Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

03-Jun-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP2/WD(2010)26
For Official Use

Working Party No. 2 on Competition and Regulation

STANDARD SETTING

-- Turkey --

14 June 2010

The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 June 2010.

Please contact Mr. Sean Ennis if you have any questions regarding this document [phone number: +33 1 45 24 96 55 -- E-mail address: sean.ennis@oecd.org].

JT03284782

English - Or. English

1. This contribution is intended to provide the approach of the Competition Board to various aspects regarding standard setting through relevant decisions of the Competition Board and the secondary legislation in the form of guidelines.

1. Decisions of the Competition Board

2. Standardization aims to define technical or quality requirements of a product or its production process and method. The standardization agreements or such decisions of association of undertakings may include various matters ranging from standardizing the type or size of a particular product to standardizing the technical characteristics of a product so that it fits other related products. Moreover, the conditions that should be satisfied to receive a quality certificate or to secure certification by a particular authority may also be deemed as standard.

3. While considering standardization agreements or such decisions of the association of undertakings under Article 4 of the Competition Act[1], which prohibits anti-competitive agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings, the Competition Board primarily takes into account that participation of the relevant undertakings in the standard setting process has not been restricted and transparency has been ensured. Moreover, in case the standard agreed is used with an aim to drive current or potential rivals out of the market or such effects occur, then the agreement or the decision would be contrary to Article 4 of the Competition Act. In order to understand whether such an aim exists or such an impact is likely, the Competition Board considers whether

- participation of the relevant undertakings in the standard setting process has been restricted,
- a transparent environment where relevant undertakings or persons can obtain information regarding the standard exists,
- the standard is applied to create discrimination, and
- undertakings are constrained to sell and market their products that do not comply with the standard.

4. Having cited these in its *Medium Density Fiberboard and Chipboard* decision,[2] the Competition Board evaluated the decision by an association of undertakings to produce medium density fiberboard and chipboard with a thickness of 16 mm instead of 18 mm. 16 mm is the standard thickness in the European Union and the Middle Eastern countries whereas consumption in Turkey concentrates on 18 mm leading to differentiation of Turkish production from world standards. By changing the industry standard to 16 mm, it is aimed to avoid restrictions faced by the industry in imports as well as exports.

5. First of all, the decision of the association of undertakings has been favored by most of the undertakings operating in the market representing a very large part of the market. The members of the association as well as non-members were aware of the nature and subject of the decision and participated in the decision-making process by presenting their views, which ensured transparency. The number of undertakings favoring the decision, the high market share they represented, the nature of the decision and transparency of the decision-making process were taken as indications that the aim was to create a new standard for the industry and there did not exist a practice by some undertakings with a purpose to restrict

1 Act on Protection of Competition No:4054.

2 The decision is dated 14.8.2003 and numbered 03-56/650-298.

competition. Moreover, that the decision did not aim to drive any actual or potential competitors out of the market was also apparent from the fact that any undertaking could produce the 16 mm product without any additional cost, investment or difficulty. Furthermore, the decision did not include any restriction preventing the undertakings from producing the 18 mm product on demand. Finally, among the benefits of the standardization through the decision of the association of undertakings, which was mentioned in the decision of the Competition Board, are compliance with the standards in foreign countries; decrease in the difficulties faced during exports; decrease in cost of raw material (mainly that of wood) as the new standard is thinner; cheaper prices for customers as a result of decrease in costs of all the inputs used in production; higher quality (the thinner the product is the higher the quality should be); and increase in competitiveness of the industry vis-à-vis foreign undertakings due to decreasing costs; and the resulting possibility of more exports. As a result, it was decided that the decision of the association of undertakings did not violate the Competition Act as there was no risk of prevention of freedom of undertakings to produce products of 16 mm or 18 mm and no possibility of exclusion from the market.

6. In another case[3], the Competition Board assessed whether the Turkish Pharmacists' Association (TPA) violated the Competition Act by granting certificate of conformity for the E signs pointing to pharmacies (Letter "E" stands for "P" of pharmacy) to be used in pharmacies. According to the relevant regulation, there must be E signs in the pharmacies the standards of which are to be determined by the TPA and approved by the Ministry of Health. It was alleged that the practice of TPA to grant certificate of conformity to E signs produced by certain undertakings and to publish a letter indicating names of those undertakings via its website complicated the activities of other undertakings which also produced the E signs in conformity with the standards but had no such certificate. The examination indicated that

- the practice of the TPA regarding E signs aimed to ensure production in conformity with the standards,
- no restriction existed regarding grant of certificate of conformity by TPA to relevant undertakings that could produce in conformity with the standards, and
- TPA had no sanction for those undertakings the production of which was not in conformity with the standards and for those pharmacies which used E signs that did not comply with the standards.

