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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- 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 29-30 June 2011.

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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by Turkey --

1. This contribution is intended to give brief information on the roundtable topic entitled *Promoting Compliance with Competition Law* especially by citing the recent initiatives from the Turkish Competition Authority (TCA).
2. In Turkey, the Act No. 4054 on the Protection of Competition (the Competition Act) provides for the basic substantive and procedural legal framework of competition rules applicable to anti-competitive conduct. The legal framework enables the TCA to carry out examinations, preliminary inquiries and investigations to detect and prohibit anti-competitive conduct and impose necessary interim measures, behavioural and structural remedies, and turnover-based monetary fines. Moreover, the Competition Act provides for rules on compensation by three fold of the material damage incurred or of the profits gained by those who caused the damage. However, private enforcement of competition rules is not well developed in Turkey and therefore public enforcement of competition rules by the TCA is the main element of the enforcement.
3. It can be argued that public enforcement of competition rules by the TCA and compliance with those rules in Turkey are highly dependent on the monetary fine that may be imposed up to 10% of the turnover of the relevant undertaking or association of undertakings, and the fine applicable for the managers or employees up to 5% of the fine imposed on the relevant undertaking or association of undertakings. The Competition Act includes provisions on corporate and individual leniency for those cooperating actively with the TCA and an implementing regulation was issued in 2009 on procedures and principles on leniency; nevertheless, for the time being the number of leniency applications remains relatively low.
4. The TCA is well aware that its enforcement activities will not be adequate to ensure compliance with competition rules and that the conduct by the undertakings to raise awareness of its personnel of competition rules and to take institutional steps to comply with them is as important as the decisions and activities of the TCA. The TCA is of the opinion that activities by the undertakings, association of undertakings and their executives and employees to comply with competition rules will not only contribute to institutionalisation of a competitive system but also avoid heavy sanctions foreseen in the Competition Act that may complicate the activities of undertakings and association of undertakings and damage their reputation. In this context the most comprehensive work to ensure compliance with the competition rules is thought to be the compliance programmes. Such programmes are important tools enabling undertakings and associations of undertakings to self assess and self monitor their conduct. As such programmes are not widespread in Turkey, the TCA has aimed to draw attention to, encourage and popularize them.
5. Within this framework, in a letter issued by the President of the TCA in 2011, the importance of compliance programmes is emphasised and the undertakings, associations of undertakings and their executives are encouraged to adopt such programmes. The TCA considers that adoption of compliance programmes will increase awareness of executives and employees of competition rules, and enable prevention, early detection and termination of violations of competition rules. Spread of compliance

programmes may probably be more effective in emergence and institutionalisation of a competitive environment compared to public enforcement activities of the TCA.

6. After the emphasis of compliance programmes, the President in its letter of 2011 informs the undertakings about the factors that affect the success of compliance programmes. Moreover, the letter, which has been posted on the website¹ of the TCA and sent to relevant stakeholders such as undertakings and associations of undertakings, briefly explains how to formulate these factors, offers advice for implementation as well as a checklist to help undertakings and associations of undertakings self assess their compliance with competition rules (See section IV of the 2011 Competition Letter as Annex I).

7. Following the President's letter, a more thorough text on compliance with competition rules in the form of a booklet, which includes basic questions, answers and a check list, has been posted on the website of the TCA (See Annex II).²

8. Finally, it should be said that although the Competition Board, the decision making body of the TCA, regarded awareness of competition rules as proving that there was existence of intent of the parties in violating competition rules³ or that the parties violated the competition rules deliberately⁴ in the past, it has not yet granted guidance on how to assess a compliance programme on competition law and whether to consider it as an aggravating, mitigating, or a neutral factor.

¹ Available via http://www.rekabet.gov.tr/dosyalar/images/file/Uluslararsiliskiler/son_mektup2011.pdf

² Available via <http://www.rekabet.gov.tr/dosyalar/images/file/Uluslararsiliskiler/Competition%20Compliance%20Program.pdf>

³ See, for instance, the decisions of the Competition Board, namely *Aerated Concrete* dated 30.5.2006 and numbered 06-37/477-129; *Ceramic Coating Materials and Ceramic Health Appliances* dated 2.2.2006 numbered 06-08/121-30.

⁴ See, for instance, the decisions of the Competition Board, namely *Fiberboard and Chipboard* dated 19.12.2005 and numbered 05-85/1182-336; *Iron and Steel Products* dated 14.10.2005 and numbered 05-68/958-259.

ANNEX I

SECTION IV OF THE 2011 COMPETITION LETTER

Competition Compliance Program

The way to increase competitive power is through compliance with law in a competitive environment!

When competition is handled as a rivalry on a lawful ground which needs to be considered within the framework of rules; competitive power and the competitive environment in which to gain competitive power are the sine qua non of each other. Therefore, undertakings must structure themselves in accordance with the requirements of competition law and the "rules of the game" of competition to survive and to be strong, and for this purpose must be sensitive or "prepared". A game without rules is not a game! For an undertaking and a management to be "sensitive and prepared" would not only mean being sufficient with regard to its costs and efficiency, and technology and investment power, but also with regard to its understanding of lawful competition, lawful conduct and transactions.

