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Working Party No. 3 on Co-operation and Enforcement

INVENTORY ON EFFECTIVE COOPERATION PRACTICES

-- Turkey --

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The attached document is submitted by Turkey to Working party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 5 June 2007.

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1. INTRODUCTION

1. Traditionally, competition laws are regarded as national. However, with globalization competition becomes more international due to reduced trade barriers and technological progress. That's why domestic competition laws are not always sufficient enough to deal with international activities of the undertakings. From this perspective not only the harmonization of the competition laws, but also international cooperation among trading partners and/or neighboring countries is very important. The Turkish Competition Act which is Act no 4054 on the Protection of Competition (hereinafter Act no 4054) is also a national law that comes across with cases that needs international cooperation and coordination during its 10 year enforcement.

2. Turkey has free trade agreements with many countries and a Customs Union (CU) with the EU. Those agreements in between Turkey and third parties comprise competition related provisions (CRPs) in various strengths. Thus, types of cooperation depend on the substance of these provisions and to what extent they could be implemented. Moreover, Turkey has signed two MoUs with the Republic of Korea's Fair Trading Commission (KFTC) and the Romanian Competition Council that is considered as an example to agency to agency agreements (ATAs). These MoUs have foreseen a lenient type co-operation between Turkey and the aforementioned two countries in the field of competition law and policy enforcement based on the free-will of the parties. Both of them are based on the principles of equality and mutual interest of the parties. Cooperation under these MoUs is mainly based on the exchange of legislation, public information, and work experience.

3. There have been three cases so far during the Act No 4054's 10 year implementation which necessitated an international cooperation. In two of these cases, the Turkish Competition Authority (TCA) faced difficulties in the finalization of investigation process conducted against the companies located abroad. In other words, the TCA could not deal with recent international cartel cases in a proper way. The investigation that was carried out in the sized coal market case¹ was partly finalized in July 2006, while the TCA experienced a similar problem in the glass market case². The third case in which the TCA looked for cooperation possibilities was a preliminary inquiry that it carried out in order to see whether it was necessary or not to open an investigation against undertakings operating in the production, import and sale of facilities and equipments concerning production, transmission and distribution of energy based on the complaint petition alleging the existence of a cartel involving gas insulated switchgear³.

4. The essence of the problem in an investigation process with international dimension lies mainly with the requirement to complete the whole investigation procedure as envisaged in the Act no 4054. Primarily, the key point in order to complete this procedural necessity is to inform the investigated undertakings officially and to let them defend themselves.

5. Procedural issues are always important and they are decisive in competition law cases. In other words, failure to meet the procedural requirements arising from the law directly affects the result of an investigation in a negative way. In this regard, inability to grant the right to defense to the undertakings under investigation is a major defect in an anti-trust investigation. As mentioned above, this element has paralyzed the enforcement efforts of the TCA in two important cases until now.

¹ Competition Board decision numbered 06-55/712-202, dated 25.7.2006.

² Competition Board decision is not published yet.

³ Competition Board decision numbered 04-43/538-133, dated 24.6.2004.

6. Although it is out of scope of this note to examine the procedural rules of the Act no 4054 in detail, some important features needs to be mentioned. According to the Act no 4054, the TCA should fully abide by the procedural rules. These rules envisage the following principles among others:

- The deadlines which govern the investigation,
- Access to file,
- The right to defence,
- Impossibility of exploiting any evidence as a ground for decision about which the investigated party is not informed.

7. The TCA has tried to overcome this difficulty via trying different solutions either consulting the Ministry of Foreign Affairs (MFA) and Ministry of Justice or using its regional trade agreements (RTAs). Communication Act no 7201 designates the procedural and substantive principles that need to be followed in the communications concerning communications within the boundaries of Republic of Turkey; whereas, the communications to a foreign country are determined by the international agreements that exist between Turkey and third parties. In other words, in order to carry out communications in another country, a bilateral or multilateral agreement is needed. Although Turkey has such agreements with foreign countries, those agreements are in the area of communication of criminal and judicial documents. Since the activities of the TCA are administrative in nature, the Ministry of Justice informed the TCA that due to the lack of any international administrative communication agreement such request of the TCA is not deemed possible.

8. The TCA has also tried investigatory cooperation in antitrust enforcement with other national competition agencies based on the provisions found in its RTAs to overcome this difficulty. To this end, experience of the TCA in the sized coal market case is given below. In brief, Turkish experience has shown that in terms of cooperation in procedural issues and substantive issues, the mere existence of RTAs in different forms is not sufficient for an effective solution. In order to obtain effective results, powerful provisions as well as willingness of the parties are a necessity.

9. Last but not least, this note will elaborate on the positive comity provisions found in the CU decision that came into force in between Turkey and the EU.

