Scope and Powers of the Competition Board in Turkey

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A. Operational Procedures of the Board

With regard to the Act on protection of Competition, article 20; a public Competition Authority which bears a public legal personality and enjoys administrative and financial authonomy is established for the purpose of providing the formation and improvement of the markets for goods and services within a free and sound competitive environment and the supervision of enforcement of this Act and to exercise all other duties assigned to it by Law.

The organization of the Board includes Office of the Chairman, the Competition Board and service departments. The Board puts its scope and powers into practice by means of the Board. As a consequence all the decisions are mentioned as the decisions of the Board.

Since all decisions and precautions taken by the Board with the penalties are accepted as administrative in the concerned Law, special procedures are foreseen and some administrative procedures are developed in their own course.[1]

These rules of procedure consist of four stages:

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[1] For detailed information see: ASLAN Zehreddin, İdari Usul Yasasına Örnek Olarak Rekabet Kurulu'nun Çalışma Yöntemleri, İdari Usul Kanunu Hazırlığı Uluslararası Sempozyumu, 1998, Ankara p.280 and following pages

1. Preliminary inquiries
2. Investigation
3. Hearing
4. Final Decision

This organization is parallel to the judgements of the judiciary organ. On accounts the process we call "judgement" the following phases are included : 1.Allegation, 2.Defence, 3.Inquiry, 4. Decision[2]

1. Preliminary Inquiries:

Upon an application on its own initiative, the Board may decide to initiate an investigation directly or to initiate a preliminary inquiry in order to decide whether or not it is necessary to initiate an investigation. (The Act on the Protection of Competition Article 40 / I)

Where a preliminary inquiry is decided to be initiated, the Chairman of the Board shall appoint one or more of the professional experts as a rapporteur. (Article 40 /II)

The rapporteur, who is appointed to carry out the preliminary inquiry, informs the Board in writing within thirty days of all the information and evidence that is obtained together with his or her own views on the subject matter. (Article 40 / III)

Within 10 days following the submission of the preliminary inquiry report, the Board shall convene to decide on whether or not it is necessary to initiate an investigation, thereby assessing the information provided. (Article 41)

As obvious, the issued applications that are processed in preliminary inquiry may either be decided to be carried out or to be concluded on the ground that it is not considered serious. Otherwise, on condition that each denunciation or complaint concerned with the procedure in the following articles of this Act may cause the Board undergo a load of wasting of time and effort so that it because hard to overwhelm.

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[2] YILMAZ Ejder, Rekabet Kanun Uygulamasında Usul ve İspat Sorunları, Perşembe Konferansları, Ankara, Kasım 1999, p.85

Having received an application of a denunciation or complaint if the Board, on the basis of the information in its possession, considers the allegation as serious and sufficient, it shall inform the applicants in writing of its decision that the allegation is considered serious and an inquiry has been initiated. (Article 42 / I) Since the decision of the inquiry is an interim measure, it is one of the measures without judicial remedies. [3]

In cases where the Board, either explicitly or implicitly by way of not notifying the parties within the specified time period, rejects[4] an application, anyone who proves to have direct or indirect interest may bring an action to the judiciary organ against the rejection of the Board. (Article 42 / II)

2. Investigation:

Upon the decision on initiating an investigation, the Board shall determine a Board member or members together with a rapporteur or rapporteurs that shall be authorized to carry out the investigation. The investigation shall be completed within no longer than six months. Where it is deemed to be necessary, this period may be extended by the Board only once, up to an additional six months. (Article 43 / I)

However the sanction of infringement of these periods is not mentioned in the Law. Due to this, if we assume that the periods of investigation as the periods directing the administration to decide rapidly, we must not assume the infringement of these periods arranged by the Law as a reason for abolition. This may be considered as a deficiency of service and the pesons who prove to have a direct or indirect interest by the overdue decision may bring an action to the judiciary organ to demand their interest.[5]

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[3] ASLAN İ. Yılmaz, Rekabet Hukuku, Bursa, 2001, p. 424

[4] Since the decision on initiating an investigation is not a final decision, it shall be taken by the attendance of at least one third of the Board members and a simple majority voting of those who have attended. Since not initiating an investigation is a final decision, the attendance of the 8 members of the Board including the Chairman or the Deputy Chairman shall vote in sound decision. The Regulation on the Bases and Procedure of Performance (Article 56 I)

[5] ASLAN İ. Yılmaz, ibid., p. 428

The Board shall inform the parties concerned, of the investigation initiated within fifteen days following the date of the decision on initiating the investigation and request from the parties[6] to submit their first defense arguments in writing within thirty days.

