposed an administrative fine of 39,727,308.20 TRY which corresponds, according to the assessments made by the Competition Board, to 4.5% of Turkcell's gross annual revenue in 2012".

It is clear that this process is also not compatible with the principle of legal certainty. In this instance, the concerned undertaking (Turkcell) had operated without thinking of violating the law for nearly five years from the preliminary investigation to the re-initiation of the investigation following the appeal, and it was later faced with a hefty administrative fine. What's more, the finalization of this decision before the administrative jurisdiction[30] means that other undertakings competing in the vehicle tracking market were exposed to Turkcell's unlawful practices for over five years.

The standard of what constitutes "evidence" in the decision-making process of the Competition Board when assessing whether to launch a preliminary investigation, investigation, or when taking a merger filing into second-phase review, is not clear. The wording "serious and sufficient" included in Article 42 of law number 4054 stands out as an open-ended standard that harms the transparency of practices. At this point, any decisions of the administrative courts to overturn the Competition Board's determination to not initiate an investigation are extremely important; for instance, the Council of State's 13th Judicial Chamber's overturn of the Competition Board's Renault Trucks decision.[31]

As mentioned above, it is argued that there is a need for a consistent and justified standard of evidence in order to avoid ambiguities that may emerge from annulment decisions. The Competition Board, which is authorized by the enforcement of law number 4054 and was established to specialize in competition law and also receives a certain percentage of the public budget, is the most competent entity to determine implementation standards. Including detailed legal and economic assessments in the decisions of the Competition Board concerning the types of evidence that can lead to doubt or suspicion under certain circumstances would certainly help strengthen the integrity of these decisions, thus eliminating any questions regarding their legal validity and reducing the administrative jurisdiction's interference with the Competition Board's discretion.

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30. Turkcell appealed for a reversal of the Competition Board's decision. The case is still ongoing in the administrative court.

31. Competition Board's decision dated 25.02.2009 and numbered 09-08/155-48.

10.1.3. Sufficiency and Public Availability of Decisions and Legal Basis

According to Article 48 of the Competition Law, the Competition Board's decision shall contain the grounds and legal basis that form the decision. Article 52 provides a detailed list of subjects that must be included in the Competition Board's decisions.[32] The same article emphasizes that the duties imposed on and rights granted to the parties within the decision must be explicitly written without lending any doubt or hesitation. Article 53 of the Competition Law states that the Competition Board's decision should be served to the parties and published on the Competition Authority's website without disclosing the trade secrets of the parties.[33]

It can be argued that the Competition Board's decisions, the general framework of which is based on the above-referred articles, are more satisfying compared to other competent authorities' decisions, including even the supreme courts. Despite the relative advancements in transparency in decisions made by the Competition Board, problems in relation to this transparency in practice can still be discussed. This section presents the analysis of two important cases.

Obscured Sections in Reasoned Decisions

The most significant practical problem regarding the availability of the Competition Board's decisions to the public is related to the trade secrets within these decisions. When data are removed from the Competition Board's decision on the basis of Article 53 of the Competition Law because they are considered to be trade secrets, it becomes impossible to find out the grounds of the decision. Picture-1 below illustrates one page of the Competition Board's decision on the ALCATEL-LUCENT/NOKIA acquisition that can be accessed on the Competition Authority's website.[34] This decision is about the approval of the demand by Nokia Corporation for the acquisition of Alcatel-Lucent as sole owner. In this decision, the Competition Board approved this operation by analyzing the market shares of the parties. It is stat-

32. According to the article, Competition Board decisions involve the following points:
a) Names and surnames of the members of the Board who made the decision,
b) Names and surnames of those who carried out the examination and investigation,
c) Names, titles, residences and distinguishing characteristics of the parties
d) Summary of the claims of the parties,
e) Summary of the examination and of the economic and legal issues discussed,
f) Opinion of the reporter,
g) Evaluation of all evidence and pleas submitted,
h) Grounds, and the legal basis of the decision,
i) Conclusion,
j) If any, writings about the dissenting votes.

33. Paragraph 2 of Article 53 of the Law numbered 4054 states that "Decisions of the Board are published (Amended phrase: 17.09.2004-5234/Article 29)26 on the internet page of the Authority in such a way not to disclose the trade secrets of the parties."

34. Competition Board's decision dated 28.07.2015 and numbered 15-32/453-137.

ed that this operation would not cause a competitive problem regarding market shares; the acquisition would not create a significant concentration in the market. As shown in this picture, because the relevant market shares and competitive companies' names are not disclosed in the decision, this decision does not allow for an informed opinion to be formed by interested parties concerning similar merger-acquisition applications. In addition, it is unclear how a third party claiming that the operation in question is causing competitive concern can appeal this decision, or how administrative courts would approach these decisions even if they were appealed. At this point, undertakings that argue that the Competition Board's decision is not in their favor could claim that their right to defense is restricted because of the spoliation of trade secrets. [35] This becomes an argument against the Competition Board decisions serving as a source of Competition Law, which is alleged to be one of the most important functions it fulfills.

Picture 1. A page from Competition Board decision number 15-32/453-137, dated 28/07/2015

15-32/453-137

Teşebbüsler	Ciro (Milyon Avro)	Pazar Payı (%)
(.....)	(.....)	(.....)
(.....)	(.....)	(.....)
NOKİA	(.....)	(.....)
ALCATEL	(.....)	(.....)
Toplam	(.....)	(.....)

Kaynak: Bildirim Formu

Tablo 2: Teşebbüslerin 2014 Yılı Türkiye İşletim Destek Sistem Yazılımı Satışları ve Pazar Payları

Teşebbüsler	Ciro (Milyon Avro)	Pazar Payı (%)
(.....)	(.....)	(.....)
(.....)	(.....)	(.....)
NOKİA	(.....)	(.....)
ALCATEL	(.....)	(.....)
Diğerleri	(.....)	(.....)
Toplam	(.....)	(.....)

Kaynak: Bildirim Formu

35. Decisions of the European Commission on various airline companies, as a result of investigations, were appealed to the European Court of Justice by the concerned undertakings. One of the reasons of the appeal was the violation of the right of defense of undertakings because of the lack of clarity of the European Commission's decision. At the end of the appeal, the European Court of Justice ordered that the lack of clarity of the European Commission's decisions violates the right of defense of undertakings. See ECJ's T-9/11 Air Canada, T-28/11 Koninklijke Luchtvaart Maatschappij, T-36/11 Japan Airlines, T-38/11 Cathay Pacific Airways, T-39/11 Cargolux Airlines International, T-40/11 Latam Airlines Group and Others, T-43/11 Singapore Airlines and Others, T-46/11 Deutsche Lufthansa and Others, T-48/11 British Airways, T-56/11 SAS Cargo Group and Others, T-62/11 Air France-KLM, T-63/11 Société Air France and T-67/11 Martinair Holland v Commission decisions.

As mentioned above, because Competition Law is a case law, Competition Law decisions are very important sources of the application of the Competition Law. These decisions set a legal precedent for undertakings in similar positions. For this reason, it is extremely important for these decisions to be disclosed to the public in order to provide the grounds on which an operation or transaction is legal or not, for transparency of Competition Authority practices, legal predictability, as well as competition advocacy.

According to Article 53 of the Competition Law, although only trade secrets should remain undisclosed under the reasoned decisions of the Competition Board, it is observed that other types of information are also hidden. As seen in the Mey İçki [36] decision of the Competition Board, the dissenting vote of Competition Board Member Dr. Metin Aslan and his reasons behind his vote were obscured in the document despite the fact that they did not constitute any trade secrets. Broadening the lines of the article of the law on protecting trade secrets of undertakings would have a negative effect on the transparency of Competition Board decisions.

Issues on the Content of Decisions

The Competition Board's decisions can lead to certain complications which are often unclear and tend to omit certain important points relating to the relevant case. With regard to this issue, there will be evaluations: (i) in cases in which decisions made against the reporter's opinion and reasons for not accepting the reporter's opinion are not explained; (ii) in cases in which violations themselves and how to end these violations are not clearly mentioned (iii) in cases in which there is insufficient information on decisions of the merger and acquisition, particularly following Communiqué number 2010/4; (iv) in cases with issues regarding the nondisclosure of one party's defense with other parties and the general public.

