INDEPENDENCE OF REGULATORY AUTHORITIES: THE ANALYSIS OF TURKEY'S CASE IN TELECOMMUNICATIONS SECTOR IN A COMPARATIVE PERSPECTIVE

DÜZENLEYİCİ KURUMLARIN BAĞIMSIZLIĞI: TÜRKİYE TELEKOMÜNİKASYON SEKTÖRÜ DÜZENLEMESİ ÖZELİNDE KARŞILAŞTIRMALI ANALİZ

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Abstract

This paper discusses the independence of regulatory authorities by looking into several case studies in telecommunications sector. In this context, it starts with the general analysis of the theoretical concepts such as public interest and capture theory. Then the origin and evolution of independent regulation in USA and EU will be examined together with the adoption of these institutions in the developing countries. In the last part, after briefly summarizing main structural features of regulatory authorities in Turkey, Information and Communication Technologies Authority of Turkey[1] and its independence will be assessed in a more detailed way by evaluating the historical developments and legal changes made by the Parliament, following with brief summary of the considerations related to board structure, revenue generation and spending powers of this institution. In sum, taking into account these case studies, it can be said that there is no uniform application of the independence concept and each country's case need to be evaluated differently to get better understanding of this subject.

Keywords: *Regulation, Regulatory Authorities, Good Governance, Independence, Accountability.*

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[1] This institution's previous name was 'Telecommunications Authority' and this name is changed to 'Information and Communication Technologies Authority' with the Law No. 5809 dated 05.11.2008.

Öz

Makale kapsamında, düzenleyici kurumların bağımsızlığı olgusu telekomünikasyon sektöründe ülke örnekleri ele alınarak incelenmektedir. Bu bağlamda, öncelikle kamu yararı ve ilgili piyasa aktörleri tarafından manipüle edilme (yönlendirilme) olarak ifade edilebilecek yaklaşımları içeren kavramın teorik çerçevesi ortaya konulmaktadır. Müteakiben, bağımsız düzenleme ve düzenleyici kurumların ABD ve Avrupa Birliği'nde gelişimiyle birlikte bu tip düzenleyici otoritelerin gelişmekte olan ülkelerdeki kurulma süreci aktarılmaktadır. Son bölümde ise Türkiye'de düzenleyici kurumların yapısal özellikleriyle ilgili kısa bir değerlendirmenin ardından; Yasama Organı tarafından getirilen değişiklikler de göz önüne alınarak Bilgi Teknolojileri ve İletişim Kurumu[2] özelinde Kurul yapısı, gelir ve harcama gibi mali hususlar çerçevesinde analiz yapılmaya çalışılmaktadır. Makalede sonuç olarak, ülke örnekleri ve karşılaştırmalı analiz ışığında, düzenleyici kurumlarda bağımsızlık olgusunun pratikte standart bir uygulaması olmadığı ve farklı uygulamaların anlaşılabilmesi için o ülke şartlarının dikkate alındığı ayrıntılı çalışmaların yapılması gereği vurgulanmaktadır.

Anahtar Kelimeler: *Düzenleme, Düzenleyici Kurumlar, İyi Yönetişim, Bağımsızlık, Hesap Verebilirlik.*

INTRODUCTION

Although independent regulatory authorities were established in the USA nearly hundred years ago, European Union (EU) member countries have relatively recently founded these institutions due to market reform and liberalization policies. Besides this, more and more first and third world (developing) countries, engaged in market liberalization, adopted (or have increasingly adopted) these institutions in various sectors ranging from telecommunications, energy to finance (to name a few of them). It is argued that for a successful market liberalization-reform, a regulatory institution has to be independent both from government and stakeholders and this is also the main topic of this paper. In fact, the objective of this paper is to analyze the independence issue and to make comments on the similarities and differences of the application of this concept in Turkey and in the other selected countries in terms of only telecommunications sectors.

Connected to this, the paper starts with the discussion of theoretical aspects of regulatory independence including normative and rational approaches. Afterwards, the origin and evolution of independent regulation in

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[2] Kurumun önceki ismi 'Telekomünikasyon Kurumu' olup bu isim 05.11.2008 tarihli ve 5809 sayılı Kanun ile 'Bilgi Teknolojileri ve İletişim Kurumu' olarak değiştirilmiştir.

USA and EU will be examined together with the adoption of these institutions in the developing countries. This part concludes with the analysis of the selected cases in USA, EU and a developing country (India) in telecommunications industries. In the last part, after mentioning number and names (and related sectors) of regulatory authorities and their general characteristics briefly, secondly and in a more detail, Information and Communication Technologies Authority of Turkey (ICTA) and its independence will be assessed by evaluating the historical developments and legal changes made by the Parliament. In this part, independence index comparisons are used to give a general understanding of the independence status and the place of this institution among comparable regulators. In addition to this, board structure and financial procedures such as budget surplus transfer requirement are discussed to highlight country specific issues.

1. THEORETICAL ASPECTS OF REGULATORY INDEPENDENCE

Regulation includes rules, principles, or laws meant to control or govern conduct, whether in the public or private sector[3]. According to Gilardi[4], regulation is composed of extensive range of institutional forms such as values, norms and informal arrangements in addition to laws, principles and rules. Furthermore, he considers regulation as consisting of rules that affect the market allocation mechanism. In very broad terms, regulation is divided into two categories; one is social and the other is economic regulation. As it is clear, regulation is in the category of economics when it is related with price, entry-exit, production (quality etc.) controls. On the other hand, when safety and health issues are taken into consideration then regulation assumes non economic dimensions. Of course, this is a simple categorization and one can find both aspects in any regulatory process (e.g. quality control and consumer protection may be found in both economic and social regulation category).

Johannsen[5] states that theoretical literature on regulatory independence consists of normative approaches which mainly recommend the adoption of independent authorities (regulators), and rational approaches which attempt to

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[3] Bjork, I. M. and Connors, C. R. (2005), "Free Markets and Their Umpires: The Appeal of the U.S. Regulatory Model", World Policy Journal, Vol.22, No:2,
http://www.worldpolicy.org/journal/articles/wpj05-2/bjork.html, retrieved 17.02.2010.

[4] Gilardi, F. (2008), *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe*, Edward Elgar Publishing, p.14-17.

[5] Johannsen, K. (2003), "Regulatory Independence in Theory and Practice, a Survey of Independent Energy Regulators in Eight European Countries", AKF, Institute of Local Government Studies, Denmark,
http://www.akf.dk/udgivelser/2003/pdf/regulatory_independence.pdf*, retrieved* 17.02.2010, *p.8.*

analyze the reasons of power delegation to independent regulators[6] by politicians. According to Newbery[7], *normative theory describes the way in which regulation should be designed to maximize social welfare, while positive[8] approaches predict the way regulation will work in practice.*

1.1. Normative Approaches

As a normative approach, in the public interest theory[9], regulation is used to solve market failures due to externalities, public goods, asymmetric information and monopoly behavior (i.e. restricting output to raise prices). Taking into account the view that regulation is a limitation imposed on the free decisions of economic actors then limitation by the power of sanction should be beneficial in correcting these market failures. According to Oliveira et al.[10], degree and form of market failures vary in each public infrastructure sector (e.g. telecom, energy, water and sewerage) and this also necessitates different degrees of intervention in each sector and in each country (country specific factors).

In order to assure that monopolist firms would keep their tariffs low and operate the utilities in an efficient way; various regulations such as rate of return regulation, price cap mechanism, quality controls are used by regulators (i.e. public authorities). In addition to this, since provision of public services should not be arbitrarily terminated, security of supply is another important rationale for regulation. Similarly, protection of consumers as opposed to companies that have lobbying power should be considered as another argument for the public interest concept.[11] In sum public interest theory indicates that regulation exists to correct various types of market failures arising from asymmetric information, externalities, public goods, or from monopoly.

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[6] Regulators, regulatory institutions, agencies and authorities are used in the same meaning and interchangeably in this paper.

[7] Newbery D. M. (2001), *Privatization, Restructuring, and Regulation of Network Utilities*, MIT Press, p.136-139.

[8] Rational and positive approaches are used in the same meaning in this context.

[9] Competition Commission of Pakistan (2008), "Independence and Accountability of Competition Authorities", Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 16-18 July 2008, http://www.unctad.org /sections/wcmu/docs/c2clp_ige9p8Pakistan_en.pdf, retrieved 17.02.2010, p.2.

[10] Oliveira, G., E. Machado, L. Novaes, L. Martins, G. Ferreira and C. Beatriz (2005), *Aspects of the Independence of regulatory Agencies and Competition Advocacy*, Getulio Vargas, Foundation, Rio de Janeiro.

[11] One could add several other regulatory responsibilities in this category. For example Smith (1997) gives three responsibilities namely; supporting investment by protecting investors from arbitrary intervention by government, protection of consumers from abuse of market power and promotion of economic efficiency. Gulen et al. (2007) in a similar perspective add some others including promotion of competition, cost effective investment and education of consumers about competition.

