



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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HEARING ON DIGITAL ECONOMY

-- Note by the Delegation of Turkey --

This note is submitted by the delegation of Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.

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DIGITAL ECONOMY

-- Note by Turkey --

1. As digitalization penetrates into daily life, information technologies seem to increase their influence in economy. The portion of the trade that has been conducted via electronic means is increasing steadily. In addition to that, undertakings began to be dependent on electronic structures more and more. The transmission of information became crucial for basic functioning of an undertaking. Electronic structures not only serve as a means of revenue collection. The solutions developed to assist undertakings in the allocation of financial resources, human resources or improving customer relations are increasingly preferred by the undertakings. In line with this enhanced importance; developments especially in the software and hardware markets, namely the backbone of digital economy¹ began to be more closely monitored. This global trend began to be effective in Turkish competition law enforcement as well.

2. Similar to other competition authorities Turkish Competition Authority (TCA) fights with collusion and abuse of dominant position, and controls concentrations. Vertical agreements are also within the scope of Turkish competition law. Decisions of the TCA are taken by the Competition Board, the decision making body of TCA. TCA is entitled to conduct inspections in the premises of undertakings and to demand necessary information for the cases under investigation.

3. In this context, based on the recent history, three cases in Turkish competition law enforcement need to be mentioned. The first case involves abuse of a dominant position². Microsoft was alleged to engage in exclusionary practices, especially through rebates and discounts against rivals in operating systems. The complaint was rejected as no clear indication of such intent was found. Second case concerns the acquisition of Sun Microsystems by Oracle³ where the transaction was cleared without any conditions. Third case was related to two acquisitions that were failed to be notified by the parties in the market of 'customer relations management solutions for pharmaceutical sector'⁴. Although the parties were fined as failure to notify was an infringement of the procedural obligations, the transactions were cleared without any conditions. These decisions are informative about the approach of the TCA to sectors of information technologies, and about the difficulties encountered in enforcing competition rules to this area as a national authority. In this note, these difficulties are grouped under two headings, namely; the issue of finding addressee and understanding the market dynamics.

¹ Commission Press Release, IP/11/660 30/05/2011
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/660&format=HTML&aged=1&language=EN&guiLanguage=en>

² *Microsoft*, dated 27.05.2008 and numbered 08-35/465-165.

³ *Oracle/Sun*, dated 14.10.2009 and numbered 09-47/1157-293.

⁴ *Cegedim*, dated 26.08.2010 and numbered 10-56/1089-411.

1. The issue of finding addressees: Obtaining information, identifying the responsible parties

4. Leaving concentration cases aside in which the notifying party establishes the communication with the TCA, communication itself is generally considered an issue. In contrast to the traditional commodity markets; where actual presence in a country may be the preferred way of doing business, especially in software and hardware markets country branches are rarely observed. In many cases, cooperation with regional distributors is preferred to local presence. Even if national branches exist, they may have limited responsibility. Many commercial decisions are taken by the global management. In both cases, the issue of identifying the addressee subject to the inquiry is complicated. If there is no local branch or local branch has no commercial responsibility, in the investigation procedure addressee may become the global management residing outside national boundaries. In such a scenario, establishing a healthy communication between the national authority and the investigated firm may be troublesome⁵. The difficulty of collecting possible fines is also another issue to overcome.

5. A second problem is obtaining data. It is known that good quality data is crucial for a realistic assessment of the case at hand. Data is generously used especially for the purposes of delineating market boundaries in concentration and dominance cases, and computation of anti-competitive harm in cartel cases.

6. The first potential source of data is generally inspected parties themselves. Unfortunately, as mentioned above, communication itself is generally an issue. Identifying the right addressee to supply data is problematic. Additionally, factors such as parallel trade make it harder to trace the actual situation in the market.