(i) In some decisions of the Competition Board, the board decides contrary to the opinions of reporters who prepared the preliminary investigation, investigation, and second-phase review. It is clear that the Competition Board is not bound by the opinions of reporters, and there is often no description of why the Competition Board decided contrary to the reporters' opinions. A recent example of this issue is the Competition Board's decision on Ortadoğu Alüminyum.[37] In this decision, it is known that the reporters thought that an investigation should be initiated. However, Ortadoğu Alüminyum and PVC Plastik İmalat San. Tic. Paz. Ltd. Şti, one of three parties that were under investigation with allegations regarding the violation of Article 4 of law number 4054, was excluded from the investigation process. There is no concrete information regarding why the final decision was contrary to the opinions of the reporters.

36. Competition Board decision dated 12.06.2014 and numbered 14-21/410-178.

37. 39 Competition Board's decision dated 16.10.2015 and numbered 15-38/621-213.

Also, in the decision of the allegations against Akdeniz Elektrik Dağıtım A.Ş., Boğaziçi Elektrik Dağıtım A.Ş., Çamlıbel Elektrik Dağıtım A.Ş., Uludağ Elektrik Dağıtım A.Ş., Trakya Elektrik Dağıtım A.Ş., Çoruh Elektrik Dağıtım A.Ş. and Fırat Elektrik Dağıtım A.Ş to restrict competition on investments and supply of services in their responsible areas, reporters[38] stated that a preliminary investigation should be conducted. However, the Competition Board decided that there was no need for action, but failed to explain why the decision contradicted the opinions of the reporters.

Within the frame of the Competition Authority's routine practices and its preliminary investigations, investigations and final decisions, nearly all necessary research and evaluations are performed by experts of the Competition Authority, who are assigned on a dossier basis. Therefore, the deepest and the most comprehensive knowledge about cases is held by the appointed reporters. For this reason, reports prepared by reporters on a case are the most basic and essential information for the Competition Authority. In fact, the Competition Board essentially makes its decisions according to information received through these reports. Therefore, it is assessed that when the Competition Board decides in opposition to the reporters, stating its reasons would be a right practice in order to increase transparency. This would not only help to guide the Competition Authority experts in later dossiers, but may also preclude claims that an undertakings right of defense has been restricted or forestall speculations that may arise in the public concerning the decision.[39] Hence, this issue was proposed as an item to be added to the agenda by external stakeholders in the 2014-2018 Strategic Plan document[40] and, thereby, the Competition Board accepted that there is a deficiency in this issue.

(ii) As mentioned above, it is a requirement for the Competition Board decisions to be reasoned, and according to Paragraph 2 of Article 53 of the Competition Law, the type of violation and how to end that violation must be clearly stated. However, in some Competition Board decisions, the type of violation is not stated clearly or reasons of some evaluations and determinations are not shared. For instance, in the Migros/Petrol Ofisi decision[41], the following statement was provided:

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38. 40 Competition Board's decision dated 18.03.2015 and numbered 15-12/169-79.

39. Because undertakings prepare their written defense reports within the context of the Law numbered 4054 according to the reports and opinions of Reporters. It could be evaluated as restriction of defense right of undertakings in which the Competition Board decides according to issues that had not been notified at reports and opinions.

40. CB 2014-2018 Strategical Plan, pg. 27 Link:

http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fGüncel%2fraporlar%2fplan11.pdf

41. Respective process is on the acquisition of 150 shops at petrol stations of OMV Petrol Ofisi A.Ş. as proprietor, right of usufruct or renter to Migros Ticaret AŞ. Competition Board's Decision numbered 14-71/321-129 and dated 08/05/2014

"...when the issue of the investigation took place, it was possible that Migros' buying volume would increase; however, it was accepted that such buying power in the supply market would not reach a level of concern for competition."[42]

In this decision, there was no information regarding how the Board reached the conclusion that the increase in buying power would not reach a level of concern for competition. The decision also did not include an analysis regarding buying power.

(iii) Workshop participants stated that, particularly following Communiqué number 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, decisions on giving permission for mergers and acquisitions during the preliminary investigation became short and had little to no content. It is expressed that such short decisions with insufficient content will not lead to precedents for competition law and will not guide future, similar cases.

(iv) Finally, in these decisions, it is observed that there is a small space spared for the defense statements of parties and the evaluations of the Competition Board on such defenses. It is believed that observing and evaluating the Competition Authority's approach towards these defense statements and the representatives defending them would be very beneficial in promoting the anticipation of the limits of acceptability for private undertakings' activities and in contributing to the development of the competition law in Turkey. Also, leaving more space for undertakings' defenses in the Competition Board decisions and providing comprehensive and sufficient answers to these defense statements would allow undertakings to more readily express themselves before the board. In some decisions of the Competition Board, answers given to the defense do not discuss all of the issues in the defense statements. For instance, the Mey İçki decision[43]:

"From the email of the Sales Chief to the Ege Regional Director, it is understood that competitors could give better discounts than Mey İçki on some occasions. Further, as mentioned in the defense of Mey İçki, while competitors could make higher discounts for their restricted product portfolio, Mey İçki's broad product portfolio does not allow such discounts. The wording of the defense is as follows:

-It is understood from the document that competitors have to make higher discounts than Mey İçki in order to insert their competing products to point of sales. On the other hand, Mey İçki's portfolio of different product segments allows them to present themselves in all price categories at sales points and this increases the bargaining power of Mey İçki vis-à-vis sales points."[44]

The Competition Board decisions are primary sources concerning the application

42. Mentioned decision, paragraph 310.

43. Competition Board's decision dated 12.06.2014 and numbered 14-21/410-178.

44. Mentioned decision paragraph 301.

of the competition law. By taking into account the Competition Board's practices since 1997, it is possible to argue that the Competition Board's decisions are the most comprehensive and detailed analyses within the regulatory agencies in Turkey. However, the abovementioned issues and practices negatively affect Competition Board decisions.

10.1.4. Competition Authority Officials' Speeches and Predictability of Competition Authority Policies

The written statements and speeches of the Competition Authority officials are beneficial for undertakings and consumers on the implementation of competition rules and compliance with these rules in order to avoid uncertainties. In addition, such statements are a significant part of the mission of competition advocacy by forming a communication channel between implementers of the competition rules and respondents of these rules.

Article 30 of the Competition Law grants the representation power to the president of the Competition Board. This power is generally used to announce the Competition Board's decisions as well as regulations and amendments in relation to the Competition Board via the website. The Competition Authority's policies, competition advocacy, and the interpretation of competition rules are publicly disclosed by both the president of the Competition Board and other authorized Competition Authority officials.[45]

Furthermore, regular reports and bulletins, the president's annual competition letter, and other such publications published via the website inform the general public about the basic policies of the Competition Authority. Also, the Competition Authority frequently organizes activities, such as conferences, symposia, and communiqué contests, and has a high level of participation due to its coordination with various universities and public agencies. In particular, the events which Competition Authority officials attend as speakers are beneficial for the information given regarding the Competition Authority's approaches on cases.

