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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

**HOW TO PROVIDE EFFECTIVE GUIDANCE TO BUSINESS ON MONOPOLISATION/ABUSE OF
DOMINANCE**

-- Turkey --

5 June 2007

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

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1. Turkish Competition Authority (TCA) attaches great importance to transparency and its relations with the business world. Being a relatively new authority with a 10 year experience, it works hard to increase awareness of competition matters among business circles. To further encourage such awareness and to promote discussion on relevant matters, the TCA evaluates duly all the concerns and/or complaints of business.

1. Examples of complaints from business about uncertainty over the legality of certain conduct or practices of unilateral conduct rules:

2. In this part of the contribution, complaints/concerns based on access to the file and the rights of defense will be dealt with. Nevertheless, such complaints/concerns of business are not only specific to unilateral conduct rules but also relevant for rules on restrictive business practices in Turkey. Therefore, this contribution will focus on the procedural side of this issue without making any differentiation whether the concerns from business in this respect stem from a restrictive business practice (under article 4 of the Act on the Protection of Competition no 4054) or abuse of dominant position (under article 6 of the Act on the Protection of Competition no 4054).

3. In competition law enforcement in general, the actual parties are those undertakings that are subject to investigation and thus they are given certain rights of defense during the investigation process as part of procedural rules. Until now, the TCA is faced with the following concerns from the business world as to the procedural aspects. These will be elaborated under three headings:

1. Whether the notification of the investigation report and the additional opinion to the complainant is needed or not,
2. Whether the complainant has a right to access to the file like the undertakings subject to an investigation,
3. Whether the undertakings could defend themselves properly because they haven't received enough information with regard to findings of the TCA during the investigation period.

4. To clarify the above mentioned issues, a short information as to the rights of complainants and the undertakings subject to investigation would be provided under each heading.

1.1 Whether the notification of the investigation report and the additional opinion to the complainant is needed or not:

5. This issue could be explained via referring the provisions found in the Act on the Protection of Competition no 4054 (Act no 4054). In this regard, Article 42 which regulates 'notification of applicants' foresees that:

“In case the Board deems the claims put forward in applications for informing or complaint serious and sufficient, informers or complainants are notified in writing that the claims put forward have been deemed serious and that an inquiry has been initiated.

In cases where the Board either expressly rejects applications, or is deemed to have rejected them by means of failure to notify within due period, anyone who documents to have a direct or indirect interest may resort to jurisdiction against the rejection decision of the Board.”

6. Accordingly, the TCA informs the informers or complainants about its decision to initiate an investigation. The idea of this provision is simply to inform the informers and complainants and to prevent

them from applying to the administrative judiciary by reason of implicit refusal. This provision is different than the one in Article 43/2 which regulates ‘commencement of investigation’ as follows:

“The Board notifies the parties concerned of investigations initiated by it, within 15 days of issuing the decision for the initiation of investigation, and requests that the parties submit their first written pleas within 30 days. In order to enable the commencement of the first written reply period granted to the parties, it is required that the Board forwards to the parties concerned this notification letter, accompanied by adequate information as to the type and nature of the claims”.

7. This article refers to “parties” without making any differentiation between the informer/complainant and the party subject to an investigation. Thus, some of the legal advisors claim that the word “party” comprises both and therefore the same information should be notified to the informer/complainant likewise those undertakings that are subject to investigation. In fact, although it is clear that it is the commencement of the investigation that should be notified to the parties –; it is not possible to interpret the word “party” under article 43/2 as referring to both applicant and the undertaking subject to investigation as alleged by some private parties in business.

