



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

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ROUNDTABLE ON MONOPSONY AND BUYER POWER

-- Note by Turkey --

This note is submitted by Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 22-23 October 2008.

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1. The Competition Board encountered certain cases where it discussed monopsony and buyer power. This contribution tries to address some issues raised in the call for country contributions.

2. Buyer power is discussed in case-law of the Competition Board in two instances; first while considering whether an undertaking holds a dominant position and secondly in the evaluation of merger and acquisition cases. First of all, it should be mentioned that Article 6 of the Act No 4054 on the Protection of Competition (the Competition Act) prohibits abuse of dominant position¹. Therefore, buying power falling short of dominant position cannot be challenged under provisions concerning abuse of dominant position in the Competition Act. Secondly, the relevant test while assessing mergers and acquisitions is the dominance test. Therefore, mergers and acquisitions creating or strengthening buying power falling below dominance level are not prohibited.

3. Buying power is discussed in case-law of the Competition Board mostly while considering whether an undertaking holds a dominant position. For instance, the Competition Board takes into account whether the customers have a sufficient level of countervailing buying power to constrain the market power of the producing undertakings.² In this sense, a buying power of 15-20% held by top five customers was considered low by the Competition Board.³ Similarly, existence of strong buyers in merger context is regarded as among the factors that has negative impact on the parties' obtaining market power following the transaction.⁴ For example, in one case regarding an acquisition, the Competition Board mentioned that in case buying power of top five customers was above 40%, it could be said that buying power existed.⁵ In this particular case, share of top five customers in total sales in the relevant market was 61% indicating high buying power and inability of the relevant parties to the acquisition to act independently of the customers following the transaction.

4. In mergers and acquisitions in retail markets, concentration ratios in selling markets countrywide are important since they produce direct effects in procurement markets.⁶ Increase in buying power as a result of concentration in selling markets enables purchasing under more convenient conditions and this, when reflected in prices, brings increase in market share in selling market in return. This so-called spiral effect will continue until a dominant position is created in the market. With decreasing competition in the selling market, the advantages derived from buying power may not be reflected to the consumers. Again, analysis of buying power in this case is limited to whether a dominant position is created in procurement markets as a result of the transaction involving retail trade.⁷ However, it is emphasised by the Competition Board that buying power of modern retailers especially operating countrywide cannot be measured solely by considering quantity they purchase.⁸ Presence of their products on the shelves of retail chains is

¹ Dominant position is defined in Article 3 of the Competition Act as “*the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers.*”

² *Coca-Cola*, dated 10.9.2007 and numbered 07-70/864-327.

³ *Mey İçki*, dated 10.9.2007 and numbered 07-70/863-326.

⁴ *OMCO İstanbul*, dated 25.4.2001 and numbered 01-20/189-48.

⁵ *Henkel KGaA/Codant S.A.*, dated 4.7.2007 and numbered 07-56/659-229.

⁶ See *Migros/Tansaş*, dated 31.10.2005 and numbered 05-76/1030-287.

⁷ In *Migros/Tansaş* case, the parties to the transaction purchased 10,4% of the sales of main manufacturers of detergents. Moreover, the parties to the transaction purchased 18,1% of sales of the main producers of frozen foods. It was decided that these market shares were far from creating dominant position in the procurement markets for detergents and frozen foods.

⁸ See *CarrefourSA/Gima-Endi*, dated 17.6.2005 and numbered 05-40/557-136.

considered important by producers due to brand image of the products. Therefore, bargaining power of modern retailers is not limited to the quantity they purchase.

5. Based on this background information, in a recent case⁹, the Competition Board mentioned that there had to be certain conditions in the market for the exercise of monopsony power. Such conditions were realisation of significant amount of purchases in the market by the buyers and the number of total buyers, existence of entry barriers in the procurement market, supply curve with a positive slope and communication among buyers. In this case, monopsony power was defined as the one that could reduce the price of the product below competitive levels and depress it.

6. In another case,¹⁰ three methods are mentioned that are used to measure buying power. These are 1 - concentration ratio in the procurement market 2 – elasticity of supply 3 – performance measurements. Although concentration ratio is the easiest one to measure, high concentration ratios in procurement markets are not sufficient alone to designate that an undertaking is dominant unlike selling markets. In case sellers are large undertakings, high concentration ratios in the procurement markets disprove dominance of the relevant undertaking. Therefore, it is essential to examine the structure of the selling markets as well.¹¹

7. In one case regarding a purchasing cartel¹² where exporting undertakings fixed the earliest date of purchase and maximum purchasing price of cherry, the Competition Board took into account whether there were conditions enabling the exercise of monopsony power. It was considered that the exporting undertakings realised a significant part of the purchases in the market and their combined market share was 60,18% based on value. The CR₄ in the market was 70,60%, and HHI was 3684. That HHI was above 1800 indicated high concentration level. Moreover, although entry was likely in the long term, such entry did not constitute a timely and sufficient alternative in a market which lasted 30 days on average. Based on these considerations, the Competition Board adopted the view that the exporting undertakings created monopsony power via a cartel agreement.

8. In this case, a monopsonistic market was defined as a market where purchasing decision taken by a large buyer affected purchasing prices and monopsony power as the one that could determine the purchasing price below competitive levels. Moreover, the decision referred to the Horizontal Merger Guidelines of the Department of Justice which states “*Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers.*”

9. The decision states that although monopsony implies a single undertaking, it is possible that several undertakings obtain monopsony power by acting like a single buyer. The impact caused by such undertakings which obtained monopsony power by acting together is generally emergence of purchasing quantity and prices below competitive levels. This is the derivative of welfare loss, created by cartels in selling markets, in purchasing markets.