One of the most important statements in terms of the activities conducted by the Competition Authority is the statement on the research processes,[46] which are the basic function of the Competition Authority. The Competition Authority's officials' statements to the general public generally disclose the Competition Board's decisions or ongoing and pending processes within the Competition Board. These state-

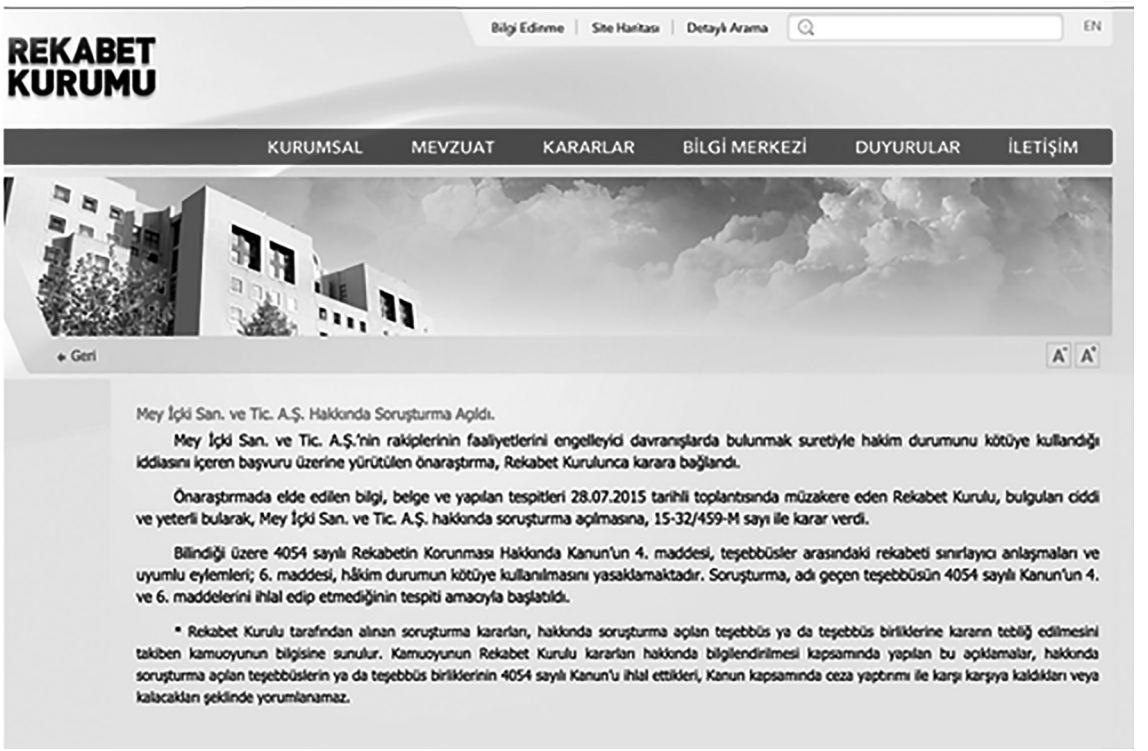
45. For instance, Chairman of the Competition Board Mustafa Parlak previously warned via media about professional trade bodies' acts that violate competition. Please see

http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=6461671&tarih=2007-05-05)

46. 48 The term "investigation process" is used to express the stages of preliminary inquiry, investigation, final decision, concentration, negative clearance and exemption.

ments include very basic and limited information, with no details being divulged on the relevant processes (for a sample statement, see Picture 2). This limitation can be explained as the need to conduct these processes in confidence, to prevent the creation of a negative perception among the general public about the party under investigation before the final decision, to keep the trade secrets of respective undertakings confidential, and, most importantly, to avoid giving an opinion before the final decision and, thus, avoid reflecting any bias on part of the Competition Authority.

Picture 2- Example of a Competition Board's Statement



Similarly, the Competition Authority informs the general public on applications for mergers and acquisitions via its website. This information contains data on which company has applied to take control of which company, the application date, the sector of the targeted company, and related information. This practice is done in order to allow third parties who have interest in the investigation to share information and their opinions with the Competition Authority.

This practice is valid for all mergers and acquisitions; however, the process of acquisition of ATV and Sabah Newspaper by Zirve Holding was not published on the Competition Authority's merger-acquisition page. Because there has still been no official explanation for this practice, it gives the impression that transparency and independence can be suspended in certain cases.[47]

In conclusion, considering all of the abovementioned activities, it is possible to state

47. http://realtime.wsj.com/turkey/2013/12/26/sabah-atv-satisinda-gozden-kacan-ilginc-detay/

that the Competition Authority seeks to inform the respective parties and the general public on its policies. However, the need for neutral, independent, and transparent work of the Competition Authority occurs during times of crisis and debatable issues, and at these times, the Competition Authority failed to deliver expected information.

10.2. Transparency of the Investigatory Process in Turkey

In addition to the transparency of the antitrust legislation as evaluated from different angles in the first part, the transparency of the Competition Authority's investigative processes, which constitute the main enforcement area of this legislation, is highly significant. The Competition Law assigns a quasi-judicial duty to the Competition Board in relation to the investigations. Therefore, maintaining a high level of transparency in the Competition Board's investigations has particular importance in ensuring the undertakings's right to a fair trial as regulated in both the constitution and the European Convention of Human Rights.

The Competition Law clearly regulates the investigation process under article 40 and the following articles. In this regard, undertakings have knowledge of the stages in the investigation process, the time period that the stages will be completed in, their rights to defend themselves at each stage, and the potential enforcement types after the end of these stages.

Furthermore, the Competition Board's decision-making process is also explained openly and in detail under the Competition Law and respective legislation. Thus, an undertaking under an investigation initiated by the Competition Board is aware of the phases and its rights during these phases.

In spite of the above explanations, there are some problems faced in practice. This section discusses the uncertainties and contradictions concerning the allegations and defense process, access to cases, and enforcement that is idetifable in practice.

10.2.1. Transparency of Allegations and Defense Process

Law number 4054 enables undertakings to submit one verbal and three written defenses. However, it is important to determine whether these genuinely provide a possibility for undetakings to defend themselves or if they are just formalities. Therefore, this option of written and oral defenses provided by the law should be thoroughly and objectively examined to understand if it ensures undertakings' rights of defense.

In order to evaluate this issue, a few things must be deciphered – whether undertakings' defenses have been considered by the Competition Board and how much these defenses have affected the Competition Board's decision, whether sufficient

information about the allegations has been provided to undertakings, and whether complainant undertakings could have an opportunity to participate in the investigation. Otherwise, in practice, it would be meaningless to have the defenses within the scope of the investigation process regulated under the law. It is clear that, due to having a quasi-jurisdiction function throughout the investigation process, the Competition Board should avoid any implementations in carrying out this process that would constitute a violation of defense rights, which are recognized as a basic human right and secured by both the constitution and the European Convention of Human Rights. In this context, the following sub-section involves evaluations regarding the transparency of the allegations and evidence as well as the undertakings' right of defense.

Preliminary Investigation Report and FIrst Written Defense

One of the most important practices in the defense phases of an investigation process, which should be explained and may have a negative impact on the transparency of the investigation process, is that of withholding (at least somewhat) preliminary examination and preliminary investigation reports from undertakings under investigation. The Competition Board decides to initiate an investigation against an undertaking on the basis of these reports created by appointed reporters. As explained, it is accepted that the allegations need to be considered "serious and sufficient" in order for the Competition Authority to initiate an investigation. In the previous sections of this report, it is pointed out that such concepts are not clear, giving rise to uncertainties. Moreover, both not sharing the reports indicating "serious and sufficient" allegations with the undertakings and demanding their first written defenses without any knowledge of these allegations cause a great deal of harm to the transparency of these investigations.

Article 43 (2) of the Competition Law entitled the "Commencement of an Investigation by the Board" is as follows:

> "The Board notifies the parties concerned about the investigations initiated by it, within 15 days of issuing the decision for the initiation of investigation, and requests that the parties submit their first written pleas within 30 days. In order to enable the commencement of the first written reply period granted to the parties, it is required that the Board forwards to the parties concerned this notification letter, accompanied by adequate information as to the type and nature of the claims."

The essential condition required in order for parties under investigation to submit written defenses is knowledge of the allegations against themselves ("equality of arms principle"[48]). The above article from the Competition Law clearly regulates

48. The equality of arms principle is defined by YEŞİLOVA as follows: "maintaining a fair procedural balance among parties; having reasonable opportunities for parties to be involved in cases and being

the method of notification in relation to an investigation. In order to properly notify undertakings that an investigation has been initiated by the Competition Board, undertakings must be presented with all of the information and documents that are considered "serious and sufficient". In the process of submitting their first written defenses, this information is indispensable in gauranteeing the right of defense to parties under investigation.

Therefore, in Article 44 (2) of the law number 4054, it is stated that:

> "Those parties that are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the Authority in connection with themselves, and if possible, a copy of any evidence obtained."