Larsen et al.[12] argue that even though solving market failures are often cited as the most important task for independent authorities, the main reason for giving independence is to minimize government failures. In this context, they state that transfer of ownership from public to private domain necessitates an independent regulator since the services (even though the companies that give these services have been privatized) still possess public good characteristics and are important for social policies of each country. Related to this, public interest theory necessitates the establishment of independent regulatory authorities[13] and, it is often suggested that independence function coupled with accountability[14] enables these institutions to regulate more effectively since government ministries are believed to be more easily influenced politically, leading to different agendas and occupations rather than efficiency objectives, in addition to those stated above, competition, promotion of consumers, safeguarding private investment etc. Accordingly, regulation duties should not be given directly to the government but has to be entrusted to an independent institution.

1.2. Rational Approaches

In the second category, Larsen et al.[15] state that decision to delegate regulatory powers to independent agencies can also be explained in rational choice terms. According to them, politicians who are trying to maximize their own power and popularity -due to several functional pressures-may delegate decision making competencies to these institutions. In other words, these functional pressures can provide politicians (who are self interested) appropriate motives (incentives) to delegate some of their political powers to the independent regulatory authorities since -owing to the existence of these pressures- benefits from delegation overcome agency costs resulting from this process in many circumstances. In this context, Thatcher[16] give four different kind of these pressures; blame shifting, the technical nature of regulation, regulation as the

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[12] Larsen, A., L.H. Pedersen, E. M. Sørensen and O. J. Olsen (2004), "Independent Regulatory Authorities in Europe", AKF, Institute of Local Government Studies, Denmark, http://www.sessa.eu.com/documents/wp/D73.1-Larsen.pdf, retrieved 17.02.2010, p.3-4.

[13] Competition Commission of Pakistan 2008, p.3

[14] Besides independence, some other desired characteristics of regulators can be stated as accountability and transparency, enforcement powers and competency (Gülen et al., 2007). Since our topic is independence, other characteristics are only mentioned in conjunction with this subject. In fact, no institution is totally independent and independence should be evaluated from relative perspective and in this respect independence and accountability can be seen as two sides of the same coin.

[15] Larsen et al. 2004, p. 4-5.

[16] Thatcher, M. (2001), "Delegation to Independent Regulatory Agencies in Western Europe", paper presented at the 29th ECPR Joint Session of Workshop, Grenoble, France.

implementation of EU policies and credibility concerns. Blame shifting occurs when politicians decide that it is convenient for them to delegate some of their powers to independent regulators especially in case of unpopular decisions. In fact, Dupuis[17] mentions that politicians can make use of these agencies for shifting the blame for the unpopular policies (e.g. raising the tariff levels after privatization) or policies not implemented in practice (e.g. universal service policies when implementation left to the regulatory authority). Connectedly, technical nature of regulation also causes this delegation. To minimize asymmetric information problem[18], it may be better to establish more competent institutions since highly adept and technically skilled personnel of these agencies may be in a better position to deal with regulatory problems (e.g. need to understand cost structure of the regulated firm). Besides this, politicians are not sure about the possible outcomes of regulatory process in terms of cost and benefit analysis (i.e. getting more vote or not unclear for the politicians). On the other hand, in some cases politicians may want to show their determinations in the implementation of economic policies. For instance, after privatization of a public monopoly, establishment of an independent regulatory agency may give appropriate signals to regulated firm and related market actors about the credibility of these liberalization policies. However there are also costs in delegation decisions. By making reference to Horn, Johansenn[19] cites four of these; decision, agency, commitment and uncertainty costs. He further notes that, different combinations of cost factors determine whether it is in the self-interest of the politicians to delegate some of their power to these authorities. Lastly, in practical terms and even though it is valid only in the EU context, independent regulatory authorities have been created due to EU requirements (i.e. it is the responsibility of each member country to establish these institutions in sectoral level such as telecom, energy under EU acquis). Thatcher[20] also argues that EU policies are in most cases not clear for the public and by following this logic; politicians may also be more willing to delegate these regulatory policies to outside of their agenda.

In addition to above arguments, contextual factors (country specific) are also important in the establishment of independent regulators and similarly in delegation process. In other words, both functional pressures and contextual

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[17] Cited in Larsen et al. 2004.

[18] Asymmetric information problems almost always exist since the seller has much more information (in fact complete) about its products and/or services than buyers. In our case, policy makers do not have access to regulated firm strategy, marketing tactics and accounting methods etc. However use of some regulatory methods by qualified and technical personnel may reduce this asymmetry to some degree.

[19] Johansenn 2003, p.17-20.

[20] Thatcher 2001, p.13-18.

factors play a role in explaining the variation in the decision to delegate power to these agencies. Furthermore, final outcome in the delegation process has also been influenced by both related actors (e.g. politicians, investors, board members, regulatory authority's personnel, civil servants etc.) who are acting to maximize their self interest. Within this perspective, capture theory implies that in regulation process eventually regulated parties will capture the regulatory agencies and make them serve their needs. Different from public interest theory, in the capture theory the objective function may not be specific (i.e. maximization of social welfare) since powerful actors (companies, multinational holdings etc.) can divert the objectives of the regulation to the benefit of their aims (i.e. profit maximization at the expense of consumers). In other words, regulatory authorities should not be assumed (automatically) to serve the objective of maximizing total welfare if one takes the view that for the regulatory agency public interest is in reality (or implicitly) the industry's (regulated company in the case of monopoly) interest in practice. Indeed, Gilardi[21], by making reference to Stigler, states that there exist four main policies for the regulators to protect and/or serve the needs of regulated firms. Firstly, regulators can subsidize firms by various mechanisms such as direct money transfers. Secondly, entry (and exit) conditions to the relevant market can be constructed in such a way that protects incumbent firm's position. Thirdly, alternative products or services can be made expensive by selective regulatory policies, favoring some firms at the expense of others. For example, in telecommunications sector; because of lobbying power of the incumbent, regulator may favor this company by devising regulatory policies as opposed to differential treatment of other small and latecomer firms. Fourthly, by selecting different price controls regulators can enhance the ability of regulated firm to protect its rents at the expense of consumers (surplus). However, one should take into account the fact that even though capture by companies may be more common (since they are more powerful in lobbying, affecting the decision making process) in some instances, regulatory policy may be influenced by consumer interests. Peltzman[22] argues that this phenomenon may have been caused by economic conditions. In detailed terms, he claims that companies have been treated more favorably during depression and consumers during economic boom periods. But one may question the validity of this argument in that, since in most of the cases regulated firms have monopoly power (at least significant market power), demand for these firms' services have not been

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[21] Gilardi 2008, p.15-16.
[22] Peltzman, S. (1989), "The economic theory of regulation after a decade of deregulation", In Baldwin, R.; C. Scott and C. Hood (eds.): *A Reader on Regulation*, Oxford University Press. p.108-109.

fluctuated much due to lower demand elasticity, e.g. demand for electricity. Lastly, Gilardi[23] cites another view of capture theory suggested by Wilson in that like any other institution, regulatory agencies are also formed by several people from different backgrounds. This also affects the decision making process since each personnel in these agencies have different motivations and/or incentives such as transferring to private sector and/or safeguarding their (especially related to board members) posts for a second term[24].

1.3. Dimensions of Independence

As it is evident from the above discussion, independence can be understood as being at equal distance from related actors in the market from the view point of regulators. Berg[25] states that, independent agency should take into consideration different interests of government (politicians, ministries, and other government institutions), industry (firms, suppliers) and consumers in the regulatory process. Related to this, independence can be divided into four components; independence from government, independence from stakeholders, independence in decision making and organizational autonomy[26]. However, one can assert that the last two items are satisfied, provided that independence from government and stakeholders are guaranteed in both formal legislation and in actual process. In other words, it should be sufficient to state that independence from both government and other stakeholders necessitate some degree of decision making capability and organizational autonomy. In fact, a well established funding mechanism (i.e. financial independence) should be regarded as one of the prerequisites of independence in practice. In this process, regulator should act as a mediator in balancing different interests and make all related actors understand the rules of the game in the market. With this observation in mind, independence from these two main actors will be further elaborated to indicate various mechanisms to safeguard this independence like establishment of autonomous funding.

First of all, independence from government should not be taken as an absolute freedom from any control. On the contrary, the duties and responsibilities together with the functions of these authorities should be clearly defined in their laws. Also, as discussed previously, accountability should be seen as a balancing (or complementary) part of independence. In a good

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[23] Gilardi 2008, p.17.

[24] If it is permitted (possible) in relevant legislation. As it is seen in 'independence index' and related discussions, this is not recommended to minimize such motivations.

[25] Berg, S. (2000), "Developments in Best-Practice Regulation: Principles, Processes, and Performance", *The Electricity Journal*, Vol: 13, Issue: 6, p.11-13.