Undertakings and executives of undertakings must evaluate themselves from a competitive perspective or from the perspective of compliance with competition law. Compliance with competition law and suitability to a competitive environment is important for undertakings. The position with regard to knowledge, sensitivity, structuring and conduct, and the current standing and sufficiency of the undertaking or its understanding of management in that regard can be tried to be understood! Thus, the undertaking or executives can perform due diligence and see their deficiencies, take the necessary measures and prepare for the future. At this point, it must be pointed out that undertakings in countries that are relatively more experienced in the field of competition law and policy take special efforts to comply with the requirements of competition law. It will also be greatly beneficial - primarily for themselves - if our undertakings too, irrespective of their scale or size, develop the said compliance programs.

Let us briefly remind why it is important for undertakings to develop programs for compliance with competition law:

One thing that captured our attention during the activities of the TCA, which now approached 14 years, was that for the significant part of the examinations and investigations carried out by the TCA, the undertakings concerned or their executives and employees were not aware that they were infringing competition rules. We have witnessed many times defenses by the officials of undertakings or their representatives such as "We did not know that this conduct of ours was an infringement of competition" or "If we had known, we would have ceased our practice immediately". Unfortunately, such belated confessions or assertions do not absolve our undertakings of severe administrative fines in most cases. However, prior knowledge on what competition infringements are, may prevent many later problems. Granted, a responsible and professional understanding of management and business administration requires an ability to foresee what is to happen. A knowledgeable and discerning executive will take the necessary measures to avoid sanctions that may put the undertaking in a predicament not only from a financial but also reputational perspective. In this respect, drawing up and implementing "programs for compliance with competition law" tops the list of measures that can be

taken by our undertakings. Unfortunately, such studies, which are seen in most of the small or big businesses in developed countries, did not become widespread in our country yet.

Compliance programs serve two very important purposes: First, they enable the executives and employees of undertaking to have knowledge about competition rules. In this manner, it will be possible for executives of undertakings to avoid decisions and conduct that may mean infringement of competition. Second, if there is any kind of compliance program, it allows for the detection of conduct or practices that violate the competition legislation, and for the termination of such conduct.

Essentially, dissemination of compliance programs, which are based on the principle of prevention of competition infringement before happening, would both reduce the risk on the part of our undertakings to face administrative sanctions and contribute to the building of a competitive economic order in our country. In addition to the activities of the TCA within the framework of the competition legislation, prevalence of such sensitivity and practices would perhaps be more effective for the formation and institutionalization of a competitive environment in our country.

There are certain basic factors that affect the success of a competition compliance program!

A standard compliance program that can be put to work for every undertaking, in every circumstance, does not seem possible. On the contrary, it is preferable for a compliance program to be formed in accordance with the structure and conditions of the sectors in which the undertakings operate, and the needs of the business itself. However, let us still point out some basic factors which would determine the success of a compliance program, in order to offer our assistance, and in a way our guidance, to our undertakings.

We can summarize these basic factors under five headings:

1. Determination and support of the higher management
2. Existence of compliance policies and procedures
3. Continuing training
4. A regular evaluation process
5. A Consistent discipline and incentive practice

The most important among the said factors is the determination of the higher management and their leadership to the staff in this regard. A clear support from the higher management to the program and its regular reaffirmation of its sensitivity is an important sign for the success of the program. If possible, the top management should issue message to all employees to announce their commitment to the program as the management. The support of the top management may be rendered more palpable by talking about this sensitivity openly in the mission or code of conduct of an undertaking, likewise by entrusting a person among the top management with the responsibility of implementing the program, and asking that person to report regularly on this issue. In addition to being a symbol of warning to the internal and outside circles, this factor will also reinforce the interest and participation of the current as well as new employees into the program.

An effective program requires more than a verbal commitment that competition law will be complied with. Close care must be given to the fulfillment of the policy and procedures prepared for this purpose. For the program to be taken seriously, it would be important that all employees are asked for possibly a written commitment with regard to the fulfillment of their duties and responsibilities, and that a notification is made that executives and employees that are to engage in conducts that infringe competition law or that infringe competition, will face disciplinary proceedings without

compromise. Special attention must be taken to not give any responsibility to those employees that have a tendency to engage in conduct that is illegal and that violates competition law.

Granted, the undertaking must allow the employees to use consulting service as to whether the transactions in the organization are in compliance with competition law and what course of action they should take in what circumstances. A "hand book" or "booklet" to be prepared on this subject, which would also have sufficient content on competition legislation and other details, would also be beneficial in this regard.