In this regard, we assume that this article also includes the preliminary investigation report that forms the basis of initiating an investigation. Thus, it is a rule that the relevant undertakings have access to all information and documents in relation to the claims. An exemption from this rule can be adopted only by law; however, there is not any exception under law number 4054.

In practice, an investigation notice including a summary of the allegations is sent to the undertakings under investigation and, sometimes, some information and documents in the preliminary investigation report are cited in the investigation notice. Nonetheless, the preliminary investigation reports are not shared with the undertakings because they are considered to be "internal correspondence" and/or they contain trade secrets. As a consequence, undertakings cannot obtain sufficient information about the scope of the investigation and, due to this uncertainty, they have concerns about the extension of the scope of the investigation. Thus, in order to refrain from sharing more information than necessary, they must summarize, using very general expressions, in their first written defenses that they have not violated the Competition Law. This turns the first written defense into a formality instead of an important stage, and causes harm to the undertakings' rights of defense.

The Second and Third Written Defenses and Analysis of Reporters

Following the submission of the first written defenses by undertakings, the investigation report with the detailed evaluations made by the reporters regarding the collected evidence and the claims against the undertakings is prepared and sent to parties who are then requested to submit their second written defenses. After the submission of the second written defenses, the reporters present their additional written opinion in response to the undertakings' defenses and then the undertakings prepare their third written defenses against this opinion. The investigation

informed about all evidence and statements of the case and the ability to comment and discuss them." See YEŞİLOVA, Bilgehan, Yargılama Diyalektiği ve Silahların Eşitliği, TBB Journal, Issue 86, pg.53-54.

report and the additional written opinion prepared by the reporters are shared with the undertakings.

By nature of the competition law, conducting detailed research is inevitable, especially in investigations in which a market is defined and the market power is analysed. The reporters try to discover the facts by carrying out highly detailed evaluations and market analysis as well as deep and detailed economic analyses in their investigation report and additional written opinion. In some circumstances, these analyses consist of research with detailed sets of data to calculate demand and supply elasticity. The Competition Board then bases its decision on the reports provided by these reporters. It is extremely important to share the research that forms the basis of the Competition Board's decisions with the parties in order to be transparent and objective as well as ensure undertakings' rights of defense. However, in practice, it is observed that the analysis technique and sets of data have not been shared with the parties in some investigations and/or final examinations.

This lack of transparency creates an information-based asymmetry between the reports, acting as prosecutors, and the undertakings, acting as defendants. Hence, this process may violate a fundamental right of the undertakings, namely the principle of equality of arms. Extremely complex analysis and calculation methods are used to define the relevant product and geographic markets as well as to carry out the dominant position analysis. The results of these analyses are used as the basic legal grounds of the decisions made by the board. When the data and methods used in these analyses are not effectively shared with the parties, undertakings are not able to examine their validity.

Effect of the Hearing

According to law number 4053, the undertakings' final right of defense is a hearing. The hearing is not an obligatory defense, but it can be held at the parties' request or, even if they do not submit such a request, the Competition Board can decide to hold a hearing. The hearing is extremely important since it is the only channel enabling the parties to directly communicate with the Competition Board. Communiqué No 2010/2 regulates in detail how these meetings will be held, how the parties, complainant, third parties, experts and witnesses will share opinions, and what kind of evidence will be provided[49].

However, in practice, it is observed that hearings occur by once again summarizing undertakings' written defenses before the Competition Board, and they do not sufficiently contribute to the undertakings' opportunity to defend themselves or to the enlightenment of the concerned case. Article 48 of law number 4054 sets forth that the Competition Board shall reach to a decision within the day of the hearing. Therefore, Competition Board members must know the case content in the hearing

49. Communiqué on Hearings Held VIS-À-VIS the Competition Board Communiqué No: 2010/2

in accordance with law number 4054. It is observed that the Competition Board members have asked spontaneous questions to the undertakings' representatives in some of the hearings. Additionally, in some cases, it is observed that complainants and/or their representatives intervene in the undertakings' defenses by providing answers or asking questions. This could harm the integrity of the oral hearing and the undertakings' right of defense.

Moreover, providing a short time period to complainants at the hearings results in an insufficient representation of their interests, which are supposed to be protected by the competition legislation. The complainants' rights in an investigation process are not clear under the Turkish antitrust legislation and complainants do not have sufficient information about the investigations and final examinations. Thus, they could not contribute to the hearings, apart from repeating their complaints and requesting that the Competition Board impose sanctions on the concerned undertakings. There is no justice in allocating a measly five or ten minutes to complainants in investigations which take several months or even over a year to conclude. Throughout the investigation, which is initiated in accordance with evidence provided by complainants in some cases, countless pages of evidence, information, and documents are collected and allegations/defenses are put forward. If diclosure of facts is the fundamental goal of these investigations, complainants should be able to make a worthwhile contribution to this process as well.

One of the Competition Authority personnel's suggestions regarding the process of Competition Authority's operations in the internal stakeholder survey of the Competition Authority's 2014-2018 Strategic Plan was to provide an opportunity for the investigation delegation to ask questions and comment on the hearing[50]. A similar suggestion was expressed by the workshop participants. As a matter of fact, in practice, there is no active contribution of the investigation delegation to the hearing. While undertakings' representatives may present their critiques and objections to the investigation delegation, the delegation is not obligated to provide a response to those critiques. However, as was stated by the workshop participants and is observed in practice, the investigation delegation gives a briefing about the hearing to the Competition Board before and after the hearings. This practice is far from being transparent; it restricts the rights to allegation and defense of both the undertakings and the investigation delegation in such a way that neither perform their tasks efficiently. Furthermore, this makes the consultation between the Competition Board and the investigation delegation before and after the hearings speculative.

10.2.2. Evaluation of Opportunities to Access the File

Paragraph 2 Article 44 of law number 4054 regulates that the parties under investigation can request a copy of any paperwork in connection with themselves and a

50. See below. The Competition Board 2014-2018 Strategical Plan 32

copy of any obtained evidence before using their right to hearing. The communiqué on the Regulation of the Right of Access to the File and Protection of Trade Secrets (No: 2010/3) regulates how concerned parties and complainants can access files and evidence in an investigation. According to this communiqué, relevant parties have the right to access all files and evidence possessed by the Competition Board except internal correspondence, secret information and trade secrets of other undertakings and persons.[51] Requests for access to the file shall be evaluated by the investigation committee and if the request is partly or fully denied, the submitter of the request shall be notified of the reason for denial by the Competition Board.[52]

In practice, a broad definition of "internal correspondence" and "trade secret" could restrict parties' access to files. An evaluation of a recent denial of the Competition Board[53] on an application to access a file will allow the issue to be understood more clearly. Representatives of six cement plants[54] under investigation for the claim of violating competition demanded access to their file; however, this demand was denied due to the fact that the "demanded documents include trade secrets and other secret information." Two board members gave countervotes on the decision of denial, stating that some of the demanded documents could be shared. The following reason Competition Board member Associate Professor Tahir Saraç gives for his countervote supports the opinion that broadening the definitions of "internal correspondence" and "trade secret" could restrict the right to defense.

"(...) in the investigation report, four officials of the undertaking were interviewed, and (allegations that could be the basis for a violation) were included in the investigation report. However, when analyzed, the statements in favor of the parties and contrary to the investigation report were not included. This is against the neutrality of the report.

(...)

The Board's reason for not sharing these minutes was concern for maintaining confidentiality. This is an unnecessary concern. Sharing the minutes fully could eliminate confidentiality. However, legislation on this issue does not bring the condition to fully share documents. By taking into account the concerns of undertakings, blackening names and addresses, access to files could be (legally) possible."