[26] Johansenn 2003, p.9.

governance concept, one may argue that the most important thing is that everyone should know the rules and know that these are not arbitrarily applied (i.e. differential treatment). Independence from government should also be evaluated from this perspective; once the procedures are established, then even government (using state power) should not be allowed to change these arbitrarily and especially investors should be able to make investment decisions for the long term without worrying about frequent interventions of the government. In practice some measures can be adopted to minimize interventions of (i.e. not transparent and arbitrary) politicians. In addition to granting independence formally, board members should be protected by law against dismissals (other than stated clearly in the relevant legislation) and appointment procedures should also be clearly stated in the relevant legislation[27]. Besides this, funding of these institutions is one of the most important issues in the establishment of independency. In other words, unless some kind of funding mechanisms is established, governments can manipulate (e.g. decreasing budget, salary) these institutions and their decision processes more easily. In this respect, it is not wrong to assert that the autonomy and independence (level) of these institutions are proportional to internal financing ability of them. To increase this ability, a stable source of funding can be created by fees from companies operating in related markets. In turn, these institutions should be given an autonomy (to some degree) to decide on promotion, salary policies etc. to let them increase quality and competence level of their personnel.

Second issue is the independence from industry (stakeholders) since regulators may be influenced by the firms (i.e. regulatory capture). As mentioned previously, board members and working personnel can be manipulated by various methods and/or motives to act in the interest of supposedly regulated companies. For instance, a board member may act differently if she wants a job in private sector after her membership expires or has stocks of companies that are under regulatory jurisdiction. Moreover, due to asymmetric information problem, regulators can be manipulated even if they think that they act in an unbiased manner. Here the capacity building of agencies plays an important role (e.g. continuous education of personnel in technical matters) to minimize this problem since as the technical people (working in these institutions) get more expertise it will be more difficult for companies to hide information and/or manipulate these institutions.

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[27]OECD (2002), *Regulatory policies in OECD countries: from interventionism to regulatory governance,* Organisation for Economic Co-operation and Development, Paris, p.27-32.

In this context, Argentina's experience may be helpful for seeing the regulatory capture of agencies. After privatizations, several regulatory authorities were established in the country with the assistance of multinational companies (that bought privatized firms). Baer et al.[28] argue that this assistance coupled with lobbying power of these companies have resulted in differential treatment (e.g. allowing very high rates of return) and institutional capture. In practice, several procedures have been devised to reduce the probability of regulatory capture by companies. To name a few, board members are not allowed to have economic interest in the regulated firms and there exists some restrictions for working in the private sector for board members (and also for technical personnel in regulators) within a defined time period, e.g. two years.

2. EVOLUTION OF REGULATORY AUTHORITIES

Public services such as water, transportation, energy were provided by state owned economic enterprises in most of the countries until roughly the last decade of 20th century with the only exception of the United States of America (USA) where these kinds of services have been provided by private firms mostly in monopoly market structure. Here, one may argue that owing to public good characteristics of these services (i.e. continuity of provision, social considerations etc.) policymakers increasingly felt the need to regulate the operations (behaviors in a sense) of these companies that have larger market shares.

Origins of regulatory authorities can be traced back to the 19th century in the USA. In fact, Yataganas[29] asserts that these institutions were invented by Americans since the prerequisite for their existence was more transparent administrative environment of this country. More specifically, Interstate Commerce Commission (ICC) was founded as the first regulatory agency in 1887 by the Congress of the USA. It is stated that the reason for its establishment was the public complaints of private firms' practices concerning quality and prices of railway transportation services[30]. Due to the continuing malpractices of private companies, the Congress decided to separate the previously responsible body (for monitoring price & quality) from the Department of the Interior[31]. After its establishment, the jurisdiction of this

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[28]Baer, W. and Montes-Rojas, G. (2008), "From Privatization to Re-nationalization: What went wrong with privatizations in Argentina?", *Oxford Development Studies*, Vol. 36, Issue:3, p.327.

[29]Yataganas, A. (2001), "Delegation of Regulatory Authority in European Union, The relevance of the American model of independent agencies", The Jean Monnet Program Working Paper 3/01, http: //www.jeanmonnetprogram.org/ papers/01/010301.html, retrieved 17.02.2010, p.21-22.

[30] The Columbia Electronic Encyclopedia 2007, "Interstate Commerce Commission",
http:// www.infoplease.com/ ce6/history /A0825369.html, retrieved 17.02.2010.

[31] Yataganas 2001, p.17.

agency[32] was gradually increased from only railroad transportation to other kinds of transportation (i.e. highway and water transportation) excluding only airplane transportation. In parallel to this expansion of jurisdiction, powers and duties of the institution were also increased including determination of fair rate of return on tariffs[33]. Then, Federal Trade Commission (FTC) was established in 1914 with powers to monitor and curb unfair trade practices of big holdings[34]. Yataganas argues that the reason for the establishment was also due to congressional apprehension of the administration, coupled with suspicions about the effectiveness of ordinary courts in dealing with anti competitive practices of undertakings. Following this[35], adoption of independent agencies has been extended in several other fields and today there exist well above fifty of such institutions[36].

As it is stated above, correction of market failures (especially in monopoly, higher prices in return for lower quality) were played an important role in the creation of these institutions in the USA context. Bjork and Connors[37] emphasize that the main reason for the adoption of such agencies was the rise of powerful monopolies that generated the need for regulation (in a sense intervention) by the name of public interest. In addition to these, there exist some other arguments for extensive use of independent agencies in this country. Sönmez[38] argues that 'check and balance' system between the President and the Congress also led to creation of regulatory institutions together with the federal administrative system (i.e. the need for ensuring coordination, standardization among federal states) of the country.

On the other hand, regulation (regulation by independent bodies) has been a more recent phenomenon in Europe. Especially with the EU harmonization policies, every member country began to create these institutions

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[32] The agency was terminated in 1995 and many of its functions have been transferred to National Surface Transportation Board.

[33] One could add that acting as a referee in labor disputes, managing the process of consolidation in railroad system and conducting investigations in the area of jurisdiction could be mentioned as (among others) duties and powers of this agency.

[34] FTC (2009), "The Federal Trade Commission at 100: Into our 2nd century, The continuing pursuit of better practices", http: //www.ftc.gov /os/2009/01/ftc100rpt.pdf, retrieved 17.02.2010.

[35] For instance, the Federal Power Commission (1930), the Securities and Exchange Commission (1934), and the National Labor Relations Board (1935).

[36] According to Longley, R. (2010), 'Agencies, like the FDA, EPA, OSHA and at least 50 others, are called "regulatory" agencies, because they are empowered to create and enforce rules - regulations - that carry the full force of a law'.

[37] Bjork and Connors 2005, p.1-2.

[38] Sönmez, Ü. (2004), *Independent Regulatory Agencies: The World Experience and the Turkish Case*, Graduate Thesis, Middle East Technical University, p.8-10.

in almost all (previously natural monopoly) sectors[39]. In more specific terms, EU Commission prepared a legal framework in which the establishments of regulatory bodies were made compulsory, for example directives on telecommunications and energy (electricity, gas) set out detailed formation process (together with powers, duties, responsibilities etc.) of these institutions. EU policy has also supported the adoption of independent regulatory authorities in new members and other candidate countries in southeast Europe and Turkey as well.

Within this context, Majone[40] point out the fact that *transition from the interventionist state to the regulatory state* (in his own words, although one may oppose this by saying that regulation is also a kind of intervention) in EU level contains *privatization, liberalization, welfare reform and deregulation.* As mentioned in the previous part (also in the USA case), privatization of previously state enterprises necessitated regulation of tariffs, continuity of supply and quality of service issues. Even deregulation, by itself means more liberal environment, lead to rigid rules such as environmental standards (instead of pollution taxes) and in this sense regulatory institutions' importance and roles have not been diminished in EU context. Secondly, it can be said that *europeanisation of policy making[41]* is even more important for the creation of such bodies in this continent. For example, only Germany had a competition authority when the Treaty of Rome was signed and after approximately forty years all member countries have adopted these agencies in implementing competition policies. But what is different from the USA is that country specific factors have also a role in this process, leading to somehow different regulatory structures (policies, practices etc.) in each member country[42].

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[39] One exception can be found in United Kingdom where a commission form of regulation for railways and canals were employed in the 19th century.

[40] Majone, G. (1997), "The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union", EIPASCOPE, Vol. 1997. No. 3, http://aei.pitt.edu/786/, retrieved 17.02.2010, p.1.

[41] Europeanization can be defined as 'construction, diffusion and institutionalization of formal and informal rules, procedures, policy paradigms, styles, "ways of doing things" and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and sub-national) discourse, political structures and public policies' (Radaelli, 2004: 5). For detailed arguments, among other works and especially related with telecommunications, please see Levi-Faur et al. (2005).

[42] For example, Thatcher (2007) argues that europeanisation was more important for France whereas regulatory authority was created for (mainly) dealing with privatized incumbent operators in UK. Moreover related ministries have more influence on the regulatory bodies in France where technocratic elites got important positions than the case in UK.