Training is a very important part of an efficient compliance program. Effective training for all staff, if this is not deemed necessary, at least for managers and employees responsible for the implementation of strategic and commercial decisions and practices should not be neglected. There is not a strict and standard form and method to be successful. A suitable method can be chosen by taking into account the features of the undertaking and the staff who will receive training. The records of training activities through methods such as conference, seminar, video presentation and role-playing should be kept and reminded to those concerned when necessary. The program should clearly express the determination of the firm to comply with competition rules and include a simple, understandable and practical list of "do's and don'ts". Moreover, the firm should have a training program performed by an experienced consultant.

Continuous assessment of the events is another important point for success. It is necessary to test the knowledge of the staff about the act, the policy of the undertaking and the procedures, and to monitor the relations with other undertakings, sale, price and supply processes on a given date or without notice for controlling actual or potential infringements. In addition, notification of actual or potential infringements to senior management and determining the problem solving mechanisms require that a regular assessment system be developed. Assessment process should be as clear as possible and the staff should be helped to know that their behavior is assessed.

In order to ensure compliance with competition law, actions and employees that are important for competition should be monitored, reported and necessary disciplinary measures should be taken. It is indispensable for the success of the system that managers and employees know that the penalties and other negative outcomes, which the undertaking is subject to, will bear consequences for both the undertaking and the employees, and that especially infringements by managers will increase penalties and that those managers may be imposed fines personally. It is very important that employees who ignore the compliance program or fail to report other employee's wrongdoing know that they might be held responsible or be punished.

Advice for implementation!

In order for a compliance program to be really effective, it must be designed for the business activities, organization, staff and culture of the undertaking. The undertaking, if its size permits, should have a proactive legal department or a competition law consultant. The lawyer and consultants of the undertaking should participate in executive meetings and ensure that employees know whom to consult when they have a question about competition legislation by visiting the facilities of the undertaking regularly. In addition, a proper reporting system should be established allowing the employees to know to whom they will report when they become aware of an improper practice. Some firms appoint an in-house consultant or establish advice line giving information directly while others assign legal departments for this task. Irrespective of the method, the confidentiality of the employee reporting the improper conduct or practice should be protected. Finally, the company official or the authorized person should make regular competition inspections, preferably without notice, and monitor the compliance efforts. These inspections should be made with advance notice or without notice where necessary and include the inspection of documents and computers (especially e-mails) of the employees with decision-making power related to competition and/or the staff of sales – marketing departments. Moreover, it is possible to talk to the employees about their relations with competitors.

As soon as the undertaking or the management become aware of an infringement, it should take action immediately, end the infringement, examine the case and inform the competition authority if necessary. It should be noted that especially in cartel agreements making active cooperation and benefiting from leniency sometimes become a kind of a race because the company that informs the competition authority first is the most advantageous company.

Associations of undertakings have important roles in maintaining the compliance program! Beside the undertakings, associations of undertakings such as chambers, unions and associations, which undertakings are members of, have also an important role. Within the frame of this role, associations of undertakings should prevent the practices under its body from violating competition rules and ensure that their members should have knowledge and awareness about competition law and policy in a general sense.

It is beneficial that like individual undertakings, associations of undertakings also publish certain guides/instructions/policy papers that can be defined as “competition compliance policy”. Those policy papers should be announced as a part of codes of conduct of undertakings and associations of undertakings and be shared with the public. In another words, undertakings and associations of undertakings should regard compliance with competition law as a moral and legal issue.

Undertakings should review and assess their current situation in terms of compliance with competition law. We have created a checklist to help undertakings and associations of undertakings. It should be emphasized that the checklist does not cover all situations but includes basic points in terms of competition legislation. We think that it is useful for undertakings and associations of undertakings to assess their situation according to this control or question list. Responds to the questions will determine to a large extend what kind of practice and approach is necessary for success.

Competition Compliance Program Checklist

A. Information about competition legislation and the TCA

It is vital to have sufficient information about competition legislation and the TCA to foresee many problems that would be very difficult to overcome otherwise. Knowledge and sensitiveness degree of managers and officials with the ability to make decisions resulting in competition infringements about what practices are legal and which kind of decisions and actions are prohibited serves as a basis to success or failure of the undertaking and the management in this area.

- Do you have sufficient knowledge about competition legislation?
Do you have information about the regulations, activities and decisions of the TCA?
- Do you regularly follow the website of the TCA?
- Is there a special department or an official to deal with competition legislation and related practices in your organization?
- Do you have rules, a booklet or a procedure prepared to ensure compliance with competition law, showing the required practices and informing all employees or the concerned?
- Do you use external consultancy services about competition legislation and practices?
- Have senior managers or employees received training about competition legislation and related practices?

B. Relations with competitors

The biggest obstacle in front of a fair competitive environment is anticompetitive agreements between businesses. Those agreements that can be defined as “cartel” are severely prohibited. Such decisions, activities and transactions, which mean “stealing from public welfare”, injure the reputation of a business and require heavy penalties.

- Do you determine prices and cost elements forming the price and sales conditions with your competitors?
- Do you exchange views with your competitors about prices and cost elements forming the price?
- Do you make geographical or consumer-based market allocation with your competitors?
- Do you have a common understanding with your competitors related to the restriction of supply and other input resources?
- Do you have a written or oral agreement with your competitors on refraining from competition?
- Do you act in common with competitors to push certain competitors or customers out of the market?
- Do you discuss with your competitors about issues such as price, cost elements etc. that might effect competition before or during tenders? Do you act jointly on these issues?