7. As the practice did not have the object or effect of restricting competition, it was not contrary to Article 4 of the Competition Act. Moreover, the practice of determining the undertakings which could produce the E sign in conformity with the standards and granting the certificate of conformity neither constituted entry barrier nor discrimination in disfavor of those undertakings producing such signs nor complicated their activities and therefore could not be regarded as abuse of a dominant position when it was taken into account that

- the practice was commenced upon demand from members of the TPA and aimed to ensure use by members of signs compatible with the standards,
- the practice did not exclude relevant undertakings that could produce in conformity with the standards, and
- the TPA applied no sanction for those pharmacies which used E signs that did not comply with the standards.

[3] Decision of the Competition Board is dated 15.11.2007 and numbered 07-86/1088-422.

8. In a final case[4] concerning a project entitled "*New Generation Laundry Detergents Project*" (the Project) carried out by the Soaps and Detergents Industry Association (SDIA) with an aim to release less chemicals to the environment by conscious use of compacted products and to ensure savings in terms of energy, packaging and distribution by less use of such products, the Competition Board analyzed the competitive object and impact of the Project under Article 4 of the Competition Act. The Project is open to all undertakings in the market regardless of membership to the SDIA or the size of the undertakings. Although the four biggest undertakings representing 95% of the relevant market would join the project, the remaining undertakings with a total of 5% share of the market would not produce compacted detergents and act in accordance to prospective market conditions. The project would last two years (from September 1st, 2008 to September 31st, 2010) with an additional one year to sell the possible stocks. The participants of the Project would be responsible to develop and market products with optimized formula leading to the same result with the suggested low dose; communicate to the consumers the information necessary to consume the relevant new products consciously in a clear manner; and to ensure that the products they produced would be safe for human health and the environment. The optimized formula is not protected by any intellectual property rights. In case of need, guidelines to produce the compacted products would be prepared by the SDIA and the International Association of Soaps, Detergents and Maintenance Products of which the SDIA is a member. The Project would have a logo to be used by the participants on their products through a free license. The financing of the Project would be assumed by the participating undertakings according to their market shares in years 2004-2007.[5]

9. As part of the examination conducted, the Competition Board first analyzed the reason why the undertakings did not use the unpatented technology individually in a competitive manner and acted under the SDIA. It was seen that previous individual attempts failed because of lack of consumer awareness to a great extent. Therefore, it was of crucial importance to advertise the Project. As a result, the Competition Board considered that an advertising campaign independent from particular undertakings and trademarks, which would be based only on the compacted nature of the product and its economic and environmental benefits, would not have the object or effect of restricting competition especially when the participation was not compulsory and the undertakings had their own advertising activities. Secondly, it was taken into account whether the financing of the advertising activities based on the market shares of the participating undertakings in particular years (sharing information on market shares) would lead to coordination in the market. It was seen that the relevant years concerned previous years and did not include years in which the project would last indicating that there would be no coordination. Thirdly, as all the rival undertakings preferred a similar production process, the prices and costs following the adoption of the new production process were also examined. Although the increase in prices was limited during the period when the examination was conducted, there was the risk to pass on the increase caused by the costs to the consumers in the long run. Moreover, the prices charged by the rivals could come close to each other as a result of increase in short term production costs with the effect of similar formulation. Furthermore, although supply would not be restricted as compacted products would replace the non-compacted products, there could be limited impact on supply indirectly depending on the consumer demand. Among some other competitive concerns taken into account were the facts that competition could be restricted in terms of limitation of consumer choice as undertakings representing 95% of the market would terminate production of classical laundry detergents and begin to produce new generation laundry detergents; there was the potential to create entry barrier; competition could be restricted in the markets for raw materials due to decrease in purchase of different production inputs etc.

10. Finally, as the Project had the potential to restrict competitive conditions, it was assessed whether the conditions for the exemption were satisfied to avoid the prohibition under the Article 4 of the