As can be understood by Associate Professor Saraç's explaination of his countervote, in the decision, the investigation committee only included unfavorable issues, failing to mention advantageous issues, about the undertakings in the minutes that were prepared after the interviews with the executives of the undertakings under

51. Article 6 of the Communiqué numbered 2010/3.

52. Article 9 of the Communiqué numbered 2010/3 which is revised in the Communiqué numbered 2016/2

53. Competition Board's decision dated 03.11.2015 and numbered 15-39/648-227.

54. Competition Board's decision dated 14.01.2016 and numbered 16-02/44-14.

investigation. These minutes were excluded from the scope of the right to access to the files because they were considered to be internal correspondence and, thus, were not shared with the representatives of the undertakings. Furthermore, some documents from which trade secrets could have be redacted were also not shared. Such practices, as mentioned in the reason of the countervote, could cause hesitations for the neutrality of the Competition Board and investigation committee.

Another issue in regard to the access to the files is the undertakings' access to the economic analysis used within the conducted investigations. Economic analyses play an important role in revealing competition law violations, which are classified as economic misdemeanors. In terms of the Competition Board forming an opinion on undertakings, the impact of the violation on the market is revealed by such analyses. Especially in investigations relating to the abuse of dominant position in merger and acquisition examinations, economic analysis might become more important than other written evidence and documents. For this reason, an Economic Analysis and Research Department was formed within the Competition Authority in order to provide specialisation and to increase efficiency in economic analysis.

Because the Competition Board makes decisions in investigations based on the evaluation of the economic studies it conducts, it is of utmost importance for undertakings under investigation to access such economic analyses to be able to use their right to defense. Therefore the undertakings must be sure about the accuracy and definitiveness of the economic studies. However, in practice, it is observed that these economic analyses are not shared fully or they are shared only partially with the claim of containing trade secrets or secret information. This issue was expressed by the workshop participants as well. Specifically, the results of the economic analyses are shared in investigations, but the data used by Competition Authority experts to reach its conclusions is not shared with undertakings. Therefore, the respondent undertakings could not examine the accuracy of these analyses.

There is also uncertainty regarding at which stage of the investigation, and with which department's decision, the opinions of the Economic Analysis and Research Department, which was established to make economic analyses and investigations, are applied. As is understood from practice, the decision to apply this department's expertise varies according to the investigation committee's will. There is no regulation, at least not one shared with the public, that determines under what conditions the investigation committee would take the opinions of the Economic Analysis and Research Department.

10.2.3. Predictability and Consistency of Fines

Within the context of law no 4054, if a violation is determined in the investigations, the Competition Law regulates two types of fines: penal sanctions and legal sanc-

tions. Penal sanctions are timely, proportional, and/or fixed administrative fines applied by the Competition Board to undertakings that violate the law. Legal sanctions include annulment and compensations.[55] In this subsection, the practical problems for both types of fines will be examined.

Penal Sanctions

Administrative Fines Arised from Violation of Competition

Articles 16 and 17 of law no 4054 regulate administrative fines for undertakings that violate the law. To undertakings and associations of undertakings who act in ways which are prohibited in Articles 4, 6, and 7 of this law, an administrative fine shall be imposed of up to ten percent of the undertakings' annual gross revenues of the financial year preceding the decision.[56] Additionally, the act regulates that managers or employees of the undertakings or associations of undertakings who are determined to have a decisive influence in the violation shall also receive an administrative fine. The Competition Board is authorized to determine the amount of the administrative fine. Upon undertakings, associations of undertakings, or their managers and employees actively cooperating with the authority, penalties may not be imposed or reductions may be made in penalties to be imposed, taking into consideration the quality, efficiency, and timing of cooperation.[57]

The Competition Law sanctions are extremely heavy economic sanctions for the undertakings. Granting broad powers to the Competition Board on how to determine the weight of these sanctions creates legal uncertainties. In order to eliminate these uncertainties, two particular regulations came into effect in 2009, namely; the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (Regulation on Fines) and Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/ Leniency Regulation) came into force in 2009. These regulations regulate how the administrative fines will be determined, in which situation immunity or reductions in fines will be granted, and the procedures and principles regarding cooperation.

Regulation on Fines

The Regulation on Fines sets forth in detail how to calculate the administrative fines which will be imposed on undertakings in the event of a violation of the competition law. Accordingly, the basic fine is determined based on a percentage of the previous year's annual gross revenue, i.e. between 2%-4% for cartels and 0.5%-3%

55. ASLAN, Yılmaz, Rekabet Hukuku Dersleri, Seçkin Publication, 4th Edition, August 2015.

56. "if it would not be possible to calculate it, then the revenues by the end of the financial year closest to the date of the decision which would be determined by the board"

57. Paragraph 5 of Article 16 of the Law numbered 4054.

for other violations. The determined fine shall be increased by 50% if the violations lasted between one and five years and shall be doubled if the violations lasted longer than five years. The final fine is calculated by taking aggravating and mitigating factors into account. Accordingly, the Regulation on Fines divides the violations into two types: cartels and other violations. When the fines imposed on cartels are compared with the fines for other violations, it can be stated that cartel is a more severe violation.

When the Regulation on Fines entered into force in 2009, a framework for administrative fines, which were previously determined in full by the Competition Board, was set and legal certainty was increased to a certain degree. However, determining the amount of administrative fines still lies significantly in the Competition Board's discretion. The Competition Board's discretion, as expected, creates contradictions and uncertainties. Some examples of such practices we determined are discussed below.

Uncertainties from the Definition Of Cartel

It is possible to argue that the greatest uncertainty arises from the definition of cartel in the Regulation on Fines. In this regulation, cartel is defined as follows:

> "Agreements restricting competition and/or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotes, and bid rigging." [58]

In practice, cartel tends to be defined more narrowly than the agreements and concerted practices against competition regulated under Article 4 of the Competition Law. Therefore, some agreements and concerted practices that violate Article 4 of the Competition Law have not been evaluated as a cartel. It is not clear in the legislation what characteristics separate a cartel from other agreements against competition. When there is a violation against Article 4 of the Competition Law, the Competition Board holds the power to determine whether this violation is a cartel or not.

This uncertainty that arises from the definition of cartel complicated the task of undertakings wishing to apply for leniency or predict their administrative fine. Further complicating the issue, both the Competition Board and its approach could change over time. For instance, in the Competition Board's decision on Peugeot Bayileri[59] and Hyundai Bayileri,[60] even though the determined violations were synonymous with the definition of cartel given by the Regulation on Fines, the activities of Peugeot and Hyundai dealers were not considered as cartel, but fell within the scope

58. Fine/Leniency Regulation Article 3.

59. Competition Board's decision dated 06.08.2010 and numbered 10-53/1057-391.

60. Competition Board's decision dated 16.12.2013 and numbered 13-70/952-403.

of other violations by arguing that these violations affected inner brand competition and had relatively restrictive effect. However, in the Kırıkkale Sürücü Kursları[61] (Driving School) investigation, the Competition Board decided that the violation was a cartel although this violation was similar to that of the Peugeot Bayileri and Hyundai Bayileri decisions.[62]

As is seen from the abovementioned decisions, it is possible to argue that there is no consistency within the practices of the Competition Board regarding which violations of Article 4 are included in the definition of cartel. What's more, the Competition Board recognized some exceptions that were not included its own regulations to undertakings through its decisions. It is not possible to predict whether the Competition Board will pursue the same approach in future decisions or whether the Competition Board will evaluate other types of violations in Article 4 as being outside the scope of a cartel as its implementation regarding the agreements restricting competition between automobile vehicles.

Uncertainties Originating from Repetition

Article 16 (5) of the Competition Law regulates that the repetition of a violation shall be also taken into consideration by the Competition Board in determining the severity of an administrative fine. Additionally, if it was priorly determined within the scope of Article 6 of the Regulation on Fines that the undertaking violated the competition law, the fine shall be increased by half to one fold in the event of the repetition of the violation.

There are different opinions in practice towards the meaning of repetition. According to one of these opinions, an undertaking, which violated the Competition Law once, should be sentenced to repetition provisions on its next violation[63] regardless of whether or not the second violation is the same as, or similar to, the first. According to another opinion, in order to determine a violation as repetition, the next violation must be similar to the previous one. For instance, the breach of Article 6 of the Competition Law will not be considered as repetition if the undertaking previously violated Article 4 of the Competition Law.