2.1. Good Governance Concept and Adoption of Regulatory Institutions in Developing Countries

Chang and Grabel[43] claim that the failure of public sector especially in developing countries led to changing attitudes towards politicians and government bureaucrats in 1980s. Owing to previously unsatisfactory state performances (in development), neoliberal policies have been increasingly adopted by developing countries throughout the world starting from this period. These neoliberal policies advocate small but capable state and give priority to the efficient functioning of markets. In this context, establishment of independent regulatory authorities in various sectors is recommended, supported and even imposed (to minimize government failure, corruption and increase investor confidence) on developing countries in the context of neoliberal policies including others such as privatization, liberalization, free trade and labor market flexibility[44]. In fact, independent authorities have become one of the most widespread elements of modern administrative governance all over the world since then. Both IMF and World Bank have actually promoted the establishment of these institutions along with USA and EU aid (in the form of grants and assistance for capacity building) for the creation and efficient working of them. One can find the clues for the increasing adoption of such bodies in the good governance[45] approach used by international institutions and the importance attached to this can be seen in many World Bank and IMF documents. For instance, in the speech made by the Managing Director of IMF (1997) it is stated that good governance is important for countries in any stage of development and their (IMF's) priority is to focus on related aspects of good governance including (among others) the effectiveness of public resource management, stability and transparency of the economic and regulatory environment for private sector activity and investments.[46] Besides this, in various reports the need for regulatory governance (as part of good governance) has been emphasized for the creation of efficient and stable markets. In this

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[43] Chang H. and I. Grabel (2004), *Reclaiming Development- An Alternative Economic Policy Manual*. Zed Books London, UK, p.35-39.

[44] Chang and Grabel 2004, p.47-48.

[45] Good governance can be defined as the combination of eight major characteristics. These are participation, transparency, effectiveness and efficiency, responsiveness, equitability and inclusiveness, consensus orientation, accountability and (following) the rule of law (Unesco, 2005).

[46] IMF (1997), "Good Governance- the IMF's Role", International Monetary Fund, Washington, http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm, retrieved 17.02.2010.

context, Das and Quintyn[47] assert that good regulatory governance is one of the most critical elements in financial stability. They have identified four key components for good regulatory governance; accountability, transparency, integrity and independence of the agency from political and industry influence. Here, one can see another example of emphasis on independent regulatory agencies (i.e. need for independent and competent regulatory body for stability of the market) in the context of good governance. Accordingly, disbelief in the capability of traditional bureaucracies and corrupt policymakers led multinational agencies to advocating the establishment of regulatory institutions to satisfy the basic conditions of good governance. More specifically, regulatory authorities are supposed to satisfy the rule of law characteristics (to safeguard foreign investment) by definition since they can operate relatively more independently from political pressures. Secondly, the decision making part (board members) are constructed to enable equitability, inclusiveness and consensus orientation. For example, board members may be selected from different representatives of the society such as related industry, civil societies and consumer associations and by this way, important prerequisites of good governance can be met to some extent (i.e. equitability and inclusiveness, consensus orientation). Thirdly, working mechanisms of these institutions are supposed to be more transparent (board decisions are published with detailed explanations) and efficiency objective can be satisfied by making these institutions accountable and setting performance targets to evaluate their success or failure, e.g. tariff reductions in real terms as a result of price cap regulation. However one should be careful here and take into account the fact that these are written features, characteristics (i.e. on the paper). For instance, selection of board members from related parties to enable representation of consumers, nongovernmental organizations etc. are mostly written in related laws of these regulations but caution should be taken about what is observed in implementation (i.e. differences between legal procedure, requirements and actual practice).

To repeat, increasing number of multinational (including USA and EU) aid (e.g. loan, grant and technical assistance etc.) have been provided with good governance conditions attached including the provisions for the establishment of independent regulatory agencies[48] since the beginning of 1980's throughout the world. Moreover there exist similar provisions in World Trade Organization (WTO) agreements. For instance, regulatory standards related to

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[47] Das U. S. and M. Quintyn (2002), "Crisis Prevention and Crisis Management: The Role of Regulatory Governance", *IMF Working Papers 02/163*, International Monetary Fund, Washington, p.8-12.

[48] Smith B.C. (2007), *Good Governance and Development*, Palgrave Macmillan, p.1-16.

telecommunications are set out in 'Agreement on Basic Telecommunications'. The Reference Paper forms the commitments of WTO and in the fifth heading the structure and characteristics of regulatory bodies is written with particular emphasis on independence[49]. Furthermore, due to EU acquis alignment requirements, accession countries are also obliged to create such institutions. In detail, according to EU Framework Directive (2002/21/EC), member states shall establish national regulatory authorities and guarantee the independence of them by ensuring that they are legally distinct from and functionally independent from other parties[50]. Accordingly, each accession country has been obliged to establish these institutions before achieving full membership status.

In Turkey's case, one can state that all of the above mentioned institutions and their policies have played a role, though in varying degrees. As a specific example from telecommunications sector, firstly it is seen that WTO agreements have necessitated the creation of a regulatory agency in this sector. Secondly as an accession country, Turkey has also obliged to the establishment of this organization. Thirdly and may be most importantly for this specific case, IMF loan conditionality led to the creation of the agency. This fact can be seen from the letter of intent written by the Turkish Government which stated the policies that Turkey intended to implement in the context of its request for financial support from the IMF. Here it is explicitly written that a regulatory body would be established at most six months after the enactment of related law[51, 52].

After seeing the reasons for the extensive use of regulatory agencies, more detailed cases in telecom sector will be discussed in the following sections.

2.2. Case-1: Federal Communications Commission of USA

Since regulatory authorities have been established firstly in USA, telecom sector regulation has also been traced back to the 1930's in this country. In detail, the

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[49] '...5-Independent Regulators: the regulatory body is separate from, and not accountable to, any supplier of basic Telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.'

[50] Ryan M. (2007), *The EU Regulatory Framework for Electronic Communications Handbook*, Arnold and Porter LLP, London UK, p.11.

[51] '...Building upon this important step, legal measures will be introduced to: (i) enable Turk Telekom to act as a private entity by making it subject to the Turkish commercial code and permit it to retain exclusivity on fixed-line operations until at least end-2002; and (ii) establish a regulatory body for the telecom sector. This body will be established within three-six months following the enactment of the law....'

[52] IMF (1999), "Turkey Letter of Intent", International Monetary Fund, Washington, http://www.imf.org/external/NP/LOI/1999/120999.html, retrieved 17.02.2010.

institution related to regulation of this sector, namely Federal Communications Commission (FCC) was established in 1934 by the Communications Act to assert control over the growing field of communications[53] and to regulate interstate and international communications by radio, television, wire, satellite and cable[54].

The executive branch of this institution is composed of five commissioners appointed by the president and confirmed by the Senate for a five year time period. Chairperson is selected among these commissioners by the President. In terms of the composition of this management board, it is stated that at most three members (commissioners) can be from the same political party. Owing to the fact that regulatory institutions have been invented and implemented firstly in this country (e.g. FCC is 75 years old), it is not surprising that there is not much argument about the independence status of these institutions. Indeed, it is emphasized that *separation of regulatory and operational functions, freedom from direct political pressure, fair and transparent procedures and finally delegation of authority to the agency to establish rules and adjudicate disputes in the public interest* are the main ingredients of independence[55].

In this respect, Bjork and Connors[56] indicate that *the US model is a hybrid of executive, legislative and judicial functions*. As in the case of FCC, board members (commissioners) are chosen by politicians (president for the federal level, governors at the state level and confirmed by respective levels) and from outside the normal civil service framework. According to them, the main reason for enabling the independence of these institutions is their final decision making authority since these regulation (decisions) can only be appealed to a court. Apart from this, Yataganas[57] points out the fact that although these independent authorities have been created by Congress and also their budgets are subjected to control (monitoring) then how can one call them independent? He claims that the basis of their independence should be looked in the fact that their board members cannot be removed by the policymakers without solid and justified (e.g. bribery, abuse of power etc.) reason. As a specific example, they give the President's (G.W. Bush) threat of removal of the members of postal service governing body, related to a rate-making dispute. In

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[53] The Washington Post (2003), "Federal Communications Commission", http://www.washingtonpost.com/wp-dyn/articles/A3339-2001Aug27.html, retrieved 17.02.2010.
[54] FCC (2010a), "About the FCC", http://www.fcc.gov/aboutus.html, retrieved 17.02.2010.
[55] FCC (2010b), "Connecting the Globe- a Regulators Guide to Building a Global Information Community", http://www.fcc.gov/connectglobe/welcome.html, Ch.1, retrieved 17.02.2010.
[56] Bjork and Connors 2005, p.1-2.
[57] Yataganas 2001, p.11-12.

this case, board members took the case to the court, and in the end court ruled in favor of the board decision, safeguarding the independence of the agency. Besides this, as mentioned above, independence should be closely accompanied by accountability and transparency. In the context of FCC, this is accomplished by various procedures. First of all, proposed decisions and related proceedings are made publicly available. Secondly, the authority announces the items that will be discussed and these are debated at public meetings. In a similar fashion, regulatory decisions including license policy are determined through consultation process together with setting of technical standards by cooperation with voluntary standard setting organizations[58]. At this point, it can be asserted that legitimacy of these agencies is closely associated with close cooperation with civil society including nongovernmental organizations and guarantees of transparency in the decision making process.