7. The second potential source is consumers. Nevertheless, in many cases they constitute quite a diversified group. Reaching an exhaustive list of consumers by pure insight is generally not probable. In some cases the relations between buyers and suppliers get quite complicated. Especially undertakings operating on a global scale may prefer to make their purchasing decisions on this scale. With the idea of harmonizing the structure of their organization worldwide or increasing their bargaining power by increasing volume of trade, buyers occasionally choose to conduct negotiations worldwide. In such a case understanding the parameters for both buyer and supplier sides is problematic⁶.

8. A third potential source of data is the inspections carried out in the premises of undertakings. However, when the undertakings inspected are either physically absent in the national markets or national branches take no initiative but only apply the decisions of global management; the prospects of reaching data via inspections get poorer⁷. The inspections also lose value in revealing market dynamics. The documents regarding the inspected parties' assessments on the issues such as which challengers are considered as rivals, which types of products exert competitive pressure in the market become very hard to obtain.

9. In markets of information technologies; especially software and hardware, data may also be emanated from special market study institutions such as Gartner or IDC. Therefore, the studies of these institutions may be considered as a fourth potential data source. Unfortunately, in many cases data detailed

⁵ See *Microsoft*, dated 27.05.2008 and numbered 08-35/465-165.

⁶ See *Cegedim*, dated 26.08.2010 and numbered 10-56/1089-411.

⁷ See *Microsoft*, dated 27.05.2008 and numbered 08-35/465-165.

in country level is not available, and when it is available, the level of the data is more general than the level required to make competition law assessments⁸.

2. Understanding the market dynamics

10. Information technologies in general but software in particular, are commonly acknowledged to be difficult to comprehend. Many interacting factors make the analysis fairly complex⁹. To begin with; contrary to a traditional sector, it is almost impossible to predict either the pace or direction of technological progress. The products that are dominating markets today may be obsolete tomorrow. Similarly, the products that are not even in the markets today may be dominating in the near future. Progress and innovation are not only seen in the form of improved products, such as; reduced size, increased speed or better design. In these markets, alternative technologies are developed as well.

11. In addition to the stochastic nature of the technological progress, the great variety both in the supplier and buyer side also complicates the analysis. For instance, in software markets the vendors can be grouped according to the type of the license of the software, as some vendors sell licenses, others prefer open source marketing. Another potential difference is about target user profile. Some vendors specialize in solutions designed for a specific sector while others develop solutions that can be generalized to all sectors. Finally, the vendors may also need to compete with potential buyers, as in-house solutions may provide alternatives to commercial products. On the buyer side things are equally complex. The needs and expectations of large enterprises differ from those of small and medium sized enterprises (SMEs). For large firms, the costs of a pause in digital structure may be overwhelming. Therefore; the functionality and reliability of the solution, the past experience with the supplier may be the main drivers in their purchasing decisions. On the other hand, SMEs tend to be more price sensitive. Most of the time, basic functions of a solution can be seen sufficient for organizing activities¹⁰. Finally, even related sectors may have different characteristics. And as time passes, the divergence between related sectors may also potentially diverge the expectations of buyers in different sectors.

12. Considering the inefficiency of the communication channels mentioned above comprehending the complex dynamics of the markets is generally a difficult and in some cases an impossible task. Since there is no general rule that can be applied to every software or hardware market, defining the boundaries of relevant markets and identifying potential competitors are problematic most of the time. Under these circumstances, national authorities naturally find themselves dependent on the assessments done in EC or US in majority of the cases.

13. Basing on the assessments above following questions arise:

1. Given the difficulties of competition law enforcement in sectors with complicated dynamics and rapid technological growth, should competition authorities devote resources to collaboration with industrial experts to comprehend market dynamics and foresee probable developments? What are the alternative means for this end?
2. Is there a possible way to enhance international cooperation in these sectors between competition authorities?
3. Given the information asymmetry between national authorities and authorities in EC and US, should national authorities import practices of the latter, if so, how?

⁸ See *Oracle/Sun*, dated 14.10.2009 and numbered 09-47/1157-293.

⁹ Case No COMP/M.4747 - *IBM/ TELELOGIC*, prg. 122-123.

¹⁰ Case No COMP/M.3216 – *ORACLE/PEOPLESOFT*, prg. 55-85.