C. Relations with customers and dealers

Undertakings distributing or selling goods and services via vertical agreements must refrain from practices that may constitute a competition infringement. Such undertakings should be sensitive about the compliance of their marketing systems with competition law and make efforts.

- Do you determine the resale price of your dealer or customer?
- Do you intervene in sales conditions such as discount rates or due date of your dealer or customer?
- Do you impose restrictions on sales to customers in the agreements with your dealers?
- Do you impose prohibitions on sales by your dealers authorized in different regions into each other's region?

D. Undertakings with dominant position/market power

In certain markets, it is possible that one or more undertakings may have power to determine, independently from their competitors and customers, economic parameters such as price, supply and distribution volume. It is essential that such undertakings act without infringing competition.

- Do you apply different price and sales conditions to customers at equivalent positions?
- Do you impose an obligation to your customer to buy another good or service with a good sold?
- Is your pricing policy under or too much above the costs?

- Do you make restrictions on supplying goods to your customers or competitors without reasonable grounds?
- Is your pricing policy complicating your competitors' activities?
- Do you use financial or technologic superiority in a market to complicate your competitors' activities in other markets?

E. Associations of undertakings

Generally, undertakings operating in a sector come together in organizations created under the titles chamber, association, union or other for several reasons. It is natural that those organizations with or without legal personality work for the success of their members. However, those associations of undertakings, in certain situations, knowingly or ignorantly, lead to take anticompetitive decisions and cause anticompetitive practices.

- Are there any provisions restricting competition in the charter of the association of undertakings?
- Do the powers of the association of undertakings over its members affect competition between them?
- Does the association of undertakings take decisions about sales prices and other sales conditions of its members?
- Does the association of undertakings take decisions restricting its members' sphere of activity?
- Are members encouraged to talk about issues such as prices, sales conditions, market/customer allocation etc?
- Do technical standards aiming to regulate the members' activities restrict members' commercial activities?

The high number of "No" responses in section A indicates that decisions and practices of the undertaking or association of undertakings in question have a higher potential to violate the competition legislation. It is advisable that undertakings and associations of undertakings at this position implement a compliance program or at least receive consultancy/training services with respect to competition law. Regarding sections B, C, D, E a "Yes" response to any question indicates that the undertaking or association of undertakings in question might be involved in competition infringement. Such undertaking or association of undertaking should reassess its practice or action concerned in terms of competition legislation and terminate its action concerned if necessary. Shortly, implementing a compliance program is the most suitable solution for preventing a possible competition infringement.

ANNEX II
COMPETITION LAW COMPLIANCE PROGRAM

Distinguished shareholders,

Our substantial duty, as the Turkish Competition Authority, is to structure a competitive system and ensure its functioning. At the same time, this duty constitutes the basis of our power and responsibility, which depend on the Constitution and the Act No. 4054 on the Protection of Competition (the Competition Act). However, as we noted on different occasions before, the mission to protect and improve competition is such an important and comprehensive issue that it cannot be realized by the Turkish Competition Authority alone. It is possible to fulfill this function properly by extending competition culture. We expect that all social groups will adopt the fact of competition and support institutional efforts to create a competitive order.

We have also noted in several platforms that we attach importance to the role of not only public institutions but also all citizens, all undertakings regardless of size, and associations of undertakings in the institutionalization process for competition. While writing Competition Letter 2011, we stated that the most important factor or parameter that will increase competitive power in the long run is “compliance with the rules of law” or “compliance with rules of the fair game”. Up to now, many undertakings and associations of undertakings have been subject to inquiries and investigations by the Competition Board, the decision making body of the Turkish Competition Authority, and those infringing competition were imposed heavy fines. Sanctions and fines are important tools given by the law to protect and improve competitive order; however, it should be highlighted that these are only tools not the objective.

In fact, when the aim is to be honest and do work in compliance with law, there is an easier way. That is to prevent competition infringements before they occur and prevent competitive problems, which can easily be adopted by everyone. Our experience shows that many of the undertakings and association of undertakings that were imposed fines had not been aware that they infringed competition until they were subject to inquiries or investigations by the Turkish Competition Authority. This fact points out that there is a large area where competitive system can be protected and improved without using fines and sanctions. At this point, it is possible to see clearly the role of undertakings and associations of undertakings.

The fact that undertakings and associations of undertakings have information about competition legislation and enforcement and take institutional steps for compliance with the legislation is as important as the decisions and activities of the Competition Board in the establishment of a competitive environment. Efforts of the managers of undertakings and associations of undertakings for compliance with competition legislation serve for contributing to the institutionalization of competitive order as well as preventing their businesses and association members from being subject to heavy administrative sanctions.