When decisions of the Competition Board on repetition are analyzed, it can be argued that the Competition Board does not have any certain policy on the issue and

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61. Competition Board's decision 08.05.2014 and numbered 14-17/330-142.

62. In all these three cases, there were issues as fixing prices, controlling these prices with different methods and penalizing the undertakings that violate the concerted action.

63. Reasons for the counter votes of the Competition Board members Assoc. Prof. Mustafa Ateş and İsmail Hakkı Karakelle on the Competition Board's decision numbered 47/1413-474 and date 01/10/2012 on UN Ro-Ro (p 74) and Professor Decision dated 06.04.2012 numbered 12-17/499-140 on East and Southeast Anatolia Cement Investigation.

the practices do not include transparency.[64] For instance, the Competition Board increased the fine by 50 percent in its decision on the Turkcell Vehicle Tracking Investigation[65] because of Turkcell's previous violations.[66] In this decision, the increase in the fine was explained as a repetition, but the Competition Board did not make any further explanations. Therefore, it is not possible to understand whether the repetition is within the scope of the same article of the Competition Law. However, in the Banka II decision[67], the repetition article was not applied for undertakings[68] that had previously involved in a similar violation. As there was no penalty for repetition in this decision, uncertainty emerges in the Competition Board's implementation of articles on repetition and the inequality that occurs between undertakings that were penalized more heavily than others.

Uncertainties from the Determination of Annual Gross Revenue

It is regulated under the Competition Law that the amount of the fine will be determined according to the annual gross revenue of the undertakings at the end of the fiscal year preceding the final examinations. Therefore, the calculation of annual gross revenue is the basic element of the amount of the fine which will be imposed on undertakings. Within this context, if there is no consistency in the process of determining revenue, undertakings would not be able to predict the amount of the fine beforehand.

There are practical problems in defining annual gross revenue. In Article 3 of the Regulations on Fine, "annual gross revenue" is defined as "net sales in the uniform chart of accounts" of undertakings. Therefore, the fine must be calculated by the total gross revenue of the undertakings. When the board determines the fine, there is no consistency for whether the fine is to be calculated from the total annual revenue or the revenue earned from the market that is affected by the violation. In general, the board determines fines based on the total annual revenue, but there have been decisions in which fines were calculated with only the revenue earned from the specific market affected by the violation.[69]

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64. GÜNDÜZ, Harun, Fines in Turkish Competition Law: Has The Lottery Ended?, Rekabet Dergisi, Cilt: 13, Sayı, 4, Ekim 2012, Ankara, s. 79

65. The Competition Board's decision dated 19.12.2013 and numbered 13-71/988-414, Turkcell Vehicle Tracking Investigation para. 191.

66. The Competition Board's decisions numbered 09-60/1490-379 and dated 23/12/2009 and numbered 11-34/742-230 and dated 06/06/2011.

67. The Competition Board's decision numbered 13-13/198-100 and dated 08.03.2013. In the respective decision it is found that 12 banks violated Article 4 of the Competition Law and these violations were considered as "other violations".

68. The Competition Board's decision numbered 11-13/243-78 and date 07/03/2011 it is found that 8 banks violated the Article 4 of the Competition Law and these violations were considered as "other violations".

69. See below. The Competition Board's Decision number 10-72/1503-572 and dated 23/12/2010 on

In the decision of Banka I,[70] dated December 23, 2010, the board calculated the fine from the total revenue of the respective market; however, three months before this decision, in the Diyaliz[71] investigation, unlike the parties' demand to calculate the fine from the respective market, the fine was calculated from the total revenue.[72] Lastly, in the recent decision of the Competition Board on Mey İçki[73], the respective product market was determined as the Rakı market, but the fine was imposed over the total annual revenue of the undertaking in all markets.

There is also uncertainty about whether or not to include other subsidiary undertakings when imposing a fine on an undertaking. For instance, in the Competition Board's Banka I decision, only Türkiye Garanti Bankası was fined, while in the Banka II decision, the whole economic group of Türkiye Garanti Bankası A.Ş., Garanti Ödeme Sistemleri A.Ş. and Garanti Konut Finansmanı Danışmanlık A.Ş were fined.

It is clear that such contradicting practices create uncertainty regarding the administrative fines of the Competition Law.

Leniency Regulation

The Leniency Regulation regulates undertakings' active cooperation with the Competition Authority for the purposes of detecting cartels[74]. Cartels cannot be detected and proved. The Leniency Regulation encourages the disclosure of cartels which are subject to the most severe fines. In essence, there is a legal basis for immunity from fines to be granted to the cartel member denouncing the cartel.

The Leniency Regulation draws the framework of the application procedures, provides ideas about the enforcement, and in general it achieves a level of legal transparency. In addition, the Leniency Guidelines[75] that entered into force following the Leniency Regulation oversee processes such as anonymous information request during the leniency process, hypothetical application and details of implementation. However, it is possible to argue that there are or will be uncertainties in practicing leniency.

In order to benefit from the Leniency Regulation and receive full immunity from an administrative fine, the Competition Authority must not have started a preliminary investigation, or, in the event that a preliminary investigation has already been started, there must not be sufficient evidence collected on the undertaking that is to receive immunity. However, some members claim that the board acted against this

Medikal Gaz and the Decision numbered 11-13/243-78 and dated 07/03/2011 on Banka I

70. The Competition Board's decision numbered 11-13/243-78 and dated 07/03/2011.

71. The Competition Board's decision numbered 10-80/1687-640 and dated 23/12/2010.

72. See below. GÜNDÜZ, Harun, Fines in Turkish Competition Law: Has The Lottery Ended?, Rekabet Dergisi (Journal of Competition) , Volume : 13, Issue, 4, October 2012, Ankara, p. 69-70

73. The Competition Board's decision numbered 14-21/410-178 and dated 12/06/2014.

74. Our evaluation on uncertainties of the cartel type of violation is valid for leniency as well.

75. Guidelines on the explanation of the regulation on active Cooperation for detecting cartels

regulation in its Maya decision numbered 14-42/783-346 and dated 22.10.2014.

In this case, known as the Maya (Yeast) Case, the Competition Board decided with its decision dated 20.06.2013 to initiate an investigation on undertakings operating in the yeast market, namely Pak Maya, Öz Maya, Dosu Maya, and Mauri Maya. During the investigation, Mauri Maya applied for leniency and did not receive a fine. However, Competition Board members Reşit Gürpınar and Kenan Türk countervoted. Their reasoning was, in brief, that before Mauri Maya's application, the board had already received a large amount of concrete evidence; therefore, according to the regulation, any immunity granted must be only partial. In fact, at the beginning, partial immunity was granted to the informer, but then it transformed into full immunity. Since the reason of the full immunity was not explained in the decision, it is not possible to give an opinion about the Competition Board's approach. However, such practices harm the effectiveness of leniency applications and create concerns on the transparency of the Competition Board.

Uncertainties regarding the Leniency Regulation are not limited to practice. There are also some uncertainties arising from the wording of the regulation, as well. With the Leniency Regulation, "cartel", which was not previously defined in the competition legislation, is defined. Furthermore, only cartels were included in the context of the Leniency Regulation. As explained above, the Competition Law did not define cartel, but preferred a broader concept of agreements restricting competition in Article 4. The same cartel definition was made in the Fines Regulation, as well. This uncertainty openly demonstrated itself in the Competition Board's Hyundai Bayileri [76] decision. In this decision, an undertaking that conducted an agreement with its competitors to restrict competition applied to the Competition Authority for leniency, but the Competition Board decided that this particular violation was not cartel but was part of other violations and, thus, that undertaking was not able to benefit from the immunity mentioned in the Leniency Regulation. However, in that decision, the evaluation regarding the undertakings' practices is as follows:

"As the agreements to fix prices are restricted, per se, by the competition law, it is not possible to make an evaluation of exemption according to Article 5 of Law No 4054. The board reached the conclusion that it does not cover the subparagraph (a) of the first paragraph of Article 5 of the law 'Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services.'" [77]

An undertaking that is part of such an agreement shall assume that the agreement

76. Competition Board's decision numbered 13-70/952-403 and dated 16/12/2013.

77. Ibid para. 163. In this decision, it is stated that as agreements on fixing prices are restricted per se, it could not be considered under the evaluation of exemption regulated by Article 5 of the Competition Law. However, this approach is assessed as clearly contradictory to the Article 5 of the Law. Hence in that decision, it is clearly observed that there is no exception on the evaluation of immunity.

will be evaluated as a cartel, without any doubt. Thus, the cartel definition in Article 3 of the Leniency Regulation includes such agreements. However, the Competition Board did not evaluate the practice in question as a cartel. If an undertaking suspects that it is part of an agreement that might be in violation of competition, its motivation to apply for leniency will be reduced if immunity can only be ascertained after the application is submitted and depending on whether or not the practice of this undertaking is considered a cartel. The uncertainties in the definition of cartel diminish the effectiveness of the leniency regulation and harm the transparency of this application.