⁹ *Leaf Tobacco*, dated 19.9.2002 and numbered 02-56/699-283.

¹⁰ *Arçelik*, dated 17.10.2000 and numbered 00-39/436-242.

¹¹ In this case, CR₄ in the supply market was 45,1% whereas the relevant buyer realised 53% of the total purchases. In addition to the low level of CR₄, the relevant buyer was not dominant in the procurement market because there was only one other buyer in the market nearly with a market share of 47% (duopsony) and therefore the relevant buyer could not act independently of its rival.

¹² *Purchase of Cherry*, dated 24.7.2007 and numbered 07-60/713-245.

10. The decision mentions that literature cites small number of buyers, whether products are homogenous, sealed bids, and inelastic supply as four main factors that may lead undertakings to obtain monopsony power by coming together. For instance, in this case, number of undertakings in the relevant geographic market was less than the number of undertakings operating countrywide, they realised a significant share of purchases in the relevant geographic market, the product was homogenous, and supply elasticity was low because of the fact that supply of agricultural products was definite and limited.¹³

11. While discussing whether the purchasing cartel benefited from exemption, among the factors that led to denial of exemption by the Competition Board were decrease in producers' income and loss in their welfare as a result of price offered below competitive levels as well as absence of any benefits for the consumer.

1. Collective Purchasing

12. An arrangement which seeks collective purchasing may be exempted under the Competition Act if it is restrictive of competition.¹⁴

13. In one case¹⁵, Shell agrees with the operators of filling stations to set up a central purchasing system for the products to be sold in retail markets in these stations. As an important feature of the system, Shell was to negotiate with suppliers on behalf of operators of filling stations and purchase relevant products to be sold in retail markets of the relevant filling stations. Shell planned to purchase the products at low prices by using the bargaining power as done by big retailers. Two points in the system were considered relevant under the competition law. The first was the fact that operators of filling stations would be obliged to purchase the products exclusively via the system. Second point was a likely risk of acting in concert or parallel prices as membership of the retail markets in a purchasing organisation would cause identical purchasing prices meaning that the retail markets refrained from being rivals in the procurement market.

14. The decision favoured central purchasing system as it would permit the operators of filling stations to have a similar buying power that big retailers had vis-à-vis the suppliers enabling them to purchase and sell at relatively low prices. Among benefits for consumers taken into account, the decision mentioned that the central purchasing system would bring improvements especially in prices of the products and consumers would buy at more convenient prices in markets of the filling stations where prices might generally be high. Moreover, as the retail trade in Turkey was competitive, it was not possible that central purchasing system would eliminate competition. Finally, the risk of coordination among the

¹³ T he fact the supply elasticity is relatively low enables the buyers to decrease the purchasing price significantly without decreasing their purchases to a great extent. Moreover, the greater the power of the buyers to exert pressure to lower purchasing prices, the higher the likelihood of creating a purchasing cartel. Definite and limited nature of supply of agricultural products decreases their supply elasticity to a great extent thereby facilitating a purchasing cartel.

¹⁴ In order to benefit from exemption, following conditions should be satisfied:

- a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
- b) Benefiting the consumer from (a),
- c) Not eliminating competition in a significant part of the relevant market,
- d) Not limiting competition more than what is compulsory for achieving the goals set out in (a) and (b).

¹⁵ *Shell*, dated 26.5.2005 and numbered 05-36/482-113.

retail markets of filling stations and sale of the relevant products at retail level at uniform prices through single purchasing price for the products were not considered credible as such systems were regarded as a healthy way to protect small retailers from competition exerted by big retailers and pro-competitive rather than anti-competitive in highly competitive markets like retail trade in Turkey. Moreover, it was considered that applying uniform prices was neither important nor a rational behaviour in competitive markets. As a result, it was decided that the system benefited from exemption.

2. Customer Foreclosure

15. One concern taken into account by the Competition Board regarding buying power arose in a case¹⁶ regarding a JV in airline catering services market. According to JV agreement, Turkish Airlines, one of the parties to the transaction, would sign a contract with the JV to purchase airline catering services exclusively from the JV for a period of five years. Such an exclusivity contract would mean that a significant part of the market could be foreclosed for the providers of airline catering services as 50% of the total turnover in the market was realised via purchases by Turkish Airlines. Moreover, as Turkish Airlines was a disruptive buyer in the market, the transaction could cause elimination of a factor that created significant competitive pressure on providers of airline catering services.

16. The Competition Board did not consider the article of the JV agreement that foresaw signature of a contract for the purchase of airline catering services by Turkish Airlines exclusively from the JV for a period of five years as an ancillary restraint directly related and necessary to the transaction. The Competition Board required that the contract should be notified after signature so that it could be examined under articles of the Competition Act that prohibit anti-competitive agreements and regulate conditions for exemption.¹⁷ The Competition Board concerned that the exclusivity clause in the contract for the purchase of airline catering services could foreclose the biggest customer operating in the downstream market of airline passenger transport services to the existing and potential rivals operating upstream market of airline catering services for five years and produce important effects on competition in the market.

17. Apart from these, the Competition Board permitted the transaction on the condition that Turkish Airlines would realise purchase of airline catering services under competitive conditions after the termination of the relevant contract for the purchase of airline catering services to be concluded with the JV.

¹⁶ *THY/DoCo*, dated 29.12.2006 and numbered 06-96/1224-369.

¹⁷ The Competition Board ruled that it could not grant negative clearance certificate and the contract could not benefit from exemption when it was notified. However, the Competition Board decided that a negative clearance certificate indicating that the contract did not violate the Competition Act could be granted if exclusive purchasing clause was removed from the contract. The reasoned decision dated 11.09.2008 has not been published yet.