The most comprehensive effort for compliance with competition legislation and enforcement is a Competition Law Compliance Program. A compliance program is a tool that enables undertakings and associations of undertakings to "make self-assessments and self-monitoring" in a sense. Those programs are widely seen in developed countries; however, unfortunately they have not become common in Turkey

yet. The main reason why we prepare a letter or a booklet institutionally about the issue is to encourage and extend such efforts, and help those interested.

The scope of the compliance programs shows that large-sized undertakings with an institutional structure engage in those kinds of activities more. Nevertheless, we believe that small and medium-sized undertakings may also make efforts easily for compliance with the legislation within the boundaries of their own possibilities. Therefore, we try to answer possible questions about compliance programs and efforts. We add a "checklist" for the benefit of especially small and medium-sized undertakings at the end of the booklet.

We have prepared Competition Law Compliance Program to clarify the issues and concepts focused in Competition Letter 2011. We wish that it will be helpful for all undertakings and associations of undertakings.

Sincerely,

Prof. Dr. Nurettin Kaldırımçı

The President

1. What is Competition Law Compliance Program?

Competition Compliance Program is a practice or the set of corporate regulations and rules that enables undertakings and/or associations of undertakings to monitor themselves in terms of competition law. The existence of a compliance program is an indication of the importance and consciousness about competing in accordance with the law. In other words, compliance program includes methods showing the measures that undertakings or associations of undertakings use to avoid actions and decisions violating the competition legislation and how those measures are applied in the organization.

2. Why is it important to develop a Competition Law Compliance Program?

In social life, it is obligatory to act legally; otherwise, it constitutes a risk for undertakings and managers. Acting illegally has both material and moral consequences. A striking point during the activities of the Turkish Competition Authority in the 14-year term is that in most of the investigations, undertakings are not aware that they are violating competition rules. However, this does not save them from being subject to heavy fines. Yet, being informed about competition infringements beforehand can prevent many problems. Responsible and professional management understanding requires foreseeing the coming events and avoiding legal/financial risks. A knowledgeable and conscious manager takes measures necessary for avoiding sanctions that will harm the undertaking in terms of both finance and reputation. From this point of view preparing and implementing "competition law compliance programs" is among the leading measures to be taken.

3. What is the aim of Competition Law Compliance Programs?

Compliance programs depend on the aim to prevent competition infringements before they occur or rise. In this respect, they serve for two important objectives. First is to ensure that undertaking managers and employees have knowledge about competition rules. By this way, managers might avoid decisions and actions that constitute a competition infringement. The second one is to allow detecting and terminating conduct and practices contrary to competition legislation, if any.

4. What is the scope of Competition Law Compliance Programs?

It seems impossible to talk about a standard compliance program for every undertaking to apply in any situation. On the contrary, it is desirable that the compliance program be shaped according to the structure and conditions of the markets where undertakings operate as well as to the undertakings' own needs. Nevertheless, it is appropriate to point out the basic issues that must be included in a compliance program in order to guide undertakings. Those issues may be classified under four topics:

1. Preparing a corporate guide explaining principles and procedures of the competition law compliance program
2. Training employees periodically
3. Regular assessment and monitoring of the compliance program
4. Consistent discipline and encouragement practices

5. What must be included in the guide explaining principles and procedures of the Competition Law Compliance Program?

The first step in terms of efficient functioning of the compliance program is generally to prepare a written guide for informing the employees about the program and direct the workflow within the

framework of the program. This guide should be written in a comprehensible style avoiding legal and technical terms as much as possible. While preparing the guide, it is advisable that the following points be taken into account:

- The guide should emphasize that competition law compliance program is an important policy of the company.
- It should include information about the consequences of competition infringement for the company. It should be stated that if the company engages in a competition infringement, it might be subject to examinations and investigations by the Competition Board. It should also be noted that the company might face damages claims by the victims of the infringement beside heavy fines and administrative measures of the Competition Board. In addition, all legal and financial risks should be underlined.
- It should include information about principles of the Competition Act and powers of the Turkish Competition Authority and the Competition Board. This may also include information about secondary legislation of the Turkish Competition Authority depending on the field of activity or the main areas where the company operates. For instance, a company with a high number of dealers or distributors is advised to inform its employees about secondary regulations about vertical agreements adopted by the Turkish Competition Authority.
- The guide should include procedures on how to make internal monitoring about whether the activities and decisions of the company comply with competition legislation. To that end, entrusting an official or a unit to carry out the principles and procedures of compliance program will contribute to the efficient implementation of the program.
- It is important for the implementation of the program uncompromisingly to hold employees responsible for their actions and decisions that are contrary to competition legislation. In this context, the guide should clearly explain the sanctions and discipline provisions to be imposed on employees engaged in competition infringements.
- The guide should include a simple, understandable and practical list of “do’s and don’ts” to counsel the employees. This list should be prepared taking the workflow of the company into account.

