

**REGULATORY IMPACT ANALYSIS AND COMPETITION
ASSESSMENT:**

**A CRUCIAL TOOL TO DEAL WITH ANTICOMPETITIVE STATE
INTERVENTION**

Conference On "Which Competition
Policy for Regulated Industries?"
Organized By Bilgi University, UCL,
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1. Introductory Remarks

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- Free Market Economy means more competition and less regulation (not “no regulation”)
- How should we see free market economy from a political economy perspective?
- It is a deal/consensus created/regulated by the State between the Society and Economic Agents which is based upon the following provisions:
 - Society agrees to surrender its limited resources to the economic agents in return for production of needed goods and services,
 - Economic agents agree to produce these goods and services at competitive circumstances in return for using these limited resources and gaining some profit
 - State agrees to be the regulator of the system.

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- **The Question: Why Regulation is needed in the market if the market is presumed to be producing the best result?**

– Answer: *Market Failures*;

However;


- *Regulation implies an inherent intervention (in most cases with a restrictive impact on competition) by the State for some purposes,*
- *Competition implies a market free from State intervention,*

How to reconcile these two concepts is a major issue.

-The Key approach is “to induce the governmental/regulatory agencies to look for alternative regulatory solutions that impose no or less restriction on competition as well as serve the same objective to be achieved”.


-Regulation serving the same objective with no/less negative impact on competition.

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2. Regulatory Impact Analysis -RIA-

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2. Regulatory Impact Analysis -RIA-

- **Regulatory Reform;** is a process of changing regulatory framework and methods in order to shift the economy towards competition-led market economy (Pushed by the OECD since the early 1990s);
 - *Stimulation of competition,*
 - *Elimination of regulatory inefficiencies*
- **Better Regulation;** is a prerequisite for regulatory reform with the following principles:
 - *Necessity*
 - *Effectiveness*
 - *Proportionality*
 - *Transparency*
 - *Accountability*
 - *Consistency*

} **Regulatory Impact Analysis (RIA) is one of the most important aspects of Better Regulation**

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2. Regulatory Impact Analysis -RIA-


- RIA is an integral part of better regulation and regulatory reform,
- According to OECD,
 - RIA is a systematic decision tool used to examine and measure the likely benefits, costs and effects of new or existing regulation.
 - The implementation of RIA supports the process of policy making by contributing valuable empirical data to policy decisions, and through the construction of a rational decision framework to examine the implications of potential regulatory policy options.
 - The overall objective of RIA is to assist governments to make their policies more efficient.
 - However RIA is not an alternative to Decisions by the Politicians.

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2. Regulatory Impact Analysis -RIA-

- Regulatory Reform including RIA is actively supported and sponsored by the OECD.
- In 1995, the Council of the OECD adopted a Recommendation on Improving the Quality of Government Regulation, which included a ten-point checklist.
- The systematic use of Regulatory Impact Analysis (RIA) is a key part of this checklist.
- Since 1997 the Governments began to introduce RIA for their regulatory activities.


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2. Regulatory Impact Analysis -RIA-

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- Objectives of RIA Pursued By the Governments:
 - Improve understanding of real-world impacts of government action, including both benefits and costs of action,
 - Integrate multiple policy objectives,
 - Improve transparency and consultation,
 - Improve government accountability.
- Methodology of RIA: Two-Step Process that mainly analyzes three main effects:
 - Social Effect,
 - Environmental Effect,
 - Economic Effect (including impact on competition).

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2. Regulatory Impact Analysis -RIA-


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- **TARGET AUDIENCE OF RIA;**
 - All Governmental Agencies that have regulatory activities;
 - Line Ministries,
 - Central and Local Governmental Agencies,
 - Sectoral Regulatory Agencies.
 - Business Community and Consumers whose interests are influenced by the regulations.

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3. Competition Assessment

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3. Competition Assessment

OVERVIEW:

- RIA provides a framework in which impacts of regulation on competition can be assessed systematically and regularly.
- Such a framework is quite important for the institutionalization of competition advocacy role of competition agencies.
- The Key idea in integrating a competition assessment into RIA is to induce governmental agencies to think alternative regulatory solutions that
 - serve the targetted objectives
 - have no or less restrictive impact on competition.

