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COMPETITION COMMITTEE**

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**ROUNDTABLE DISCUSSION ON PRIVATE REMEDIES: PASSING ON DEFENSE; INDIRECT
PURCHASER STANDING; DEFINITION OF DAMAGES**

-- Turkey --

The attached document is submitted by the delegation of Turkey to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 7 February 2006.

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Introduction¹

1. Section Five of the Law on the Protection of Competition No 4054 (Law No 4054) provides rules about private law consequences of limiting competition. Article 57 entitled “Right to Compensation”, Article 58 entitled “Compensation for the Damage” and finally Article 59 entitled “Burden of Proof” provide provisions about compensation of damages arising from limitation of competition.² The conduct limiting competition within the scope of Law No 4054 may lead to tortious liability. The person who causes damages on consumers or rival undertakings through his transactions or practices distorting, preventing or limiting competition will have to compensate such damages within the framework of tortious liability. The person can ask for compensation via suits he files in civil courts. The plaintiff has to prove that there is an infringement of competition either within the scope of Article 4 of Law No 4054 prohibiting agreements, concerted practices and decisions limiting competition or Article 6 prohibiting abuse of dominant position and he has suffered damages as a result of the infringement.

2. Although rules to be applied for damages resulting from limitation of competition are those in Law of Obligations, Law No 4054 brings rules different from Law of Obligations with respect to calculation and proof of compensation. Therefore, these different provisions in Law No 4054 have precedence in application whereas Law of Obligations shall apply for other matters.

General Principles concerning Compensation in Private Legal System in Turkey

3. Law of liability is based on the principle that the person who causes damages pays the damages incurred by the relevant person. Tortious liability is the obligation to compensate the damages that originates from infringing a legal duty that one must comply against everyone. The conditions for compensation (tortious liability) are the existence of act, damages, appropriate causal relation, fault and unlawfulness. Act refers to human behaviour causing damages. Damage is the difference between value of properties at the moment and value of properties that would have been if the event causing damages had not happened. Basic types of pecuniary damage are actual damages and the profits one is deprived of. Pecuniary damage occurs when value of property decreases as a result of the act causing damages. Profits one deprived of refer to decrease in value of property when increase in the value of the property in normal course of events is prevented due to the act causing damages. Appropriate causal relation is cause and effect relationship between the damages occurred and the act. Fault that can be intentional or negligent is the conduct condemned or not favoured by legal order and requires act contrary to law. Burden of proving fault in tortious liability is on the person who incurs damages. Unlawfulness is infringement of imperative rules written or unwritten that aim to protect properties belonging to people or themselves directly or indirectly. The act should be contrary to a certain rule of law in order that conditions for compensation occur.

4. The aim of law of liability is to compensate in kind or in cash the decrease in the property of the person who incurs damages without his volition. Therefore before determining the amount of compensation, the damages should be calculated. General rule is that the amount of compensation to be paid by the one who causes damages can never exceed the amount of the damage occurred because the purpose of the compensation is not to punish the one who causes the damage or enrich the one who incurs the damage but to compensate the damage. According to Turkish Code of Obligations, it is the plaintiff who should prove that it has incurred damages and the amount of the damage. However, the judge has wide discretionary powers in determining the damages and he decides the amount of the damage according to experiences of life, normal course of events, statistical information and if necessary the expertise of the expert witness. According to the principle of subtracting the benefits obtained from the event causing damages, the benefits from the event causing damages obtained by the person who incurred the damages

are deducted from the amount of damages. Otherwise the person incurring the damages is enriched unjustly at such an amount.

Provisions in Law No 4054 concerning Compensation

5. Articles 57-59 of Law No 4054 concerning compensation include both elements repeating the general principles of law of liability and provisions completely contrary to these general principles.

6. Article 57 entitled “Right to Compensation” regulates the parties to and conditions of compensation obligation within the scope of Law No 4054. First sentence of the Article demonstrates that the lawmaker has not limited the parties to the action for damages by taking the characteristics of competition law into account and as a result everyone who causes damages by a conduct contrary to Law No 4054 can be a defendant whereas everyone who incurs damages can be a plaintiff.³ Article 57 also regulates under which conditions right to compensation occurs. According to the Article, those causing damages via practices, decisions, contracts or agreements contrary to Article 4 of Law No 4054, or abuses his dominant position in a particular market for goods or services contrary to Article 6 of Law No 4054 is obliged to compensate the damages.