6. What is the role of training with respect to the success of Competition Law Compliance Program?

Training is an important part of an efficient compliance program. Effective training for all staff, if this is not deemed necessary, at least for managers and employees responsible for the implementation of strategic and commercial decisions and practices should not be neglected. Training can be given by the employees of the company or by an external professional or a firm. There is not a strict and standard form and method to be successful. Small and medium- sized enterprises may apply to more practical methods such as asking an expert, joining to courses or training programs or using the website of the Turkish Competition Authority. A suitable method can be chosen by taking into account the features of the undertaking and the staff who will receive training. The records of training activities through methods such as seminars, video presentation and role-playing should be kept and reminded to those concerned when necessary.

7. How should Competition Law Compliance Program be followed and monitored?

Regular assessment of the compliance program is another important point for success. It would be appropriate to test the knowledge of employees about the act, the policy of the undertaking and the procedures related to compliance program, and to monitor the activities of the employees on a given date or without notice for controlling actual or potential infringements. In addition, notification of actual or potential infringements to senior management and determining the problem solving mechanisms require that a regular assessment system be developed. Assessment process should be as clear as possible and the staff should be helped to know that their behavior is assessed.

The company, if its size permits and it has the opportunity, should have a specific department or a consultant. The officials concerned and consultants of the undertaking should participate in executive meetings and visit the facilities of the undertaking regularly. It is important that the employees know whom they will call when they have a question about competition legislation or when they become aware of an improper practice. Some firms appoint a consultant or establish an advice line giving information directly while others assign legal departments for this task. Irrespective of the method, the confidentiality of the employee reporting the improper conduct or practice should be protected. Finally, the company official or the consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. These inspections should be informal where necessary and include the inspection of employees with decision-making power related to competition and/or the staff of sales – marketing departments.

8. Why a coherent disciplinary and encouragement practice is necessary for the success of the Competition Law Compliance Program?

In order to ensure compliance with competition law, it is necessary that actions and employees that are important for competition should be monitored, reported and necessary discipline measures should be taken. The surveys conducted in developed countries show that employees' awareness about compliance with legislation increase with disciplinary and encouragement activities.

An efficient program requires more than oral commitment to comply with competition law. Requesting commitment, if possible written commitment, from the employees to fulfill their duties and responsibilities properly and highlighting that disciplinary actions will be taken uncompromisingly against employees or managers who might be engaged in actions contrary to competition law or violate competition are important for the program to be taken seriously. Care should be taken to avoid giving responsibility to employees who have tendency to behave contrary to the competition law.

It is indispensable for the success of the system that managers and employees know that the penalties and other negative outcomes, which the undertaking is subject to, will bear consequences for both the undertaking and the employees, and that especially infringements by managers will increase penalties and those managers may be imposed fines personally. It is very important for a successful compliance program that employees who ignore the compliance program or fail to report other employee's wrongdoing know that they might be held responsible or be punished. On the other hand, employees who contribute to the prevention of decisions, practices or conduct harmful for the company should be appreciated and awarded.

9. Are there any methods to encourage employees' efforts for compliance with legislation?

Preparing a simple and understandable list of “do’s and don’ts” that shows which actions and decisions are considered as infringements, and which ones are not problematic in terms of competition legislation will help employees significantly. This list can be organized as a general checklist for all employees or as specialized lists for each department according to their job definitions and workflows. The

existence of an in-house official whom employees may consult for the issues not included in the checklist or when they hesitate will reinforce the expected efficiency of implementation.

A checklist is added at the end of this text to guide undertakings and associations of undertakings.

10. What is the role of senior managers in the Competition Law Compliance Program?

The determination of the senior management and their leadership is an important indicator for the success of the program. Clear support of senior management to the program and their regular statements about their awareness will lead to the perception of the program as an important company policy not a simple effort to comply with legislation. In large-sized enterprises, one of the members of the senior management team might be held responsible for applying the program and be requested to prepare reports regularly. This will materialize the support of the management. Besides being a warning to internal and external environment, this will reinforce interest and participation of newly employed personnel to the program as well as current employees.

11. What kind of resources might be used to prepare the Competition Law Compliance Program?

The simplest and cost-free way of preparing a compliance program is that the legal department of the company prepares and implements a program using the website of the Turkish Competition Authority. The officials may find detailed information about the Competition Act, secondary legislation, Competition Board decisions and activities of the Competition Board as well as works for sharing competition legislation and enforcement with the public such as Competition Letter, Competition Hand Book, Application Guide, etc. and academic work.

Companies wishing to follow a more professional way to prepare and implement the program may purchase services from consultancy firms.

12. What is the role of associations of undertakings in the development of Competition Law Compliance Programs?

Associations of undertakings have also important roles in implementing the compliance program. In this process, beside individual undertakings, associations of undertakings such as chambers, unions and associations, which undertakings are members of, have also an important role. Within the frame of this role, associations of undertakings should prevent the practices under its body from violating competition rules and ensure that their members should have knowledge and awareness about competition law and policy in a general sense. It is beneficial that like individual undertakings, associations of undertakings also publish certain guides/instructions/policy papers that can be translated into our language as “competition compliance policy”. Those policy papers should be announced as a part of codes of conduct of undertakings and associations of undertakings and be shared with the public. In another words, undertakings and associations of undertakings should regard compliance with competition law as a moral and legal issue.