2. INVESTIGATORY COOPERATION INVOLVING EVIDENCE GATHERING

2.1 *The Experience in Sized Coal Market Case*⁴

10. The TCA decided to examine the coal market upon the complaints regarding sharp increases in coal prices. As a result of the preliminary investigations it was found out that the sharp increase in domestic retail prices had resulted from the systematic increases in the prices of imported coal. During the preliminary investigation, it was seen that the price increases were associated with the price fixing by different undertakings some of which did not have any operational branches within the boundaries of Turkey. During this investigation, the TCA faced difficulties in terms of procedural issues at every stage in particular regarding the companies not located in Turkey: the Mir Trade AG of Switzerland and Krutrade AG of Austria. Under these circumstances, **communication** with the headquarters of those undertakings that are located abroad becomes a necessity in order to finalize an investigation.

⁴ Competition Board decision numbered 06-55/712-202, dated 25.7.2006.

11. The TCA can directly notify any decision and/or any other relevant document to those undertakings in its jurisdiction. In this case, being aware of the limits of its jurisdiction, the TCA tried to communicate its investigation decision and investigation report to the undertakings subject to investigation located outside Turkey via Ministry of Foreign Affairs (MFA). The whole notification process was executed via MFA, but relevant embassies were not able to find the undertakings at the registered addresses. When the reason for failure to notify these official documents to the said undertakings is examined, it is seen that the communication of official documents related to competition issues is not directly covered by any international convention either at multilateral or bilateral level. Despite the fact that the MFA is in the opinion that “The Hague Convention on Law Procedure” might be an international legal ground for the delivery of the official documents of the TCA, and therefore instead of the MFA, the Ministry of Justice would be a more convenient authority to communicate with third countries; the Ministry of Justice argues that the Hague Convention does not cover the competition issues based on the argument competition law is an administrative issue. Thus, due to lack of necessary framework for international administrative cooperation with respect to implementation of competition laws in between relevant administrative bodies of Turkey and third countries, such communication (i.e. communication of the statement of objections and investigation report to the parties located abroad) is deemed impossible.

12. It is truism to argue that the discussion, as to whether either the Hague Convention or any other multilateral or bilateral convention to which Turkey and other countries where the investigated parties located are dealing with competition issues or not, is irrelevant at this point. What matters is the existing turmoil regarding the notification of official documents of the TCA to the foreign undertakings which has caused a great failure in terms of the sake of investigation.

13. In the meantime, the TCA tried to cooperate with the relevant parties on the basis of substantive provisions found in its international agreements. To this end, the TCA has requested for co-operation/consultation with those countries where the relevant undertakings were located based on its EFTA and CU Agreements. Therefore, after submitting the necessary information, the TCA mentioned initially the section on competition rules of the Association Council Decision No 1/95 (the decision establishing the CU between the EU and Turkey) in its letter sent to the MFA. Then the TCA added that the provision on the adoption of implementing rules could not be realized so far and mentioned the Article 43 of the Association Council Decision No 1/95 in particular. The TCA was of the opinion that although the implementing rules regarding Association Council Decision No 1/95 were not adopted yet, rights granted by Article 43 could still be used. As a result, TCA asked the European Commission and Competition Authority of Austria to take the necessary measures against these undertakings within their jurisdiction and carry out on the spot inspections and send the information and documents concerning Turkish market to be obtained during on the spot inspections to the TCA. TCA, in line with Article 43/1, provided information and important evidence about the nature of anticompetitive activities.

14. In the same request, articles 17 and 23 of the free trade agreement between Turkey and EFTA states were also cited to have the cooperation of Switzerland. It was mentioned that Article 17 of the EFTA agreement was about competition rules and prohibited activities restricting competition which affected trade between Turkey and Switzerland. Thus, it enabled any party to take safeguard measures that were determined in Article 23, if one party established any prohibited activities that were carried out in the jurisdiction of the other. TCA further pointed out that first paragraph of Article 23 envisaged consultation between the parties to solve the matter before applying any safeguard measures. As a result, TCA in conformity with the Article 23 of the EFTA agreement, asked the Competition Authority of Switzerland to take the relevant measures against the undertakings within the jurisdiction of Switzerland the activities of which affected competition in the Turkish market negatively and conduct on the spot inspections and send the information and documents concerning Turkish market to be obtained during on the spot inspections to the TCA. TCA also submitted relevant information and evidence to EFTA authorities and Competition Authority of Switzerland.

15. Finally, European Commission officials informed that they could not share any information and documents about the firms and their activities with any country that is out of the scope of the jurisdiction of the European Commission due to principle of professional secrecy and that Article 43 did not foresee this type of cooperation and thus they could not share information and documents even if an Association Council Decision had been adopted in line with Article 37 of the Association Council Decision No 1/95. Moreover, the Commission officials, in their reply, accepted the justification of such a request, however they argued that such requests caused great sensitivity and discussions, the law firms were well-equipped and aggressive, therefore the Commission had to have strong legal bases, they also faced similar situations in their similar requests and could not obtain information from third countries, trade secrets, insiders as the source of the information and other legal barriers complicated the matters worse.