Another matter that can be considered as a legal uncertainty in the leniency process relates to when the leniency application will be evaulated as a valid application. In order to make a valid leniency application and, thus, benefit from immunity or a reduction in fines, all information and documents within the scope of Article 6 of the Leniency Regulation shall be submitted to the Competition Board as well as the fulfillment of other conditions.

Article 6 of the Leniency Regulation indicates the necessary conditions for an undertaking to apply for leniency but does not provide any details regarding the content and quality of the information and documents to be considered valid. Such uncertainty also exists within the Leniency Guidelines. There is a high probability that undertakings which are willing to apply for leniency aviod applying based on the assumption that they will not be able to provide sufficient information and documents.

Legal Sanctions

Apart from monetary fines, another punishment for undertakings that violate the Competition Law is the legal sanctions that allow them to do, or ban them from doing, certain operations. Legal sanctions, like the monetary fines, are important tools for applying the Competition Law and maintaining competition in the market. In some cases, legal sanctions could be an even greater deterrent than monetary fines. Within the context of the competition act, there are three basic legal sanctions: invalidity, compensation, and termination of a violation.

This study determined that the most important uncertainties with regard to transparency are the decisions of “termination of violation,” or the 9.3 decisions.[78] If the Competition Board finds that a practice or process (for instance, an agreement, practices of an undertaking in a dominant position or merger-acquisition process) infringes upon competition (if that action cannot be evaluated within Article 5 of the Competition Law), the board may prohibit or invalidate that practice or process. If the board establishes that the law was infringed upon, “it notifies the undertaking or associations of undertakings concerned of the decision encompassing those behaviours to be fulfilled or avoided so as to establish competition and maintain the

78. These are known as 9.3 decisions referring to the article of the Law.

situation before violation, in accordance with the provisions mentioned in section four of this act". [79]

Statements used in this article became the basis for the 9.3 decisions, which is one of the most problematic points of the Competition Law. Likewise, the fourth chapter of the Competition Law regulates the procedures of the Competition Board's investigations and inquiries and covers both investigations and preliminary investigations. Referring to the fourth chapter of the Competition Law allowed the Competition Board to take decisions to terminate the violations not only through investigations but also through preliminary investigations. In many cases, without initiating an investigation and only processing the preliminary investigation, the board determined violations or quasi-violations. In such cases, without giving any administrative fines, the board shared its opinions regarding its decisions on how to terminate the violation. [80]

It is clear that such practices by the Competition Board cause harm to consistency because the preliminary investigation does not span a sufficient enough amount of time to make a decision on a case, and undertakings do not have an opportunity to defend themselves. What's more, as the mentioned decisions are merely "opinions and suggestions," the undertakings have no opportunity to apply to the administrative court.

In the above-stated "termination of violations" statement, opinions and suggestions, such as to terminate some actions and fulfill some positive requirements, are shared with undertakings. Although these statements are presented as the Competition Board's opinions and suggestions, in reality, these are strong indications of a possible investigation initiation if issues mentioned in the statement are not fulfilled by the undertakings. In this case, receiving a statement of "termination of violation" can be as binding as a decision made after an investigation. Additionally, even there is not an administrative fine in the "termination of violation" statements, positive requirements advised at these statements could be more drastic than administrative fines and even make it impossible for undertakings to continue its activities in the market.[81]

If an undertaking's action violates the Competition Law, the basic aim of the Competition Law is to end that practice. The Competition Board may decide that a practice

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79. Paragraph 1 of Article 9 of Competition Law

80. For instance, the Competition Board's decisions numbered 12-29/846-247, dated 31/05/2012 on Kütahya Yapı Denetim; numbered 11-50/1258-447, dated 29/09/2011 on TMMOB Makine Mühendisleri; numbered 12-09/288-89, dated 02/03/2012 on Turgutlu Ekmek Fırınları; numbered 11-47/1181-422, dated 14/09/2011 on Vişne; and numbered 11-32/664-327, dated 26/05/2011 on Kayseri Sürücü Kursları.

81. For instance, the Competition Board's decision numbered 15-28/327-102, dated 07/07/2015 on Diye. Danışmanlık, a statement was send to undertakings to stop purchasing Media Barometer service from an undertaking under investigation and warned them to initiate a process if they still work with that undertaking.

is in violation of the Competition Law and then require the practice be terminated. In this case, the mentioned undertaking shall terminate that practice. However, it is clear that in determining whether an undertaking's practice is in violation of competition, the administrative practice is a full-fledged investigation. As mentioned clearly in the Competition Law, following the Competition Board's decision to terminate a practice as a result of an investigation, the undertaking has the right to appeal the decision to the administrative court. However an undertaking receiving a "termination of violation" decision without an investigation loses this opportunity. This creates a legal uncertainty both for the undertaking and other beneficiaries, as well as harms the transparency of the Competition Board's practices and it causes a loss of rights.

10.3 General Overview of Transparency of Investigatory Process in Practice

As mentioned above, in general, there is a consensus on the advanced level of transparency of the regulations on competition law in Turkey, particularly when compared with other legal areas. In this study, problems related to transparency were determined to be mainly caused by practice of law. This study found that practices that increase uncertainty in competition law can be classified under two major topics: problems in sharing information with stakeholders and cases for which no specific rule has been applied.

For each investigation, undertakings must receive full information of allegations in order to defend themselves. This right to full information can be restricted only for trade secrets. However, in practice, it is observed that when the Competition Board defines "trade secret" in broader terms, transparency of investigations and right to defense become more restricted. This is same for internal correspondences, as well. Not sharing correspondences that affect stakeholders of the investigation as internal correspondence create similar problems as the "trade secret" issue.

It is not possible for regulators of any field to estimate all possible cases and provide regulations for them. It is certain that enforcers of regulations (in this case experts and the Competition Board) must fill in these gaps according to the spirit of basic laws of the respective field. During this practice, decisions must be reasoned well, reasons must be shared with the public, and gaps in legal regulations must be overcome through precedents by taking similar decisions in similar cases. However, in competition investigations, in cases that are not clearly regulated by laws, the board does not share its reasons for decisions with concerned parties or the public and the board could make decisions contrary to precedent.

CHAPTER THREE

11. Conclusion and Recommendations

The rise of independent regulatory authorities in the world that are formed to regulate problems of the market economy has increased concerns on the rule of law. To resolve these concerns and to avoid the arbitrary use of power by regulatory authorities, some reform steps have been taken throughout the world. One of the steps taken in this regard is the efforts to secure more transparent practices by regulatory agencies.

Transparency refers to clarity, accessibility and predictability of "the rules of the game". Under truly transparent conditions, parties would know the boundaries of their actions and they would be aware of the sanctions if they cross the line. Increasing transparency limits arbitrary behavior and reduces uncertainty and, in turn, increases the predictability of the system for stakeholders.

In Turkey, there is growing concern about the increasing power of the independent regulatory agencies and their negative impacts on the rule of law and, accordingly, the need for more transparency has been gaining importance. Issues such as transparency of regulatory agencies and their practices and how to increase transparency have been attracting more attention. In order to meet this need, at least in part, the transparency of the CA and competition investigations in Turkey were examined and the following findings were reached in this study:

Workshop participants composed of lawyers, consultants, and academics in contact with competition law stated that the competition legislation in Turkey and the CA is transparent in comparison with other fields of law and their agencies. The survey, conducted among anonymous stakeholders evaluating investigatory processes, also scored the transparency of the agency and investigatory processes as above average.