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3. Competition Assessment

- **Definition (OECD):**

- Assessment is the evaluation of whether one or more potential policy alternatives may unduly restrict competition. The goal is to identify those policy measures that would achieve the regulatory objectives with least harm to competition.

- **Importance (OECD):**

- Regulation often has substantial effects on competition, even when aimed at other policy objectives,
- In absence of considerations of competition effects, laws and regulations may inhibit competition unnecessarily,
- Competition Assessment can promote increased focus on alternatives that achieve a given regulatory objective but have less detrimental effects on markets

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3. Competition Assessment

- **COMPETITION SHOULD PREVAIL OR NOT:**

- **The Main Question** is about where to make a balance between regulation and competition while assessing anti-competitive interventions,
 - There are justification for the prevalence of competition over anti-competitive regulations,
 - There are cost of such prevalence and justification for the existence of regulation even with anti-competitive impacts,
 - *Please see: The paper titled "State Facilitated or Imposed Restraints on competition: The Role of Competition Authorities" by Dr. Michael Gal*

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3. Competition Assessment

- There is a need for creating a right balance in between regulation and competition,
- But **I HAVE TO SAY** that
 - Competition is not an absolute matter of life for us if there are strong justification for anticompetitive intervention.
 - However if there are alternative ways, less anticompetitive and producing the targeted benefits (and if the justification for regulation is weak), then competition concern should prevail.

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3. Competition Assessment

- Countries where regulation is subject to RIA have also attached special importance on competition assessment, like UK, Australia.
- OECD, sponsor of RIA is also a firm supporter of Competition Assessment.
- Correspondingly, **the Competition Assessment Toolkit of the OECD Competition Committee** is a very recent work that guide all interested Countries on how a competition assessment can be integrated into general RIA framework.

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3. Competition Assessment

- **Elements of Toolkit**
 - Competition Checklist
 - Introduction to Competition Assessment
 - Detailed reference manual
- **Target Audience**
 - Government officials who are part of the decision-making process and implementation process
- **How to Use**
 - Can become part of policy development process for new laws and regulations
 - Can be used as part of an overall review of the existing stock of laws and regulations
 - Governments can adopt and adapt the materials for domestic use

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3. Competition Assessment

- **Competition Checklist Questions:**
 - Does the regulation;
 - Limits the number or range of suppliers?
 - Limits the ability of suppliers to compete?
 - Reduces the incentive of suppliers to compete vigorously?
- The Assessment envisages a two-step review process;**
- **Initial Review,**
 - **Full Review.**

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3. Competition Assessment

INITIAL REVIEW(ITEM 1)

- **Limiting the number or range of suppliers such as;**
 - granting exclusive rights,
 - establishing a license, permit or authorization process as a requirement of operation,
 - limiting the ability of some suppliers,
 - significantly raising cost of entry or exit by a supplier,
 - creating a geographical barrier to the ability of companies.


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3. Competition Assessment

INITIAL REVIEW (ITEM 2)

- **Limiting the ability of suppliers to compete such as;**
 - controls or substantially influences the prices,
 - limits on freedom of suppliers to advertise or market,
 - setting standards for product quality that provide an advantage to some suppliers over others or that are above the level that many well-informed customers would choose,
 - significantly raising costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

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3. Competition Assessment

INITIAL REVIEW (ITEM 3)

- Reducing the incentive of suppliers to compete vigorously such as;
 - creating a self-regulatory or co-regulatory regime,
 - requiring or encouraging information on supplier outputs, prices, sales or costs to be published
 - exempting the activity of a particular industry or group of suppliers from the operation of general competition law
 - reducing mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers

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3. Competition Assessment

- According to Toolkit;
 - if any of the above question is met with a **YES** answer,
 - it is required that **a detailed full competition assessment of the regulation** under consideration is to be conducted
 - as it potentially signals a significant competition concern.