8. The main purpose of the Act no 4054 is to protect public interest via maintaining competition in the markets for goods and services. That’s why the primary concern of the TCA is to preserve public interest. Of course, the complainant has a right to benefit from this situation. But the complainant’s interest is at a secondary level compared to that of the interest expected from the preservation of the public interest. Nevertheless, there is no provision which prevents the TCA from consulting with the complainant/informer anytime it deems appropriate. For instance likewise in BIAK¹ case, the TCA referred to the complainant upon after making some notifications or via informal communications. This case is important as to the question of whether the investigation report and the additional report should be notified to the complainant or not. This was a special decision since there is no obligation in the Act no 4054 for the notification of the complainant of the relevant documents during the initiation period of the investigation. Moreover, there is a section that delineates the borders of the investigation procedure in the “Directive concerning the procedural rules that are applicable to Act no 4054” Despite the fact that this is an internal document, its application might be regarded as a sort of guidance for the business.. The relevant section of the Directive determines that the complainant/informer would be informed about the investigation decision but not the relevant information and/or documents. But given that there is no legal obligation, the TCA’s decision in BIAK case is an acceptable solution as it gives flexibility to the TCA to communicate with the complainant in case such necessity arises.

1.2 Whether the complainant has a right to access to the file like the undertakings subject to an investigation or not:

9. This is another issue which was raised by the undertakings under investigation. However, article 44/2 of the Act no 4054 openly states that access to file is acknowledged for “*those parties which are notified of the initiation of an investigation*” and they are entitled to “*ask for a copy of any paperwork drawn up within the (Competition) Authority in connection with them, and if possible, a copy of any evidence obtained.*” Thus, there is no statutory right of the complainant arising from the Act no 4054 in access to file. Nevertheless, under specific circumstances and whenever it deems necessary the Competition Board might let the complainant to have access to file in a limited way in the sense that complainant is not allowed to see confidential information inside the file as experienced in Renault Mais² investigation.

¹ ompetition Board decision dated 04.03.1999 and numbered 99-13/99-40

² ompetition Board decision dated 09.05.2000 and numbered 00-17/163-83

1.3 *Whether the undertakings could defend themselves properly because they haven't received enough information with regard to findings of the TCA during the investigation period.*

10. There are many cases in which parties subject to investigation go to the appeal court alleging that they are not provided sufficient information with regard to the findings of the TCA. Before elaborating on the decisions of Council of State, it would be necessary to mention about the provisions found in the Act no 4054 in this regard:

- First written plea via article 43/2: The Competition Board notifies those undertakings within 15 days by issuing its decision for the initiation of investigation and requests those undertakings subject to investigation to submit their first written pleas within 30 days. The Board has to inform them by adequate information as to the type and nature of the claims.
- Second written plea via article 45/1, 2: The report prepared at the end of the investigation period is notified to all the undertakings concerned.
- Those undertakings subject to investigation are required to submit their written pleas to the Competition Board within 30 days or in case they requested additional period the undertakings subject to investigation may submit their written pleas at most in 60 days.
- Third written plea via article 45/2: The investigation team declares an additional written opinion within 15 days against the pleas to be submitted by the undertakings concerned. Those undertakings subject to investigation are required to submit their written pleas to the Competition Board within 30 days or in case they requested additional period the undertakings subject to investigation may submit their written pleas at most in 60 days.

11. In addition to the above mentioned and very detailed defense rights of the undertakings, the Act no 4054 further supported this right in the following provisions:

- Last sentence of the Article 44/1:., during the investigation period, those persons claimed to have infringed the Act no 4054 may, at all times, submit to the Competition Board any information and evidence likely to influence the decision.
- Article 44/3: The TCA may not base its decisions on issues about which the parties have not been informed and granted the right to defense.
- Article 44/2 on "access to file": Those parties which are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the Competition Authority in connection with themselves, and if possible, a copy of any evidence obtained.

12. Furthermore, a 'Hearing' can be held upon the parties' declaration of their will to enjoy the right to hearing in their petition of reply or defense via article 46/1.

13. In brief, rights of defense are designated in a very wide spectrum via detailed rules. Nevertheless, some of the undertakings applied to the Council of State alleging that they haven't received enough information and documents against the claims of the Competition Board to defend themselves sufficiently. In a recent case in cosmetics sector, the Council of State³ decided on behalf of the Competition Board, although the Competition Board refused to give those information and documents to those undertakings

³ decision of the Council of State Chamber 13, numbered 2006/1041, dated 30.5.2006

who were claiming to use them during their defences before the finalization of the investigation process. The Council of State's such approval is realized upon seeing that all the procedural steps (three written pleas and one hearing) are followed and completed duly by the Competition Board against the party subject to investigation. It is truism to argue that the Council of State approves the conduct of the Competition Board due to the fact that all procedural steps in rights of defense are accurately handled by the Competition Board including the notification of the investigation report prepared at the end of the investigation period (article 45/1) to all the undertakings concerned.