Nevertheless, this does not mean that there are no problems and/or discussions related to the structure and workings of these institutions. For example, some criticize the assumption of neutrality by pointing out the fact that every person has prior judgments and/or beliefs about any social issue (in fact any regulation is also a social process involving many things and of course value judgment of any board member is part of this) and policy decision. For example, according to Bjork and Connors[59], FCC opposed to the deregulation of media industry during the presidency of a Clinton appointee and in Bush era, another FCC chairperson (executive officer) promoted deregulation and tried to ban showing of improper content during important live broadcasted events like scandalous acts, dresses of singers in ceremonies, sport tournaments. By looking at these cases, they claim that *regulatory policy also entails the exercise of subjective judgment*, and politics can't be eliminated from the policy space.

2.3. Case-2: Office of Telecommunications in UK and Germany's Early Experience in Telecommunications Regulation

As discussed in the preceding section, like other regulatory agencies, the setting up of telecommunications authorities in EU countries have began much later than the case in USA. The process firstly started with the beginning of liberalization process and establishment of the Office of Telecommunications (Oftel) in the United Kingdom. Since then the numbers have been increased rapidly following the enactment of related EU directives.

So as the first example in EU, Oftel was created in 1984, after the ratification of Telecommunications Bill in United Kingdom. Afterwards;

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[58] FCC 2010b, "Components of the regulatory process and organization of the FCC", Ch.3.
[59] Bjork and Connors 2005, p.5.

Broadcasting Standards Commission, Independent Television Commission, Radio Communications Agency, Radio Authority and OFTEL were merged to establish the Office of Communications, OFCOM[60]. Ofcom's Board is composed of a Chairman and both executive and non-executive members. The Executive runs the organisation and answers to the Board, whilst the work of both Board and Executive is informed by the contribution of a number of advisory departments[61]. The Ofcom Board meets at least once a month and agendas and notes of meetings are published regularly on the Ofcom website, creating more transparency in the workings of this institution. Here one can affirm that (as UK and USA practices show) giving as much information as possible to both industry actors (firms), nongovernmental organizations (related to environment, consumer protection) and consumers are beneficial for decreasing information asymmetry and important component of good governance approach. In this respect, Jacobzene[62] mentions the fact that these agencies have significant information related to their industries (sectors). Some of them publish these data, statistics, reports etc. regularly and give the board decisions and reasons for these decisions to public view and this considerably helps public discussions and increases transparency of these institutions. Indeed, according to Jacobzene[63], the periodic publication of this information can be regarded as an important step towards transparency, holding these organizations accountable (which are together with transparency inseparable part of independence) for their decisions.

Before creation of Ofcom, Oftel was accused of being captured by the incumbent operator, British Telecom (BT) several times for allowing leverage of BT's market power in fixed line telephony into other markets such as broadband internet services. As a specific example one of the biggest internet service provider of this time, Freeserve accused Oftel for letting BT to use detailed information contained in its residential customers' bills to target particular customers, since no other operator has access to this information[64].

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[60] National Audit Office (2006), "The creation of Ofcom: Wider lessons for public sector mergers of regulatory agencies",
http://www.official-documents.gov.uk/document/hc0506/hc11/1175/1175.pdf,
retrieved 17.02.2010, p.7-8.
[61] Ofcom (2010), "About Ofcom", http:// www.ofcom.org.uk/about /csg/ofcom_board/role,
retrieved 17.02.2010.
[62] Jacobzone S. (2005), "Independent Regulatory Authorities in OECD countries: an overview", *in Designing Independent and Accountable Regulatory Authorities for High Quality Regulation,* OECD, Paris, p.74.
[63] Jacobzone 2005, p.75.
[64] Richardson, T. (2002), "Freeserve slams over BT Broadband" The Register,
http://www.theregister.co.uk/2002/05/20/freeserve_slams_oftel_over_bt/, retrieved 17.02.2010.

Similarly a fixed line telephone company INMS blamed Oftel for working in a biased manner. In the accusation the executive manager of the company claimed that '*the regulator has not got the independence it needs to carry out its duties in the UK and the Commission must ensure that there is no link between national regulatory authorities and ministries. Ministries have a habit of doing deals with operators.*' Naturally Oftel rejected the charges, claiming its formal autonomy and it was stated that '*Oftel is perfectly satisfied that it has the independence from government necessary to carry out its duties and more importantly, this was fully recognized by the European Commission last November in its Fifth Implementation Report*[65]. From these examples, it is clear that related parties (firms) have constantly engaged in lobbying activities to preserve their marketing shares (and to increase also), but the extent of their influences should be examined with respect to each case in each country. The same is also true for policy makers' influence in the regulatory policy making process. However for EU countries, one should also take into account the role of European Commission in overseeing this process apart from country specific policy mechanisms. For instance, in response to above mentioned operator's (INMS) complaint about interconnection dispute[66], European Commission requested detailed answer from the Oftel concerning this issue. Within this subject, Dasgupta[67] points out the fact that although regulatory authorities are assumed to be independent in theory, in practice things may indicate the opposite conclusions. Indeed, he begins the research question by asking 'are regulatory authorities independent in practice?' and proceeds with the case study of Oftel and local loop unbundling (LLU) issue[68]. The debate about this issue started by Oftel in 1987 and this institution announced the final date as 2001 for the implementation of LLU. Industry actors complained with this long transition period but Oftel endorsed the incumbent's (BT) request to license amendments and negotiations that were advantageous for the company (i.e. delaying tactics in a sense). In turn European Commission forced Oftel to finish related work earlier than the proposed date. Owing to these pressures, (both from the Commission and to a lesser extent from other firms) Oftel set pricing

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[65] Wakefield, J. (2000), "Oftel accused of bias at European summit", ZDNet UK, http://news.zdnet.co.uk/hardware/0,1000000091,2078900,00.htm, retrieved 17.02.2010.

[66] More specifically, the complaint was about the indirect access request of INMS from major operators and after nearly one year waiting for Oftel decision, this company applied to the European Commission for resolution.

[67] Dasgupta, P.S. (2004), "Oftel and Independent Regulatory Agencies in Practice: Local Loop Unbundling Issue", Presentation in CARR, London School of Economics (LSE), http: //www. lse. ac. uk/ collections/ CARR/ pdf/ 04StudentConfPresentations/Dasgupta.pdf, retrieved 17.02.2010.

[68] LLU means access to the full and exclusive use of the copper pair connected to the customer and/or some form of shared access to the last mile, i.e. the transmission path linking end users to the nearest exchange (Telecommunications Regulation handbook, 2000).

principles and resolved technical issues. However, the demand for this service (by firms) declined within this time period and interest in this process fell to some extent, negatively affecting competition in the related market[69]. Then Oftel proceeded with LLU but rejected the complaints of other firms that obtained services from BT. In conclusion; it is stated that although there were not sufficient evidence to claim the regulatory capture, long delays (timetables) and poor information gathering evidently worked in favor of the incumbent company. Furthermore, at that time, decision against BT was considered as conflicting with government policies (in terms of broadband strategy) and this created more favorable environment for this firm[70]. In this case, Bartle et al.[71] state that although British model was a prototype (in general terms) for other countries and especially for Germany's telecommunications regulator (formerly RegTP), Oftel learned from RegTP's experience related to LLU process. Apart from regulatory capture arguments, they suggest that Oftel adopted wrong approach, 'co-regulation' in which BT was given more discretion to reach voluntary agreements with new firms (entrants) as opposed to RegTP's practice of supporting new market entrants to the local loop (which was controlled by Deutsche Telekom) with detailed regulations in more interventionist form. In general terms, according to them, this shows the evidence of the learning from each other experience in EU level and some convergence develops in telecommunications sector despite the fact that there still exists divergences in regulatory process (mostly) due to traditions of administrative practices in each country (in this case UK and Germany).

Having mentioned the RegTP's approach in the LLU issue, it may be appropriate to briefly assess the independence aspects perceived in this country (Germany) together with UK. In this subject, Bartle et al.[72] mention that in both of these countries the parliamentary system and the emphasis on parliamentary sovereignty lead to complications for the establishment of these independent authorities. First of all, as stated in the above paragraph, British example (especially Oftel in telecommunications) has been adopted by many other EU member countries including Germany. Secondly, there also exist some debates in the context of independence in this country too, but more from the point of regulatory capture by politicians. For instance, RegTP's first president was regarded as highly successful for third generation mobile service licenses in the

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[69] Dasgupta 2004, p.4-7.

[70] Dasgupta 2004, p.9.

[71] Bartle, I., M. Müller, R. Sturm and S. Wilks, (2002), "The Regulatory State: Britain and Germany Compared", Anglo- German Foundation for the Study of Industrial Society, http://www.agf.org.uk/cms/upload/pdfs/R/ 2002 _R1268 _e _regulatory _state.pdf, retrieved 17.02.2010, p.13-17.

[72] Bartle et al. 2002, p.15-19.