4 Decision dated 15.7.2009 and numbered 09-33/727-167.

5 Only those undertakings with a market share above 3% were supposed to contribute to the financing.

Competition Act. The Project was granted exemption because it would lead to new or technical developments in the production, improvement in distribution, consumer benefits due to less environmental pollution and monetary savings caused by less energy consumption. Although the fact that undertakings controlling 95% of the market would begin the production of the compacted detergents could be considered as complicating, via creation of a standard, the competitive conditions for undertakings the production of which would fall outside the standard and as limiting the supply of non-compacted products, it was decided that the Project did not have such an object or effect. It was considered that the chance of success for such a concerted action would be very low without taking account of a fundamental factor such as consumer awareness. Moreover, the sales prices indicated that the participating undertakings competed against each other as well as against other undertakings producing classical non-compacted products. The Project foresaw only advertising activities under a common logo at initial stages; did not restrict advertising and marketing activities of the participating undertakings and therefore the undertakings continued their competitive conduct in terms of pricing their products. Again, although the Project was carried out with the participation of undertakings controlling a significant share of the market, it would be hard to achieve the improvements and benefits of the Project without the participation of the majority of the producers and necessary level of work to ensure consumer awareness. Moreover, the duration of the Project was reasonable to allow the producers to carry out the necessary investments and sell the possible stocks. As a result, in addition to new or technical developments in the production, improvement in distribution, and consumer benefits, it was decided that the Project would neither eliminate competition in a significant part of the relevant market nor limit competition more than what was compulsory.

2. Guidelines on technology transfer agreements (within the context of industry standards)

11. Apart from the decisions of the Competition Board concerning standard setting, certain general rules on the topic to the extent that intellectual property rights support industry standards can also be found in *Guidelines on Application of Articles 4 and 5 of the Act No. 4054 on the Protection of Competition to Technology Transfer Agreements*[6] adopted by the Competition Board. In this context, a brief account of some important points in the Guidelines can be provided in the following.

12. The Guidelines consider technology packages resulting from cross licences and creating de facto industry standard, which third parties need access to compete effectively, as closed standard reserved for the parties, if the parties cross licence each other and undertake not to licence third parties.[7] Normally, there would be no competition concerns in case the third parties are granted licences regarding technologies supporting such standards on fair, reasonable and non-discriminatory terms.[8]

13. Technology pools may lessen innovation by foreclosing the market to alternative technologies especially when they support an industry standard or establish a de facto industry standard.[9] The standard and the technology pool may complicate the entry of new and developed technologies in the market.[10] In case the agreements between the technology pool and individual licensees are of relatively long duration and the technology in the pool supports a de facto industry standard, then the pool may prevent access of new substitute technologies to the market where the pool includes technologies alternatives of which are available outside the pool or which are not necessary for the production of the products that the pool relates

6 Dated 13.5.2009 and available via www.rekabet.gov.tr

7 Paragraph 142. Such licensing agreements will be assessed under principles concerning technology pools in paragraphs 182-207 of the Guidelines.

8 Paragraph 142.

9 Paragraph 185.

10 Paragraph 185.

to.[11] In order to evaluate risk of foreclosure under these circumstances, it will be important to consider whether the licensee has the option to terminate part of the licence at reasonable notice with a corresponding reduction in royalties.[12]

14. Undertakings, which create a technology pool compatible with the relevant articles of the Competition Act and an industry standard it supports, are free to determine the royalties for the technology package and the royalty for individual technologies inside the package either before or after the standard is set.[13] However, under certain circumstances, it could be important to agree on the royalties before the standard is chosen to avoid granting market power to one or more essential technologies.[14] Competition may be increased between the available technological solutions in case an independent expert selects the technologies to be included in the pool.[15]

15. Licensors and licensees should be free to develop rival products and standards and to grant and obtain licences outside the pool so that third party technologies are not foreclosed and the pool does not limit innovation and prevent emergence of alternative rival technological solutions.[16] In case the pool supports a (de facto) industry standard and the parties are subject to non-compete obligations, there is the risk of prevention of new and improved technologies and standards.[17]

16. Finally, when participation in the creation of a standard or a pool is open to all interested parties representing different interests, it is more likely that the technologies to be included in the pool will be selected according to price/quality considerations compared to a situation where only a limited number of technology owners involve in the process.[18] Similarly, when the relevant organs of the pool are composed of people representing different interests, it will be more likely that licensing terms including royalties will be fair, non-discriminatory and will reflect the value of the licensed technology compared to the case where the representatives of the licensors control the pool.[19] Another factor is the extent to which independent experts involve in creation and operation of the pool.[20] For instance, as it is a complex matter generally requiring special expertise to decide which technologies are essential for a standard supported by the pool, it is useful that independent experts involve in the process of selection of the technologies in the pool.[21] Therefore, the experts should be independent from the undertakings creating the pool and have the necessary technical expertise.[22]

---

11 Paragraph 194.

12 Paragraph 194.

13 Paragraph 197.

14 Paragraph 197.

15 Paragraph 197.

16 Paragraph 199.

17 Paragraph 199.

18 Paragraph 203.

19 Paragraph 203.

20 Paragraph 204.

21 Paragraph 204.

22 Paragraph 205.