

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

Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND
ADMINISTRATIVE PROCEEDINGS**

-- Turkey --

16 February 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

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1. Act No. 4054 on the Protection of Competition (the Competition Act) and the secondary legislation issued in accordance with it provide for the basic rules concerning procedural fairness. This contribution aims to express relevant elements of the legislation as part of the explanations on procedural fairness in the following.

1. Identity of the Decision-maker

2. First of all, the Competition Act overtly empowers the Competition Authority to implement the Competition Act¹ and provides the basic framework of its organisation² such as the Presidency³, service units, and the Competition Board which is the decision-making body of the Competition Authority, and the duties and powers of the Competition Board⁴ and the Presidency⁵.

2. Guidance on Substantive Legal Standards

3. The Competition Act determines basic substantive standards regarding anti-competitive agreements, concerted practices and decisions, abuse of dominant position and mergers and acquisitions.

4. For instance, the Competition Act prohibits and lists a non-exhaustive list of agreements, concerted practices and decisions that may be regarded as anti-competitive such as those fixing prices, sharing markets etc.⁶ According to the Competition Act, the prohibition concerns those agreements, concerted practices and decisions the object or effect or likely effect of which is the prevention, distortion or restriction of competition directly or indirectly.⁷ Similarly, criteria to exempt such anti-competitive conduct are also cited in the Competition Act.⁸ Individual decisions by the Competition Board contain information on how the criteria are applied in practice. Moreover, the Competition Board also issues communiqués and guidelines to ensure legal certainty on application of exemption criteria regarding certain type of agreements such as vertical agreements, on notification, and on certain concepts such as market definition.⁹

¹ Article 20(1).

² Article 21.

³ The Presidency is composed of the Chairman of the Competition Board, the Deputy Chairman and the Vice-Chairmen of the Competition Board. See Article 29(1).

⁴ Article 27.

⁵ Article 30.

⁶ Article 4.

⁷ Article 4(1).

⁸ Article 5.

⁹ Current list of the block exemption communiqués and guidelines is as follows:

- Block Exemption Communiqué on Technology Transfer Agreements,
- Block Exemption Communiqué in relation to the Insurance Sector,
- Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector,
- Block Exemption Communiqué on Research and Development Agreements,
- Block Exemption Communiqué on Vertical Agreements,

5. As to the abuse of dominant position, the Competition Act also prohibits and lists examples of abusive practices such as preventing new entry or complicating activities of rivals, applying discriminatory terms etc.¹⁰ Again, individual decisions of the Competition Board also grant detailed information on the legal standards applicable to certain abusive conduct such as price squeeze. However, the Competition Board has not issued any secondary legislation to provide guidance concerning abuse of dominant position yet.

6. The legal standard for mergers and acquisitions is cited in the Competition Act as prohibition of dominance indicating that the basic concern is whether the transaction will create or strengthen dominant position as a result of which competition is significantly decreased.¹¹ The Competition Board has issued a communiqué¹² clarifying various issues such as factors to be taken into account in the assessment.

3. Procedural Rules

7. The procedural rules are granted in a detailed manner in the Competition Act. For instance, the Competition Act fixes deadlines for the proceedings to be conducted by the Competition Authority and for the rights to defence to be enjoyed by the parties.

3.1 *Initiation of Preliminary Inquiry and Investigation*

8. The Competition Board may either initiate an investigation or decide to conduct a preliminary inquiry to determine whether it is necessary to initiate an investigation.¹³ Preliminary inquiries last 30 days¹⁴ and the Competition Board has to convene to decide whether or not to initiate an investigation within 10 days following the submission of the preliminary inquiry report to the Competition Board.¹⁵

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- Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings,
 - Guidelines on Vertical Agreements,
 - Guidelines on Application of Articles 4 and 5 of the Competition Act to Technology Transfer Agreements,
 - Guidelines on Certain Subcontracting Agreements between Non-competitors,
 - Guidelines on the Definition of Relevant Market,
 - Guidelines on Explanation of Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.

¹⁰ Article 6.

¹¹ Article 7(1).