SPD (leading political party at this time) but due to his connections with opposition political party (CSU) he was asked to leave (implicitly) the office (in addition to this the successor was more favorable to the new government), supporting the view that independence in theory (i.e. what is written in legislation) sometimes differs from what is observed in practice even in a developed country context. Notwithstanding to this, constant legal conflicts between RegTP and the incumbent Deutsche Telekom (DT) can be deemed as an important indicators of independence from the incumbent operator in the early years of liberalization as opposed to UK experience (one can find many other similar cases) in which incumbent operator treated more favorably (in the early years of liberalization, market opening phase). Thirdly and related to the previous one, influenced by these legal conflicts RegTP designed and implemented regulatory work more formally (in relative terms, of course) in terms of codified, detailed rules and procedures than the Oftel's situation in the early years of regulation. Indeed, in the first two years (from the establishment date) this institution has been sued 400 times and this process inevitably forced the authority to design very detailed regulations (*at least to meet the requirements of the Administrative Procedures Act* in the words of Bartle et. al.). Here one may add that this process has augmented the independence by increasing the capacity and experience of this organization.

Even these few examples show that (i.e. Ofcom is the oldest telecom regulatory authority in EU and for this reason it may be regarded as an important example for benchmarking with USA) situating independent regulatory authorities in EU context has been a challenging task in the existing regulatory framework in a number of European countries as opposed to the USA experience in which they (regulatory authorities) have very long history and experience where they have been given clear congressional objectives and duties.[73] Furthermore, what is more confusing is that member countries have established these institutions as a result of EU directives but each have different characteristics reflecting the country specific factors (national and administrative frameworks) as opposed to the federal level uniform practice of FCC. In fact, it is planned that EU level telecom authority will be established in the medium term, but the discussion of this issue is beyond the scope of this paper.

2.4. Case-3: Telecommunications Regulatory Authority of India- TRAI

Telecom Regulatory Authority of India (TRAI) was founded in 1997 by the telecom regulatory authority of India act[74]. According to the article (3) of this

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[73] Jacobzene 2005, p.73.
[74] TRAI (1997), "The Gazette of India- Telecom Legislation- TRAI Act 1997",

law, the Authority's executive level is composed of a Chairperson, and not less than two, but not exceeding six members, to be appointed by the Central Government. From this it can be inferred that representation of different segments and/or related parties concept have not been taken into consideration by India's policymakers when establishing this institute. Determination of vice-president of the agency is also made by government itself as opposed to some other practices such as selection of vice-president by the authority's board independently (as in the case of Turkey). On the other hand, the reasons for removal and suspension of member/s from office in certain circumstances are explicitly stated in the related chapter[75]. Another specialty of this law is that powers of central government to issue directions are explicitly written in a separate article. In this article, it is stated that *central government may issue to the Authority such directions as it may think necessary in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.* From this it may be inferred that central government wants to control and intervene the policy making mechanism by using this article if it is considered necessary or optimal from the point of theoretical cost-benefit analysis of power delegation.

On the other hand, one can observe a kind of power struggle between Department of Telecommunications (DOT) and newly established authority in this era. Indeed, in the functions of authority part, only recommendation duties have been given to TRAI (i.e. recommendation of the need and timing for introduction of new service provider and the terms and conditions of license to a service provider instead of giving and/or authorizing licenses directly to firms). On the other hand, DOT has been empowered with giving licenses and in this sense can be regarded as the main body of telecom policy in this country. In other words, since once the licenses are given (i.e. entry conditions) afterwards rules of the game would be determined to considerable extent leaving only the inspection duties to the regulatory authority within the predetermined policy boundaries. For a specific example, Dokeniya[76] states that DOT authorized a company (in fact its corporatized firm) named MTNL to diversify into other businesses other than the initial license conditions. Immediately afterwards

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http://www.trai.gov.in/trai_act.asp, retrieved 17.02.2010.

[75] '…The Central Government may remove from office any member, who, has been adjudged an insolvent; or has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or has become physically or mentally incapable of acting as a member; or has acquired such financial or other interest as is likely to affect prejudicially his functions as a member; or has so abused his position as to render his continuance in office prejudicial to be public interest…'

[76] Dokeniya, A. (1999), "Re-forming the state: telecom liberalization in India", *Telecommunications Policy*, Vol. 23, No: 2, p.125.

TRAI blocked the implementation on the condition that its opinion had not been asked, but in the end related court decided in favor of DOT's decision indicating that the power of amending licenses belonged to this institution.

Within this context, Dokeniya argues that *the political structure in India is based on tacit contractual agreement.* According to him, central government has extraordinary powers in every policy sphere but in return people expect social services (uninterrupted provision of public goods etc.) at low prices and economic growth. Accordingly, one can say that this agreement and its political outputs have created this generic and country specific regulatory structure in telecommunications industry. In other words, the regulatory processes of this country although influenced by liberal policies, still have various country specific characteristics and objectives such as employment creation, technology acquisition and provision of telecom services at low cost to the people.

3. REGULATORY AUTHORITIES IN TURKEY

Since 1980's, like virtually the case in other developing countries (especially in South America), liberal economic policies have been adopted by Turkey as a result of international agency's imposed policy (World Bank & IMF) on the country. Indeed, Glenn[77] explains that World Bank gave 200 million $ loan subject to the country's implementation of structural adjustment policies and stringent programme of economic reform. One can also add the requirements of EU membership process (alignment with the EU acquis) and WTO commitments to the reasons of the creation of these institutions in later periods. Following these reasons, as indicated earlier, regulatory authorities have began to be established to monitor post privatization process and safeguard the workings of capital markets in the context of good governance approach. In this respect, the first regulatory authority was established in the capital markets by the name of Capital Markets Board in 1982. The names, establishment dates and board member numbers of all these regulatory authorities in this country are given in the following table (Table 1).

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[77] Glenn, J. (2008), "Global Governance and the Democratic Deficit: stifling the voice of the South", *Third World Quarterly*, Vol. 29, Issue:2, p.221.

Table-1: Regulatory Authorities in Turkey

Name	Establishment Year	Number of Board Member	Administrative & Financial Autonomy
Capital Markets Board	1982	7	Yes
Radio & Television Supreme Council	1994	9	Yes
Competition Authority	1994	7	Yes
Banking regulation & Supervision Agency	1999	7	Yes
Telecommunications Authority (now ICTA)	2000	7	Yes
Energy Markets Regulatory Agency	2001	7	Yes
Sugar Agency	2001	7	No
The Tobacco, Tobacco Products & Alcoholic Beverages Market Regulating Agency	2002	7	Yes
Public Procurement Agency	2002	10	Yes

Source: Web pages of these institutions.

Before proceeding further, it can be said that although most of the features (and characteristics) of these institutions are similar, there exists various differences between some of them.

Firstly, with the exception of Competition Authority and Public Procurement Agency[78] that are concerned with all sectors of the economy, other agencies are responsible for one market (for energy market regulation; electricity, natural gas, petroleum and oil markets). The case of the Tobacco, Tobacco Products & Alcoholic Beverages Market Regulating Agency is also

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[78] One should note that this institution's discretion (scope of its power that is to say) is also reduced with further legislations, e.g. latest exclusion of military procurements, projects of the state.

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interesting since this institution has no control over alcoholic drinks that are in the responsibility of Ministry of Agricultural and Rural Affairs.

Secondly, all these authorities have formal administrative and financial autonomy (formal independence) except for Sugar Agency. What is more interesting for this agency is that there is no restriction for the board members to hold another position (or work elsewhere) and in this regard these memberships can be regarded as part time jobs.

Thirdly, the powers and responsibilities of these institutions should be evaluated in a dynamic (changing) view. In other words, policymakers (Parliament) constantly change and modify these institutions' powers and abilities through new legislations. For example Sezen[79] points to the budget surplus transfer requirements to the Treasury taken in 2005 to limit the financial resources and abilities of these institutions[80]. Fourthly, whereas appointments of board members of Radio & Television Supreme Council are made by the Parliament the other regulatory authorities' board members are appointed by the Council of Ministers. Lastly[81] in terms of accountability concept, there exist some provisions for monitoring and controlling the administrative functioning of these institutions, including the inspection procedures of the Court of Audit. However one can argue that all these procedures (provisions) are not related to the analysis of regulations in terms of costs and benefits (i.e. cost- benefit and regulatory impact analysis) of such actions and policies.

Having stated the adoption of regulatory authorities and some differences (related to structures) between them, the next subsection proceeds with more detailed analysis of one of them, 'Information and Communication Technologies Authority of Turkey' (ICTA).

4. ICTA (OF TURKEY)

This part starts with a general analysis of historical background of the sector and establishment of this institution.

4.1. Historical Background

The legal basis of the telecommunication services which began to be provided directly by a state monopoly PTT was the Telegraph and Telephone law of 406

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[79] Sezen, S. (2007), "Independent Regulatory Agencies in Turkey: Are they really autonomous?", *Public Administration and Development,* Vol. 27, p. 323.

[80] I do not mean that act is beneficial (positive or negative) or not, this is an example showing only for the indication of changing legal environment in this country.