13. What should company managers do when they realize that the company is engaged in competition infringement?

As soon as the management becomes aware of an infringement, it should take action immediately, end the infringement, examine the case and inform the competition authority if necessary. It should be noted that especially in cartel agreements making active cooperation and benefiting from leniency sometimes become a kind of a race because the company that informs the competition authority first is the most advantageous company.

14. Are there any kinds of undertakings or sectors where Competition Law Compliance Programs are particularly necessary?

Sometimes it appears that partners and senior executives are not aware that their undertaking is engaged in competition infringement. This is the case for large-sized holding companies operating in more than one sector, where day-to-day business and management responsibility belongs to professionals. Therefore, it is important that senior management be sensitive about the issue.

In some markets, competition infringements are more frequent because of the reasons such as product characteristics, entry conditions, operation scale, and the existence of mechanisms facilitating communication between competitors. We strongly advise that undertakings operating in such markets implement a competition law compliance program. Therefore, managers are recommended to review the following checklist, assess their risks and determine their needs about the compliance program accordingly.

- **Is your undertaking a leader in the market?**

Market leaders may face with "abuse of dominant position" allegations under Article 6 of the Competition Act. Decisions and actions of such companies may be subject of competition inquiries and investigations.

- **Is the number of producers and/or suppliers low in the market you operate? Is the important part of the market controlled by a few undertakings?**

The fact that there are a few number of undertakings in the market facilitate anticompetitive agreements (cartel) between competitors. The fact that a significant part of the market is controlled by a number of undertakings may lead to agreement attempts between competitors for market allocation.

- **Are the products you produce/sell standard products?**

In sectors where standardized products are produced and/or sold such as iron, steel, chemicals and cement, the parameters to agree are generally issues about price and sale; therefore, cartels are more frequent.

- **Can new firms easily enter into the market you operate?**

Markets where entrance into the market is difficult and there are many barriers, tendency to create and maintain cartels is higher compared to markets where entrance is easy, in other words, there are not entry barriers.

- **Is the market where you operate shrinking or being affected by the crisis significantly?**

Cartels are more frequent in markets that experience shrinking or effects of crisis significantly.

- **Is your pricing policy parallel to your competitors?**

The fact that practices of your undertaking such as price, term, discount, etc. are similar to those of your competitors significantly and for a long time may draw attention as an indicator of anticompetitive information exchange or a formation of cartel.

- **Was the sector where your undertaking operates subject to inquiries or investigations of the Turkish Competition Authority?**

The Turkish Competition Authority focuses its attention on the sectors where inquiries and inspections were concluded with an infringement decision.

- **Do the managers or employees of your undertaking participate in the meetings of associations, unions or chambers frequently? Is there a regular communication between your employees and competitors' employees?**

Associations of undertakings in the sector generally facilitate and sometimes even lead cartel agreements. Anti competitive information exchange individually or under the body of the association, the frequency of communications with competitors, the continuity and intensity of this communication increase the risk of infringement.

- **Is there a joint venture or a commercial agreement between your undertaking and competitors?**

Commercial relations and structural associations like joint ventures are among factors that facilitate cartels. Those kinds of relations may cause practices that can be deemed as grounds for infringement assertions.

15. How can small and medium sized enterprises comply with competition legislation?

Generally, it is not possible for small and medium-sized enterprises to prepare and implement a comprehensive compliance program. The checklist included in this brochure is prepared to help the said undertakings to some extent. Small and medium-sized undertakings are recommended to review their decisions and practices by using the website of the Turkish Competition Authority (www.rekabet.gov.tr) in addition to the issues stated here.

We think that it would be relevant to remind some points to be taken into account by undertakings in question. It is considered as a severe infringement if undertakings determine sales conditions such as sale prices, discounts and due dates, and allocate markets and customers with their competitors. Those kinds of infringements may be seen in the context of public tenders. Therefore, undertakings participating in public tenders may face with severe administrative fines if they determine tender price or other commercial issues related to tender with competitors.

Associations of undertakings such as chamber, union and federation may sometimes be used as a platform where market information that can affect decisions related to competition such as price, production volume, and sales conditions is shared between members. The Turkish Competition Authority often investigates the practices where price recommendation by associations of undertakings is perceived and used by member undertakings as a fixed price. Therefore, associations of undertakings should be sensitive about regulations that may lead to fixed prices and member undertakings should clearly warn managers of associations of undertakings if necessary.

Given the severity of administrative fines imposed by the Competition Board, competition infringements cause serious problems to small and medium-sized undertakings. As a result, managers of the undertakings in question should be attentive and make efforts to comply with competition legislation and enforcement in order to protect their vital interests.