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3. Competition Assessment

FULL REVIEW:

- Full review requires the examination of all the issues related to whether the regulation might;
 - impose barriers to new entry,
 - force certain types of incumbent businesses (e.g., smaller firms) to exit the market
 - increase the prices of goods and services
 - reduce product variety
 - significantly increase concentration in the relevant market
 - reduce innovation
 - affect related markets
 - If yes then,
 - Evaluate effects on all the relevant related markets

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3. Competition Assessment

- A Draft Recommendation for the OECD Council on “Competition Assessment” by the OECD Competition Committee,
 - The Draft is mainly based on the Toolkit,
 - As the Recommendation is still draft, no detailed information can be given for the time being.
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- English Version of the Toolkit can be found at:
<http://www.oecd.org/dataoecd/15/59/39679833.pdf>
 - Turkish Version of the Toolkit can be found at:
<http://www.oecd.org/dataoecd/6/61/39809192.pdf>

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3. Competition Assessment

- **Other Countries Experience:**

- UK, a guideline on competition assessment,
- Australia, a guideline on competition assessment,
- EU, part of RIA,
- US, part of RIA,
- Mexico, initiated a project to review existing law-stock on the basis of toolkit in coordination with OECD Competition Committee,

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4. RIA and Competition Assessment in Turkey

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4.1. RIA in Turkey

- Regulatory Impact Analysis (RIA):
 - A Better Regulation Working Group was set up within the Prime Ministry to conduct studies on Better Regulation issues including RIA.
 - The By-Law on Procedures and Principles of Drafting Legislation took into force as of 17th of February 2006.
 - This By-Law envisaged introduction of RIA in Turkey in Article 24 as follows:
 - “Draft bills and decree-laws whose effect is estimated to exceed 10 million TRY are subject to RIA (mainly primary legislation).
 - The Prime Ministry has the power to request implementation of RIA regardless of estimated impact or type of legislation (both primary and secondary).
 - RIA is to be carried out by all governmental agencies who propose/prepare any regulation.

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4.1. RIA in Turkey

- A transition period of one year was envisaged for the taking into force of RIA.
- The main references: OECD works, European Union Lisbon Agenda and Relevant EU Documents,
- Capacity-Building activities were organized by the Prime Ministry.
- An Additional Guideline was issued as Prime Ministry Circular on 3rd of April 2007.
- Guideline; a two-step process and analysis of economic, social and environmental impacts.

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4.1. RIA in Turkey

- The Guideline has the following clause among others:
 - **“Impact on Competition:** the following should be examined to assess impact on competition in coordination with the Competition Authority:
 - Whether the draft legislation strengthens the position of firms or makes these firms dominant or not,
 - Whether the draft legislation reduces/increases the number of firms in the market,
 - Whether the draft legislation supports the competitive level/process in the market.
 - During the preparation stage of this Guideline the Turkish Competition Authority (TCA) had the opportunity to be heard and it shared its views in particular considering the Competition Assessment Toolkit of the OECD Competition Committee.

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4.2. Competition Assessment in Turkey

- **Competition Advocacy Role of the TCA;**
 - Competition Assessment to be considered in this framework,
 - Legal basis of competition advocacy: The Turkish Competition Law No: 4054,
 - Two Prime Ministry Circulars to ask for competition assessment for legislative activities in coordination with the TCA in 1998 and 2001.
 - A new Article is proposed as part of amendment package to strengthen advocacy role,
 - Successful ex-post advocacy cases; *Belko Coal/Ankara Municipality* (environment and competition), *Liberalization of Airline* (de-facto monopoly and competition), *Tursab Case* (self-regulation and competition).

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4.2. Competition Assessment in Turkey

- **Importance of RIA for the Advocacy Role of the TCA:**
- RIA is a very important legal framework with its requirement for a competition assessment,
- RIA has the potential to fill the gap in terms of advocacy role of the TCA,
- RIA has provided a platform over which the TCA can further strengthen its advocacy role vis-à-vis other governmental agencies.
- Competition Assessment will be a natural part of review of regulatory initiatives and competition concerns will be detected and eliminated if necessary ex ante.

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4.2. Competition Assessment in Turkey

- **Works to Be Done by the TCA:**
 - An Important Priority for the TCA is to be the introduction of a guideline on competition assessment taking into account *OECD Toolkit (which also covers experience of other countries) and its own experience,*
 - For its own-evaluations,
 - For the officials of other Governmental Agencies,
 - Seminars/Trainings to be held by the TCA for the officials of the Governmental Agencies,
 - Publications of guidelines/booklets by the TCA,

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