¹² Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board. There is a separate communiqué for privatization transactions providing for rules on pre-notification and authorization of such transactions. See Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid.

¹³ Article 40(1).

¹⁴ Article 40(3).

¹⁵ Article 41.

3.2 Duration of Investigation

9. In case the Competition Board decides to initiate an investigation, it is concluded within 6 months at the latest.¹⁶ The Competition Board may grant an additional period up to 6 months only once where it is necessary.¹⁷ It should be mentioned that the period indicates the maximum time frame in which the investigation report is to be prepared. Therefore, it may take around 19 months to reach a final decision in a case involving an investigation provided that all the extensions concerning the investigation, rights to defence etc are granted and other procedural requirements are complied with.

3.3 Right to Defence

10. The parties concerned have to be notified of the investigation within 15 days starting from issuing of the decision that initiates the investigation.¹⁸ The notification also requests that the parties send their (first) written pleas within 30 days.¹⁹ It is compulsory that the Competition Board sends adequate information to the relevant parties as to the type and nature of the claims in order to enable the commencement of the first written plea period.²⁰

11. When the first written pleas are received by the Competition Authority, an investigation report is prepared within the aforementioned timeframe and notified to the parties²¹. Upon the receipt of the investigation report, the parties may submit their (second) written pleas to the Competition Board within 30 days.²² In response, the Competition Authority notifies the parties of its written opinion with regard to the second written pleas within 15 days.²³ The parties may send their (third) written pleas as a reply to the opinion of the Competition Authority within 30 days.²⁴ The Competition Act allows the Competition Board to extend the periods for written pleas only once and by one fold at the most in case the parties provide justifiable grounds.²⁵ According to the Competition Act, the pleas of the parties shall not be taken into account in case they are not submitted within due period.²⁶

3.4 Right to Hearing

12. Before the final decision is taken, the Competition Act enables the parties to enjoy the right to hearing.²⁷ Hearing is done upon the parties' request or on the Competition Board's own initiative.²⁸ The

¹⁶ Article 43(1).

¹⁷ Article 43(1).

¹⁸ Article 43(2).

¹⁹ Article 43(2).

²⁰ Article 43(2).

²¹ Article 45(1). It should be mentioned that the investigation report is notified to the relevant parties in a way not to disclose the trade secrets of the remaining parties.

²² Article 45(2).

²³ Article 45(2).

²⁴ Article 45(2).

²⁵ Article 45(2).

²⁶ Article 45(3).

²⁷ Article 46(1).

²⁸ Article 46(1).

hearing should be held within at least 30 days and at most 60 days from the end of the investigation stage.²⁹ Invitations for the hearing are forwarded to the parties at least 30 days before the day of the hearing.³⁰

13. The Competition Act provides for principles concerning hearing.

14. According to these principles, hearings are held publicly unless the Competition Board decides to hold it in camera on grounds of protecting the general morals and trade secrets.³¹

15. Hearings are chaired by the Chairman of the Competition Board or by the Deputy Chairman in his absence.³² There must be at least four members of the Competition Board in addition to Chairman or the Deputy Chairman.³³

16. It should be mentioned that hearings should be completed in no longer than 5 consecutive sessions, and various meetings held within the same day are deemed as one session.³⁴

17. The parties are obliged to notify, 7 days before the hearing at the latest, the Competition Board of the means of proof they shall utilize in the hearing and they can not utilize the means of proof not notified within due period.³⁵

18. During the hearing, the parties may utilize any evidence and means of proof.³⁶ The parties claimed to have infringed the Competition Act, or their representatives, and those who prove to the Competition Board prior to the session that they have direct or indirect interests, or their representatives may participate in sessions.³⁷

3.5 *Access to File*

19. According to the Competition Act, the parties may, at all times, submit to the Competition Board any information and evidence likely to influence the decision.³⁸ Moreover, the parties 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.³⁹ The Competition Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense.⁴⁰

²⁹ Article 46(2).

³⁰ Article 46(2).

³¹ Article 47(1).

³² Article 47(2).

³³ Article 47(2).

³⁴ Article 47(3).