2. Experience with guidelines

14. The TCA has issued Block Exemption Communiqué regarding Vertical Agreements no 2002/2⁴ in year 2002. This secondary legislation was in harmony with that of the Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices except for the market share thresholds. In other words, this Communiqué was providing block exemption to all vertical agreements as long as they satisfy the relevant conditions without making any differentiation as to the size of the undertakings i.e. including undertakings in dominant position. In the same vein, the TCA prepared and published a "Guidelines on the Explanation of Block Exemption on Vertical Agreements"⁵. The purpose of issuing these Guidelines is to clarify to the extent possible the points to be taken into account by the Competition Board in the application of the Communiqué to the business, and thus to minimize the uncertainties likely to arise in the interpretation of the Communiqué by undertakings. In brief, it aims to ensure transparency for the business. However, the implementation of the block exemption and the guidelines shows that there is need for a market share threshold especially to provide a level playing field for those with relatively small market power or no market power at all and to provide certainty for the undertakings with market power. The four-year implementation of the said Communiqué and the guidelines also shows that automatically exempting those vertical agreements of undertakings with a relatively bigger market power is not satisfying the exemption conditions all the time. Meanwhile, the economic theory puts forward that the harmful foreclosure effect of vertical agreements on competition is larger when the undertakings possess a market power in the relevant market. In that respect, the TCA had to withdraw the benefit of the block exemption communiqué for vertical agreements in some of the sectors based on the fact that efficient competition is prevented such as in the beer market⁶ and in the packaged chips market⁷. Withdrawal of the benefit of block exemption from certain agreements is likely to lead to uncertainties among the business actors party to such agreements. Thus, with a recent amendment in the said Communiqué, a market share threshold of 40 % is adopted which clarifies that the undertakings with a market share below 40% will benefit from the block exemption automatically whereas those with a market share above 40 % will not benefit from an exemption automatically and will need an individual exemption in case such necessity arises.

15. Another "Guidelines" is issued concerning the "Block Exemption Communiqué on Vertical Agreements and Concerted Practices in Motor Vehicle Sector no 2005/4"⁸. The guidelines as to the

⁴ n English version of this communiqué can be found at <http://www.rekabet.gov.tr/etebilig.asp>

⁵ n English version of these guidelines can be found in English at <http://www.rekabet.gov.tr/ekilavuz.html>

⁶ *ompetition Board decision, Efpa/Bimpaş dated 22.4.2005 and numbered 05-27/317-80: the Competition Board withdrew the benefit of the block exemption for those exclusive purchasing agreements concluded between the two leading breweries and/or their distributors on the one hand and retail sale outlets on the other, because such agreements prevented efficient competition in the market.*

⁷ *ompetition Board decision, Frito Lay dated 20.9.2004 and numbered 04-60/870-207: the Competition Board has withdrawn the benefit of the block exemption regarding agreements among Frito Lay and final points of sale in the packaged chips market.*

⁸ n English version of this communiqué can be found in English at <http://www.rekabet.gov.tr/etebilig.asp>

explanation of this communiqué are welcomed by the business concerned. Those vertical agreements in which the market share of the provider in the relevant market where it provides motor vehicles or spare parts or maintenance and repair services does not exceed 30 %, or 40 % for agreements where quantitative selective distribution is preferred for the distribution of motor vehicles, can benefit from the block exemption. The competition experts in charge of the implementation of this secondary legislation are attending various conferences held by the chambers of commerce and/or symposiums held by the actors of the industry in order to explain the meaning and purpose of the said secondary legislation and the use of guidelines in this regard. Until now, no complaint/concern received from the undertakings that are not benefiting from this block exemption, i.e. the ones with a relatively bigger market power or in a dominant position.