The competition legislation in Turkey is adopted from the European Union which reflects many years of experience in Europe. This phenomenon may explain, to a large extent, the positive evaluation of the transparency of competition investigations.

The survey results also indicated the evaluation differences between the providers (CA staff) and users of information. In all items on the survey, the transparency evaluation of the agency staff is higher than others. In other words, one party claims that they are providing sufficient information while the other party's perception is contradictory.

This is one of the most important findings of the study and can be explained in one of two ways: Either available information is not transmitted effectively by the agency or the information is not sufficiently open and clear.

The survey results show that the CB gives less importance to sharing information with third parties and the general public. This could be interpreted as either the CB not paying enough attention to inform third parties and the public or not transmitting the information efficiently.

If transparency is related to the "rules of the game", there is likely one of two basic problems: Either there is no rule, or the existing rules are not applied effectively. Interviews conducted with stakeholders and case analysis revealed that problems related to the transparency of competition investigations in Turkey usually originate from the application of these rules. Major issues could be classified under two headings.

The first is not sharing information with parties in the name of "confidentiality" or "internal correspondence." No doubt, limiting disclosure of business secrets is necessary for the protection of the legitimate interests of parties and to ensure the cooperation of parties and others with the agency during investigations. However, the study results show that as these concepts are defined by the CB in a broader sense[82], they restrict the transparency of the investigations and right to defense.

The second issue is related to the cases in which there is no specific rule applicable to a particular situation. Obviously, it is impossible for lawmakers to estimate all possibilities that may occur in a related field and make rules in order to cope with them. It is clear that such a gap must be filled by enforcers (in our case, the board experts and the Competition Board) in compliance with the spirit of the fundamental laws. In practice, decisions must be well reasoned, reasons must be shared with the public, and gaps of the legal regulations must be overcome through setting precedents by giving similar decisions in similar cases. However, in competition investigations in Turkey, when it comes to issues that are not regulated formally by the law, the board does not share the reason for its decision with parties of the investigation or the general public and it gives different decisions on similar issues.

Based on the findings of this study, recommendations that would improve transparency of investigation processes have been formulated. These recommendations are split into two groups: General and specific.

General Recommendations:

The involvement of stakeholders in the legislative process to provide feedback on law proposals and the organization of regular meetings to discuss the issues in application of the legislation would allow stakeholders to better understand the reasons of the asymmetric evaluation between providers and users of information and resolve this asymmetry.

82. In some cases, it is observed that certain information is redacted in the board decisions despite the fact that those are already available as the related undertaking is open to the public.

The CB receives the opinions of stakeholders at different times. However, it is questionable whether the CB pays attention or not. One workshop participant stated that he shared an opinion with the CB on a draft regulation and, apart from opinions on content, he asked for the correction of a misspelling. However, later, the regulation was published without correcting the misspelling. The agency staff might not agree with the participant on the content of a new regulation, but not correcting a misspelling raises questions about how much attention the CB gives to the contributions of stakeholders. When an investigation is initiated, it is obvious that the parties under investigation are the parties which need the information the most. Therefore, accessing information is of utmost importance for the parties under investigation. However, informing the public on "the rules of the game" is as important as informing concerned parties. If the actors are aware of behaviors permitted by law and those that call for investigation, they would take part in illegal actions less, and the costs incurred by the parties as a result of breaching the law would be avoided. Therefore, the agency must be sensitive to sharing information with third parties and the general public along with the investigated parties.

Uncertainties must be resolved through new regulations. In the absence of clear rules, the decision-makers should be obliged to explain how they interpreted the existing rules and which methods they used. If there are no written rules in certain areas, precedents should be set. "Consistency" must be a basic principle of the decisions.

The agency must pay more attention when restricting information in the name of "confidentiality" or "internal correspondence". It must be ensured that parties' right of defense and/or right to access information are not violated while preserving the agency's or an enterprise's privacy.

Specific Recommendations

With regard to the "Communique on on-the-spot inspection": It is understandable for the CB to regulate its staff's actions and attitudes (communique on dress and appearance, conditions of using office equipment, etc.). However, if these regulations affect the rights and obligations of persons and entities outside of the agency, it must be shared with the general public. The "Communique on on-the-spot inspection" that we discussed in this study, is not only an "internal correspondence" that regulates the attitudes of the staff, but is also a directive that regulates the rights of undertakings. Therefore, sharing it or similar regulations with the general public is a requisite to improving transparency.

With regard to the certainty of timing: In our opinion, the source of the abovementioned problem is the very short time allowed for the preliminary inquiry on mergers and acquisitions of Law Number 4054. In this regard an extension of this timing to a

reasonable and feasible length and being tied to it strictly may reduce uncertainties about timing. Additionally, informing parties that applied for the merger-acquisition regularly about the examination process would contribute to transparency. Currently, the process of informing parties of the progress of an investigation is conducted very slowly (petition for demanding information followed by a written answer from the CB). Instead, the adoption of an application tracking software, such as e-state or UYAP (National Judiciary Information System), that can be accessed online and would enable applicants to track the current status of their investigation would be increase speed, efficiency, and transparency.

With regard to restrictions on sharing information in the name of "confidentiality": In our opinion, like other intellectual property, the trade secret feature of a document must expire after a certain time. Information classified as "secret" today may lose its sensitivity and become common knowledge tomorrow. Particularly, data showing the current state of a company (like market share, revenue, and number of sales etc.) quickly loses its sensitivity, and hiding information that rapidly changes for years would not be meaningful. For this reason, releasing information which has been classified as "confidential" by the Competition Board into a public domain after a certain period of time would help improve the transparency of competition investigations. Sharing data used for market definition or dominant position, at least within an interval as in the European Commission's practices (for instance sharing market share information within +/- 5% margins), or providing explanatory information without exposing trade secrets would be an alternative way of increasing the transparency of the agency.

With regard to improving communication and the exchange of ideas among stakeholders: As mentioned before, when the CB formulates new legislation, it receives the opinions of stakeholders. However, whether it takes these opinions into consideration or not is questionable. Sharing the comments received about the secondary legislation with the general public (via internet) would make the process more transparent and force the agency to pay more attention to such opinions.

With regard to increasing the efficiency of the oral defense: Similar to the EU practice, an independent Hearing Officer[83] could be employed to administer meetings and protect the rights of all parties.

Oral hearings organized for the final decision of mergers and acquisitions should follow a different procedure than other processes since a merger or an acquisition is not an infringement of the competition law. For this reason, designing these hearings as meetings that allow parties to express their concerns and demands instead

83. Hearing officer is neutral officer employed at the EU Commission's investigations that organizes and manages hearings and when a problem occurs to protect rights of parties hearing officer intervenes to resolve the problem.
http://ec.europa.eu/competition/hearing_officers/index_en.html

of acting as an oral defense containing accusation and defense would be more consistent with the nature of mergers/acquisitions.

With regard to uncertainties on the determination of annual revenue: In order to overcome problems regarding administrative fines of the Competition Law, clarifying which revenues of enterprises will be taken into account would contribute to transparency.

With regard to uncertainties on the "ceasing infringement" decisions: The Competition Board can make the decision of infringement only following an investigation and completing the necessary inquiry and processes of allegation and defense. Sending cease and desist letters to undertakings and imposing obligations on them before finalizing due process may lead to the loss of rights for these undertakings. By transmitting its opinion on an issue of concern regarding competition to the parties through a dialogue process (compromise and consultation) rather than sending cease and desist letters to undertakings and imposing obligations on them, the board would both avoid bringing new burdens (which cannot be appealed to the legal court) upon undertakings and protect legal interests mentioned by the law at the same time.

With regard to uncertainties on the repetition of infringement: In order to make penalties more predictable, the concept of "repetition", which changes the amount of the administrative fine to a large extent, must be clearly defined.

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