[81] One can find many other differences in various respects including enforcement powers, but these arguments are both outside the scope of this work and too detailed (enforcement powers, related legislation etc.) to discuss in this context.

on 21 February 1924. Based on this law, there were not major changes in the telecommunications sector in Turkey until 1980s. Nevertheless, major regulatory and structural changes at the global level towards liberalization of telecommunications markets affected Turkey as well. With this development in the world, Turkish legislation structure began to alter in 1994 by the law 4000 which divide PTT as two bodies. As a result of this, telecommunications services were provided by Turk Telekom which was a state economic enterprise, postal services were provided by Post and Telegraph Inc. (PT). Moreover this law had provisions enabling privatization of 49% of the company and liberalized value added services and allowed the Ministry of Transport to grant licenses to private enterprises. In the fixed line market, the privatization of Turk Telekom was completed after seven attempts in 2005 for 6, 5 billion US$. On the other important category of telecommunications services, liberalization was realized with the authorization of two private companies to provide mobile services over the GSM 900 standard in 1994. These companies, Turkcell and Telsim, had revenue agreements with Turk Telekom until 1998. Different from many European countries, Turk Telekom did not take part in the mobile business until 2001. The bidding for the third license for installment and operation of a GSM 1800 network was won by Turkiye Is Bankasi and Telecom Italia Mobile consortium (Aria) in 2001. Finally Turk Telekom (fixed incumbent operator) started to operate the fourth mobile operator as Aycell in 2001. However, Aycell and Aria established AVEA mobile subsidiary company as a result of merger. The last development in the mobile telecommunication sector was to sell of Telsim, the second biggest mobile operator of that period, to Vodafone. In this era, another important step regarding liberalization and regulatory reform was the enactment of the amending Law No. 4502, adopted in January 2000. With this law, Telecommunications Authority (TA), regulatory body regarded with telecommunication, was established. Besides this, the law ended monopoly rights of Turk Telekom in fixed voice telephony on 31 December 2003. More recently, with the Law No. 5809 'Electronic Communications Law', the name of the organization has been changed to ITCA.

4.2. Independence Evaluation of ICTA

Having seen the establishment process and some important developments in the telecommunications sector briefly, it may be convenient to proceed with a study on formal independence of this organization. Accordingly, this part follows with the application of an 'independence index' developed by Gilardi[82, 83]. Basically,

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[82] Independence index questions and answers related to ICTA of Turkey are given in Annex-1, due to the length of this questionnaire.

this index is composed of questions related to status of agency head and other board members' relationship with government, financial and organizational autonomy. As applied to our main case (Annex-1), higher index scores indicate more independence owing to different weights given to different answers. That is to say, if an agency head's term of office is over 8 years, this corresponds to maximum weight of 1 (one) and if there is no fixed term then 0 (zero) weight is given to this answer. If we return to our case, head of the agency and board members are appointed for 5 years and this gives above average score. Other categories that give higher scores are due to the provisions that both of them are not allowed to hold other offices in the government and dismissal is possible, but only for reasons not related to policy. Nevertheless, they are both appointed by council of ministers and this corresponds to below average score. Besides this, their appointments are renewable, meaning zero score for these categories. On the other hand, in the financial category, independence of funding gives maximum score but for the other categories such as budget control and personnel policy etc. answers in our case correspond to average results. The more problematic section is the 'regulatory competencies' part, since one may have difficulty in selecting the most suitable answer. That is to say, even though ICTA has considerable discretion in the regulation of the sector, recent amendments (e.g. universal service regulation in the discretion of the Ministry) and changing of the previous sector (telecom) to information and communication technologies sector (i.e. definition difficulties in the scope etc.), complicates this issue. Having made these calculations, then one can compare our case's score with those of obtained by Gilardi[84]. In the following table, selected country scores are given for this comparison.

Table-2: Index Results (Telecommunications)

Country	Index Result					
	A	*B*	*C*	*D*	*E*	*independence*
Turkey	0,704	0,704	0,6	0,466	0,15	*0,59*
Austria	0,73	0,56	1	1	0,25	0,71
Belgium	0,36	036	0,5	0,33	0,25	0,36
Denmark	0,15	0,28	0,75	0,63	0,75	0,51
Finland	0,32	---	0,92	0,88	0,25	0,59
France	0,84	0,88	0,59	0,67	0,25	0,65
Germany	0,26	0,39	0,67	0,33	0,75	0,48

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[83] It should be admitted that this is a benchmarking tool so one should be careful in assessing the results. In this context, I try to compare my case to other comparable telecom regulatory authorities' scores calculated by Gilardi.

[84] Gilardi 2008, p.144-146.

Greece	0,75	0,59	0,84	0,54	0,25	0,59
Ireland	0,55	---	0,75	1	1	0,83
Italy	0,73	0,77	0,92	0,88	0,25	0,71
Luxembourg	na	na	na	na	na	na
Netherlands	0,51	0,51	0,83	1	0,25	0,62
Norway	0,31	---	0,67	0,88	0,25	0,52
Portugal	0,75	0,75	0,75	0,88	0,20	0,83
Spain	0,7	0,7	0,84	0,79	0,25	0,66
Sweden	0,62	0,3	0,92	0,71	---	0,64
Switzerland	0,41	0,33	0,92	0,63	0,25	0,51
UK	0,38	---	0,84	1,00	0,15	0,59

Source: Gilardi (2008) and author's own calculations.

This index may give a general understanding related to formal independence of regulatory authorities in EU context. The interesting point is that, as mentioned in the case study part; there exist differences in terms of board appointment procedure, revenue appropriation and spending, budgetary control and regulatory competency among member countries. One can accept these differences due to each country's specific characteristics and historical background, but for the independence issue; it can be argued that only looking at this or similar index numbers may be misleading without making detailed case analysis. Indeed, although; Turkey, Finland, Greece and UK all get the same score from this index calculation; in practice one may not have much difficulty to find several differences regarding their external and internal affairs (e.g. budgetary procedures, personnel policy). For instance, whereas universal service policy is implemented by Ofcom in UK, the responsible institution is Transportation Ministry in Turkey and only quality of service issues are left to the regulatory authority. Apart from this, as seen from the case studies, several factors such as power of the incumbent operator, relations between market actors (mainly ministry, authority and dominant firms) have all played roles in this dynamic (i.e. changing regulations) process.

4.2.1. Considerations Related to Board Structure and Decisions

With the Law No.5809, the number of board members has been changed from 5 (one chairman and four members) to 7 (one chairman and six members). Board members are appointed by the Council of Ministers for a 5 year period and they can be reelected after expiration of this period. It is also stated that *'...president and members of the Board may only be dismissed by the Council of Ministers ...for one's inability to work due to a serious disease or illness, abuse of one's duty or conviction of infamous crimes.'* and one may indicate that this

provision (as implemented in USA, UK and in other EU member countries) increase the formal independence of the agency. For assessing the actual implementation of this provision (it is shown that even in Germany, board members can be forced to resign in the face of pressure by governments) one, of course, should look at other considerations. In this respect, Sezen[85] has made a survey for evaluating the independence of these regulators by making interviews (with board members) and sending questionnaires to these institutions. Although subject to limitations (limited population size[86]) this type of work may be regarded as useful indicators and provide some helpful insights to future research. Related to 'job security' category, 32% of members thought that they could be dismissed before the end of their terms. This may be regarded as an indication that the written rules may not be enough for the provision of complete job security (security of their positions). Of course this is a very difficult issue to prove (or disprove) but one can also find examples also in this case. For instance, the first president of ICTA (then TA) resigned before the expiration date of his service in 2002. What is interesting for this resignation was that there were many speculations before the resignation, indicating some tensions between the related Minister (Ministry of Transportation) and the president of the Board. Later, as speculated in the press, the president resigned but he stated different reasons for his action, i.e. work in the abroad or health reasons[87]. Anyway if the resignation was due to alleged tensions, the situation is somehow different from the RegTP case (resignation example), in that this president was appointed by the same government, but one should note that the ministers were not the same, increasing the suspicions that new minister-although from the same political party- wanted to work with his intimate colleagues and of course this is not an uncommon practice for anyone familiar with the politics in this country.

On the other hand, different from some other practices, each board member represents the telecommunications and wireless services, telecommunications sector and consumers. More specifically it is stated in the relevant legislation that (other than the members representing telecommunications and wireless services) *'...member representing the telecommunications sector shall be appointed among one candidate to be nominated by each of the operators which manufacture telecommunication*

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[85] Sezen 2007, p. 324-330.

[86] Sezen (2007, p. 325), states that only 47, 6% of the questionnaires were returned to the sender and from one agency no answered questionnaire were returned to the author.