³⁵ Article 47(4).

³⁶ Article 47(5). Article 47(5) refers to evidence and means of proof provided in the Part Two Chapter Eight of the Code of Civil Procedure.

³⁷ Article 47(5).

³⁸ Article 44(1).

³⁹ Article 44(2).

⁴⁰ Article 44(3).

20. It should also be mentioned that the parties may always meet with the professional staff and the heads of the departments as the investigations are carried out by the professional staff under the supervision of the relevant head of the department. It is also possible for the parties to meet members of the Competition Board.

3.6 Final Decisions

21. The Competition Act provides for deadlines for the Competition Board to take its final decisions following the investigation stage. Accordingly, the final decision is made on the same day after the hearing, or if not possible, within 15 days, together with its grounds.⁴¹

22. In cases where a hearing is not requested by the parties, and the Competition Board does not decide to hold a hearing on its own initiative, the final decision is made within 30 days following the end of the investigation stage, pursuant to the examination to be performed on the file.⁴² In case the parties concerned fail to attend the hearing despite the decision to hold a hearing, the decision is made within one week following the date of the meeting determined, pursuant to the examination to be performed on the file.⁴³

23. It should be mentioned that even if the decisions are made within the deadlines provided above, it also takes some more time to prepare them in writing including all the necessary elements cited below and publish them accordingly. The Competition Authority strives to avoid long delays in this process via deadlines valid during the internal work within this context.

24. The Competition Act necessitates that the decisions taken by the Competition Board include⁴⁴

- Names and surnames of the members of the Competition Board who made the decision,
- Names and surnames of those who carried out the examination and inquiry,
- Names, titles, residences and distinguishing characteristics of the parties,
- Summary of the claims of the parties,
- Summary of the examination and of the economic and legal issues discussed,
- Opinion of the reporter,
- Evaluation of all evidences and pleas submitted,
- Grounds, and the legal basis of the decision,
- Conclusion,
- If any, the dissenting votes.

⁴¹ Article 48(1).

⁴² Article 48(2).

⁴³ Article 48(3)

⁴⁴ Article 52(1).

25. Moreover, it is also obligatory that duties imposed on and rights granted to the parties with the decision made have to be written explicitly such that they do not pave the way for doubts and hesitations.⁴⁵

26. When decisions are signed by the members of the Competition Board participated in the relevant meeting, they are kept in the archives of the Competition Board.⁴⁶ A copy of the decision is submitted to the relevant parties in return for signature.⁴⁷ Decisions of the Competition Board are published on the internet page of the Competition Authority in such a way not to disclose the trade secrets of the parties.⁴⁸

3.7 *Mergers and Acquisitions*

27. Regarding mergers and acquisitions, the Competition Act provides that when a merger and acquisition is notified, the Competition Board performs a preliminary examination within 15 days to decide whether to permit it or initiate a final examination to deal with it.⁴⁹ In case a final examination is initiated, the Competition Board is required to notify the relevant parties with a preliminary objection letter of the fact that transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it.⁵⁰ According to the Competition Act, rules concerning preliminary inquiries and investigation apply during the final examination phase.⁵¹ However, it should be mentioned that although it may take around 19 months to reach a decision in a case involving an investigation as mentioned above, the final examination regarding mergers and acquisitions lasts shorter in practice.

28. In case the Competition Board does not respond to or take any action for the notification within due time, the transaction shall take effect and become legally valid after 30 days as of the date of the notification.⁵² It should be emphasised that although the Competition Act mentions that preliminary examination will be conducted within 15 days, in practice the Competition Board finalizes it within 30 days, which is the period after which the transaction takes effect and becomes legally valid.

⁴⁵ Article 52(2).

⁴⁶ Article 53(1).

⁴⁷ Article 53(1).

⁴⁸ Article 53(2).

⁴⁹ Article 10(1). The 15 day period starts when the notification is complete. Therefore, in case of incorrect or incomplete information in the notification, the period starts when such information is completed.

⁵⁰ Article 10(1).

⁵¹ Article 10(1).

⁵² Article 10(2).