16. Austrian Federal Competition Authority officials replied that it would be better to handle the matter at Community level rather than at national level and that wording of Article 43 reflected that the parties to the agreement were the Community and Turkey, but not the EU member states or their competition authorities, therefore Association Council Decision did not form a sufficient legal basis for the request of the TCA.

17. Officials of the Competition Authority of Switzerland replied that on the spot inspections could be carried out when there were signs that anti-monopoly rules in Switzerland were violated, therefore they could not initiate any process against the firms that violated anti-monopoly rules in Turkey and permission of the relevant parties was necessary to send information and documents belonging to Swiss firms. Moreover, they told that they were always open to informal cooperation and would examine the file and it would be possible to initiate legal proceedings if they found any sign that the firms carried out any conduct prohibited in Switzerland. Finally, they told that EFTA process did not have any effect in such cases in practice.

18. Despite all these difficulties arising from application of a national competition law to those undertakings located abroad but whose activities are negatively affecting the competition in the relevant markets of Turkey, the investigation was carried on with those undertakings which have a contact point in Turkey. This case shows that cooperation on substantial grounds *i.e. investigatory cooperation involving evidence gathering* is not an easy task to handle among various national competition authorities. In addition to that, even if a competition authority would be able to find enough evidence to carry out an investigation about an undertaking whose activities are affecting its own national boundaries *i.e. "effects doctrine"*, because of limitations with respect to its authority in another national jurisdiction, it might not be possible to satisfy the relevant procedural aspects arising from the Act no 4054. Therefore, that competition agency would not be able to finalize a case due to lack of procedural obligations. However, the TCA worked hard to find a solution in this case and believes that discussion among jurisdictions all over the world should be carried on.

3. POSITIVE COMITY AND INFORMATION EXCHANGE

19. In the Association Council Decision no 1/95 (the decision establishing the Customs Union (CU) between the EU and Turkey), there is a provision concerning "positive comity" in article 43⁵. "Positive

⁵ Article 43 of the CU Agreement between Turkey and EU:

"1. If the Community or Turkey believes that anti-competitive activities carried out on the territory of the other Party are adversely affecting its interests or the interests of its undertakings, the first Party may notify the other Party and may request that the other Party's competition authority initiate appropriate enforcement action. The notification shall be as specific as possible about the nature of the anti-competitive activities and their effects on the interests of the notifying Party, and shall include an offer for such further information and other cooperation as the notifying Party is able to provide.

comity” lets one party to an agreement to request the other party to take enforcement action. The trigger to notify arising from this positive comity article is dependent on subjective assessment of the parties and is not attached to any conditions in the Association Council Decision No 1/95. This Article requires that the notification should include information as specific as possible about the nature of the anti-competitive activities and their effects on the interests of the notifying party. Moreover, the notifying party shall offer to provide additional information and other cooperation within its capacity.

20. Nevertheless, the wording is so inclusive that such information will probably be included in any notification as part of the basic content. After the notification, the notified party’s competition authority has to consider whether to initiate appropriate enforcement action against the practices notified and inform the notifying party about its decision. In case, the notified party starts enforcement action, the outcomes, and if possible, important temporary developments should be conveyed to the notifying party. This article, however, clarifies that discretion of the notified party’s decision about the initiation of the enforcement action under its relevant competition laws and enforcement policies cannot be prejudiced and the notifying party can not be prevented from starting enforcement action in its own jurisdiction regarding the notified anti-competitive activities.

21. This article provides that if the EU or Turkey believes that anti-competitive activities carried out on the territory of the other Party are adversely affecting its interests, the first Party may request the other Party to initiate enforcement action. Furthermore, under Article 39 (3) the parties are to convey changes to their laws concerning restrictive practices done by undertakings and inform about cases when the laws regarding restrictive practices are applied.

22. With respect to information exchange, again in the Association Council Decision 1/95 there is a general article which provides the parties the opportunity to exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy (Article 36). Another provision as to information exchange is Article 40 that necessitates the EU to inform Turkey of any decision under Articles 81, 82 and 87 of the EC Treaty whenever Turkey’s interests are affected and Turkey is entitled to demand information regarding any particular case where these Articles are applied.

23. Article 37 envisages the adoption of the necessary “implementation rules” within two years following the entry into force of the CU for implementing the competition rules prohibiting anticompetitive agreements, conducts, decisions, abuse of dominant position and state aids. These rules should be based on those already in the Community and specify the role of each competition authority.⁶ *However, as argued by Commission officials such implementing rules can not be adopted due to lack of necessary legislation on state-aids.* The absence of such rules proved to be an impediment for successful application of the above mentioned provisions with respect to positive comity and information exchange.

2. Upon receipt of a notification under paragraph 1 and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authority of the notified Party will consider whether or not to initiate enforcement action, with respect to the anti-competitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement action is initiated, the notified Party will advise the notifying Party of its outcome and, to the extent possible, of significant interim developments.

3. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement action with respect to the notified anti-competitive activities, or precludes the notifying Party from undertaking enforcement action with respect to such anti-competitive activities.”

⁶ Article 37(1).