7. As mentioned earlier, net amount of damages should be determined before deciding on the amount of compensation. Lawmaker explains in Article 58 the principles in determining the damages of the consumers and competing undertakings as a result of limitation of competition. First sentence of Article 58 provides that “Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited.” The type of the damage that consumers incur is the actual damages in their property because they pay higher price and it is based on the presumption that prices increase due to limitation of competition. However, although the consumers would be able to claim the extra amount they paid as damages, it could be very difficult, sometimes even impossible, to determine the price difference in practice. While determining the price difference, it should be kept in mind that prices could be affected by some other conditions in addition to limitation of competition. There could be significant difficulties in calculating the prices that would have occurred if competition had not been limited. Prices in a similar market where competition is not limited can be taken as point of reference. Another problem that can be faced in practice is how the consumers can file a suit if they are in great numbers although there is no doubt that consumers who has paid extra prices can file a suit individually.

8. Final sentence of first paragraph of Article 58 provides that “In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.” The type of damages incurred by competing undertakings is profits they are deprived of. A method to calculate damages of competing undertakings takes into account the difference between the actual amount of the property and the amount that would have been if competition had not been limited. This method suggested while calculating the potential profits of the competing undertakings can cause great complications in practice.

9. It must be accepted that although the lawmaker, while calculating the damages, takes into account the price paid by the customer and the profits that competing undertakings are deprived of, they are cited as examples; parties incurring damages as a result of limitation of competition are not limited to the consumers and competing undertakings; similarly the damages occurred are not composed of only the examples in Article 58. Therefore, the judge will have the discretion to decide those causing and incurring damages and how to calculate the damages.

10. Article 58(2) provides that “If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured,

award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.” It is seen that the lawmaker aims that the person causing damages pays compensation that is higher than the damages he has caused. Three fold compensation goes beyond the basic principle of law of liability that aims to compensate the damages of the injured. In Turkish legal system, there is the principle that the amount to be decided in action for damages can not exceed the damages incurred. Anti-trust law of the United States provided the inspiration for the insertion of three fold compensation into Law No 4054. It must be accepted as a sort of punitive sanction rather than compensation.⁴ The wording of Article 58(2) provides that the judge has discretionary power regarding three fold compensation although it is said that the injured must request so. Another element in Article 58(2) that is not compatible with law of liability is the fact that the profits of the person causing damages will also be taken into account in addition to the damages of the injured. This is also contrary to the principle that compensation can not exceed the damages.

11. Final article of section five of Law No 4054 is about burden of proof. As a rule, it is the person claiming compensation who should prove that the elements of tortious act have occurred and the amount of damages as a rule. Although this is also valid in competition law, Article 59 brings a reversal of the burden of proof in case of concerted practices similar to the one in Article 4⁵ of Law No 4054. Therefore, burden of proof is eased for the injured in case of concerted practice because it is hard to prove the existence of concerted practice. Second paragraph of Article 59 that provides that “The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence” brings easiness of freedom of proof to the parties. However, it should be kept in mind that to claim compensation the plaintiff should not only prove that competition is limited but also elements of tortious liability.

NOTES

- 1 The explanations in the contribution are based on Aksoy, N. (2004), “*Private Legal Consequences of Violation of Law on the Protection of Competition*”, Publication by Turkish Competition Authority, Ankara.
- 2 The texts of the Articles are as follows:

Legal Nature of Agreements and Decisions Contrary to This Act

Article 56- Any agreements and decisions of associations of undertakings contrary to article 4 of this Act are invalid. The performance of acts arising out of such agreements and decisions may not be requested. In case a request is made for reclamation due to the invalidity of previous acts fulfilled, the return obligation of the parties is subject to articles 63 and 64 of the Code of Obligations.

The provision of article 65 of the Code of Obligations is not applicable to disputes arising out of this Act.

Right to Compensation

Article 57- Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly.

Compensation for the Damage

Article 58- Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings which limited competition. In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

Burden of Proof

Article 59- Should the injured submit to the jurisdictional bodies proofs such as, particularly, the actual partitioning of markets, stability observed in the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof is for the defendants that the undertakings are not engaged in concerted practice.

The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence.

3 Although the first two sentences of Article 58(1) cite consumers implicitly and rival undertakings explicitly as plaintiffs in an action for damages, the list should not be seen as exhaustive because the real purpose of Article 58 is not to cite the parties to action for damages but to determine how to calculate the damages and Article 57 overtly regulates that everyone who incurs damages can file a suit for compensation. Therefore, it is contrary to purpose of competition law to accept that right to compensation is granted to only competing undertakings and consumers. See Aksoy, p. 56.

4 Aksoy, p. 59. Aksoy cites a view from literature that one of the possible aims of this three fold compensation is to encourage litigation for the compensation of damages incurred by third persons.

5 Full text of Article 4 is as follows;

Agreements, Concerted Practices and Decisions Limiting Competition

Article 4- Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.

Such cases are, in particular, as follows:

a) Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,

b) Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,

c) Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,

d) Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market,

e) Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,

f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.

Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.