[87] ICTA (2002), "News bulletin: Announcement related to alleged resignation of President of Telecommunications Authority", http://www.tk.gov.tr/Basin_Duyurular/Bulten/Bulten_2002.htm, retrieved 17.02.2010 (in Turkish).

equipment and systems…which hold a minimum of 10% market share within the relevant telecommunication service market…' and *'…member representing the consumers shall be elected from among two candidates to be nominated by each the Ministry of Industry and Commerce and the Turkish Association of Chambers and Exchanges.'* With reference to this provision, it can be argued that selecting different representatives (e.g. consumer representative) from portfolio of related actors may increase (depending on actual selection process) the independence of decision making and reduce the possibility of regulatory capture by more powerful industry actors.

Apart from this, as mentioned in the UK case study part, publication of any information is useful for decreasing the information asymmetry problem in the sector. In this regard the workings of the institution can be regarded as transparent compared to other organizations. For instance, in the preparation phase of any regulation, all interested parties opinions are taken and all these works are published in the web page of this authority. The Authority also publishes its yearly work plans to notify related actors earlier about the forthcoming works. On the other hand, some of the Board Decisions related to industry had not been published previously and some criticized this for reducing transparency. Indeed, as observed in Competition Authority's practice, it should be better to publish all decisions (related to industry) with explanations on the web page of this organization. Although some important decisions had been published previously, after the 'Electronic Communications' Law, all the decisions of the board with explanations other than internal affairs of the institution have begun to be published in the web page, increasing transparency requirement.

Another aspect worth considering is the prohibition of board members from working in another firm, organization etc. to increase the independence of board members. Furthermore, there exists another prohibition for the member representing telecommunications sector not to work and/or own (any telecom company) shares after two years from the expiration of the membership duty. These provisions are also in line with the other country practices (as also seen in USA and UK examples) that are assumed to reduce regulatory capture by the industry.

4.2.2. Budgetary (financial) Considerations

Another dimension of independence is related to revenue generation and spending powers of this institution. Since revenue generation is fairly stable (mainly wireless fee collections from the operators) more controversial part is revenue spending and transfer of the surplus to the Treasury. In addition to transfer of income (budget) surplus and budget scrutiny process of the

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Parliament, it is also observed that policymakers (government) have used the revenues of this organization to fund different projects. For instance in the Law No.5809, it is stated that Ministry of Transportation shall extract funds from the organization's budget to finance research and development activities in information and communications sector[88]. Similarly according to another Law (No. 5369) related to 'Universal Service', universal service fund shall be financed by the Authority's revenues[89] and spending (selection of projects and payments) shall be made by the Ministry. These examples indicate that governments have transferred the revenues of this organization to other institutions to be used in the financing of certain activities, projects[90]. Apart from these issues, there exist some other minor provisions that can be regarded as limitation of the financial (and administrative) independence[91] of these agencies -as valid for all other regulatory authorities-, such as prior approval conditions from the related Ministry to visits to abroad in the form of study visits and meetings.

CONCLUSION

Regulatory authorities were firstly established in USA and only after the adoption of privatization and liberalization policies they have been created elsewhere, beginning with EU member countries. At the same time starting from 1980's, international institutions, mainly IMF and World Bank, have began to force developing countries to adopt neo liberal policies including the creation of such institutions. As a result, today, there exist at least one sector specific regulator and competition authority with some common features such as independence and accountability not only in developed countries but also in developing countries throughout the world.

However, the case studies show that there is no uniform practice and understanding related to the legal status, functions and powers of these organizations. In fact, the most problematic issue is independence concept and even to some degree in USA; in most other countries it appears that discussions and some policy changes related to this issue will continue depending on country specific factors, administrative traditions and structures. In fact, even EU level policy impositions have not succeeded in achieving uniformity of these

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[88] In the section of Ministry's duty's and power's, Article 5 (g).

[89] In the section of Funding of Universal Service and Net Cost, Article 6.

[90] Again this discussion should only be taken in the context of (budgetary) independence; other issues are not considered in the scope of this article, i.e. social policy needs, questions related to efficiency of these mechanisms, monitoring procedures etc.

[91] For example, Sezen (2007, p. 326) sees this as a limitation of independence of these organizations.

institutions in some respects as seen from the comparison of UK and Germany experiences.

For Turkey, it can be said that, as a latecomer country, owing to the adoption of EU legislations and procedures, similar structures have been created in terms of board structure, budgetary and administrative independence as shown in the case studies. However, having seen country experiences, one may conclude with the observation that independence is a very complex issue to deal with and in some cases what is written in legislation can be different from what is witnessed in practice, and this is also true even for developed countries. On the other hand, as emphasized in unorthodox development policies, it is evident that each country knows her resources and objectives (provided that some governance capacity exists) so like India's practice, each country should be allowed to pursue her economic policy including the creation of peculiar institutions for the well being of their people. Before concluding, it can be emphasized that more research and work is needed for increasing our understanding of the independence concept related to the regulatory authorities. For example, specific studies analyzing regulator vs. industry relationships (regulatory capture by the industry) like the study of LLU process in UK, in Turkish context for any industry can be helpful for future policy implications.

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Annex-1: Formal Independence of ITCA (Previously TA)

Questions	Weight	Coding	Answers
A-Status of the Agency Head		0,20	
Term of Office			
• over 8 years	1,00		
• 6 to 8 years	0,80		
• 5 years	0,60		5 years
• 4 years	0,40		
• fixed term under 4 years or at the discretion of the appointer	0,20		
• no fixed term	0,00		
Who appoints the agency head?			
• the members of the management board	1,00		
• a complex mix of the parliament and the government	0,75		
• the parliament	0,50		
• the government collectively	0,25		council of ministers
• one or two ministers	0,00		
Dismissal			
• dismissal is impossible	1,00		
• dismissal is possible, but only for reasons not related to policy	0,67		possible, but only for reasons not related to policy
• there are no specific provisions for dismissal	0,33		
• dismissal is possible at the appointer's discretion	0,00		
May the agency head hold other offices in government?			
• no	1,00		not allowed
• only with the permission of the government	0,50		

• yes/no specific provisions	0,00		
Is the appointment renewable?			
• no	1,00		
• yes, once	0,50		
• yes, more than once	0,00		yes (provision in Law)
Is independence a formal requirement for the appointment?			
• Yes	1,00		Yes
• No	0,00		
B-Status of the members of the management board			
Term of office			
• over 8 years	1,00		
• 6 to 8 years	0,80		
• 5 years	0,60		5 years
• 4 years	0,40		
• fixed term under 4 years or at the discretion of the appointer	0,20		
• no fixed term	0,00		
Who appoints the members of the management board?			
• the members of the management board	1,00		
• a complex mix of the parliament and the government	0,75		
• the parliament	0,50		
• the government collectively	0,25		council of ministers
• one or two ministers	0,00		
Dismissal			
• dismissal is impossible	1,00		

• dismissal is possible, but only for reasons not related to policy	0,67		Only for reasons not related to policy
• there are no specific provisions for dismissal	0,33		
• dismissal is possible at the appointer's discretion	0,00		
May the members of the management board hold other offices in government?			
• no	1,00		Not allowed
• only with the permission of the government	0,50		
• yes/no specific provisions	0,00		
Is the appointment renewable?			
• no	1,00		
• yes, once	0,50		
• yes, more than once	0,00		Yes (provision in Law)
Is independence a formal requirement for the appointment?			
• Yes	1,00		Yes
• No	0,00		
C-Relationship with government and parliament		0,20	
Is the independence of the agency formally stated?			
• Yes	1,00		Yes (provision in Law)
• No	0,00		
What are the formal obligations of the agency vis-à-vis the government?			
• there are no formal obligations	1,00		

• presentation of an annual report for information only	0,67		For information
• presentation of an annual report that must be approved	0,33		
• the agency is fully accountable to the government	0,00		
What are the formal obligations of the agency vis-à-vis the parliament?			
• there are no formal obligations	<u>1,00</u>		
• presentation of an annual report for information only	<u>0,67</u>		
• presentation of an annual report that must be approved	0,33		For approval (budget)
• the agency is fully accountable to the government	<u>0,00</u>		
Which body, other than a court, can overturn the decisions of the agency where the latter has exclusive competence?			
• no body	1,00		No body
• a specialized body	0,67		
• the government with qualifications	0,33		
• the government, unconditionally	0,00		
<u>D-Financial and organizational autonomy</u>		0,20	
What is the source of the agency's budget?			

• fees levied on the regulated industry	1,00		Fees
• both the government and fees levied on the regulated industry	0,50		
• the government	0,00		
How is the budget controlled?			
• by the agency	1,00		
• by the accounting office or court	0,67		
• by both the agency and the government	0,33		Both
• by the government only	0,00		
Which body decides on the agency's internal organization?			
• the agency	1,00		
• both the agency and the government	0,50		Both
• the government	0,00		
Which body is in charge of the agency's personnel policy (hiring, firing, deciding on its allocation)			
• the agency	1,00		
• both the agency and the government	0,50		Both
• the government	0,00		
E- Regulatory competencies		0,20	
Which body is competent for regulation in the relevant domain			
• the agency only	1,00		
• the agency and another independent authority	0,75		Both
• the agency and the parliament	0,50		

• the agency and the government	0,25		
• the agency has only consultative competencies	0,00		

Source: Adapted from Gilardi (2008).