CHECKLIST FOR COMPLIANCE WITH COMPETITION LEGISLATION

Undertakings should review and assess their current situation in terms of compliance with competition law. We have created a checklist to help undertakings and associations of undertakings. It should be emphasized that the checklist does not cover all situations but includes basic points in terms of competition legislation. We think that it is useful for undertakings and associations of undertakings to assess their situation according to this checklist or question list. Responses to the questions will determine to a large extent what kind of practice and approach is necessary for success.

A. Information about competition legislation and the Turkish Competition Authority

It is vital to have sufficient information about competition legislation and the Turkish Competition Authority to foresee many problems that would be very difficult to overcome otherwise. Knowledge and sensitiveness degree of managers and officials with the power to make decisions resulting in competition infringements about what legal practices are and which kind of decisions and actions are prohibited serves as a basis to success or failure of the undertaking and the management in this area.

- Do you have sufficient knowledge about competition legislation?
- Do you have information about the regulations, activities and decisions of the Turkish Competition Authority?
- Do you regularly follow the website of the Turkish Competition Authority?
- Is there a special department or an official to deal with competition legislation and related practices in your organization?
- Do you have rules, a booklet or a procedure prepared to ensure compliance with competition law, showing the required practices and informing all employees or the concerned?
- Do you use external consultancy services about competition legislation and practices?
- Have senior managers or employees received training about competition legislation and related practices?

B. Relations with competitors

The biggest obstacle in front of a fair competitive environment is anticompetitive agreements between businesses. Those agreements that can be defined as “cartel” are severely prohibited. Such decisions, activities and transactions, which mean “stealing from public welfare”, injure the reputation of a business and require heavy penalties.

- Do you determine prices and cost elements forming the price and sales conditions with your competitors?
- Do you exchange views with your competitors about prices and cost elements forming the price?
- Do you make geographical or consumer-based market allocation with your competitors?

- Do you have a common understanding with your competitors related to the restriction of supply and other input resources?
- Do you have a written or oral agreement with your competitors on refraining from competition?
- Do you act in common with competitors to push certain competitors and/or customers out of the market?
- Do you discuss with your competitors about issues such as price, cost elements etc. that might effect competition before or during tenders? Do you act jointly on these issues?

C. Relations with customers and dealers

Undertakings distributing or selling goods and services via mostly vertical agreements must refrain from practices that may constitute a competition infringement. Such undertakings should be sensitive about the compliance of their marketing systems with competition law and make efforts.

- Do you determine the resale price of your dealer or customer?
- Do you intervene to sales conditions such as discount rates or due date of your dealer or customer?
- Do you impose restrictions on sales to customers in the agreements you sign with your dealers?
- Do you impose prohibitions on sales by your dealers authorized in different regions into each other's region?

D. Undertakings with dominant position/market power

In certain markets, it is possible that one or more undertakings may have power to determine, independently from their competitors and customers, economic parameters such as price, supply and distribution volume. It is essential that such undertakings act without infringing competition.

- Do you apply different price and sales conditions to customers at equivalent positions?
- Do you impose an obligation to your customer to buy another good or service with a good sold?
- Is your pricing policy under or too much above the costs?
- Do you make restrictions on supplying goods to your customers or competitors without reasonable grounds?
- Is your pricing policy complicating your competitors' activities?
- Do you use your financial or technological superiority in a market to complicate your competitors' activities in other markets?

E. Associations of undertakings

Generally, undertakings operating in a sector come together in organizations created under the titles chamber, association, union or other for several reasons. It is natural that those organizations with or

without legal personality work for the success of their members. However, such associations of undertakings, in certain situations, knowingly or ignorantly, lead to take anticompetitive decisions and cause anticompetitive practices.

- Are there any provisions restricting competition in the charter of the association of undertakings?
- Do the powers of the association of undertakings over its members affect competition between them?
- Does the association of undertakings take decisions about sales prices and other sales conditions of its members?
- Does the association of undertakings take decisions restricting its members' sphere of activity?
- Are members encouraged to talk about issues such as prices, sales conditions, market/customer allocation etc?
- Do technical standards aiming to regulate the members' activities restrict members' commercial activities?

F. Undertakings participating in public tenders

Another area where competition infringements are seen widely is public tenders. It is considered as a severe competition infringement if the bidding undertakings in a public tender make close communication and share tender or tender elements as a result of this communication before or during a tender.

- Does your undertaking communicate with competitors about the tender or tender elements before or during tenders?
- Is your undertaking in an agreement with its competitors about price, amount, etc. related to tender?
- Does your undertaking allocate tenders with the competitors especially when there are more than one tender?
- Does your undertaking agree with your competitors and withdraw from tender in favor of one or more competitors?

The high number of "No" responses in section A indicates that decisions and practices of the undertaking or association of undertakings in question have a higher potential to violate the competition legislation. It is advisable that undertakings and associations of undertakings at this position implement a compliance program or at least receive consultancy/training services with respect to competition law. Regarding sections B, C, D, E, F a "Yes" response to any question indicates that the undertaking or association of undertakings in question might be involved in competition infringement. Such undertaking or association of undertaking should reassess its practice or action concerned in terms of competition legislation and should terminate its action concerned if necessary.