In order for the time period for the first written defense arguments to commence, the Board shall also send sufficient information to the parties on the type and the nature of the allegations, together with notification. (Article 43 / II)

A Committee composed of the Board member and the rapporteurs authorized to act on behalf of the Board and carry out investigation may, during the course of investigation, exercise the powers of requesting information stated in Article 14 and the powers of the shot investigation stated in Article 15 of this Act. Within this period, the Committee may also request from the parties and other related authorities to submit all necessary documents and information. During the investigation stage of the Board, any person or persons who are alleged to have infringed the Law may anytime, submit to the Board any information and evidence that may affect the decision.[7] (Article 44/ I)

By means of this arrangement, members of the Board are appointed to investigate and inquire besides deciding. At this point a critical question arises on what will happen if the incident is discussed in front of the Board on the grounds that the infrigement of the Competition Law has likely been done by the Board members who is going to administer the investigation and the inquiry with the competition experts? Will the member be against the parties with the allegation of the infrigment of the

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[6] The words "party and parties" included in the Competition Act stand for the persons against whom an investigation is initiated. Their oppoinent is the Board authorised with some important powers. On the other hand, when the general system of the Law is searched it is not possible to accept the part which issues a complaint as one of the sides. Because, the Board, in the frame of public powers given by the Law, shall perform the necessities without being related to the allegements of the complaints and evidences. Apart from all this, the person who demands a complaint and is not accepted, in regard of Article 42, is called "applicant" not a "side".

[7] Exact evidences are necessarily required on the infringement of the Competition Law in the Board decisions. For the decisions on the issue see (R.K.. 20.11.1997, K.40/257-13, R.G. 13.11.1998, S.23522, p.15); (R.K. 03.12.1997, K. 41/264-14, R.G. 13.11.1998 S.23522,p.16); R.K. 07.01.1998, K.46/323-34, R.G., 17 Kasım 1998, S 23526, p.24); (R.K. 03.03.1999, K. 99-12/89-31, R.G. 09.09.1999, S.23811, p.169)

Competition Law during the verbal defence meeting of the Board that will be the organ to decide on whether the parties have infringed the Competition or not? Unfortunately the Law forces one or more members of the Board to be both in the rank of district attorney and decision.[8]

As it is obvious, the Board appoints one or more members of the Board with the rapporteur or rapporteurs that it assigned during the preliminary inquiry and investigation to administer and to collect evidence.

The member or members of the Board appointed in this way inquire, share, and prove the allegation, and afterwards the same member or members become a part of the Board to assess the defence and have a final decision on whether the Act nr. 4054 is infringed or not. In addition, being a part of the final decision of the member or the members who send and administer the investigation causes the immpossibility for them to be at an equal distance to both parties and decide on the grounds of justice[9] independently and in an objective way.

However, in the Swiss Federal Act on The Cartel and Restriction of Competition and in the Act of Federal Republic of Germany on The Restriction of Competition which are taken as models during the preparation period of this regulation are arranged in a totally different manner. With regard to this, the secreteriat of the Board which has the identification of district attorney administers the preliminary inquiries, investigation, and the researches on the Restriction of the Competition. The Board members giving the decision for investigation merely have the rights of asking questions, searching and attending the hearing of the witnesses.

However, in the defences the Board make in the suits brought against, the Competition Institution is obliged to determine the nature of the incident primarily on the grounds, either directly or in an incident upon application. At any rate in the Article of the Act among the components required in the decision, paragraph "f" includes the expression " Opinion of the rapporteur". Moreover, it is also observed that the members of the Board who administer the investigation vote

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[8] For the decision on the issue see AKINCI Ateş, Rekabetin Korunması Hakkında Kanunun Eleştrisi. TES-AR The notification given for the Antalya Meeting , p.17

[9] GÖZÜBÜYÜK Şeref; Bir Uyuşmazlığa İlişkin Hukuki Mütalaa, p.6

against the rapporteur's opinion. The members of the Board under responsibility in the investigation committee take the responsibility of observation and coordination function as a hierarchic superior to end the investigation promptly and in discipline. That the members of the Board may have an influence on the opinion of the rapporteurs cannot be under consideration. On the other hand, all the information issued as a result of the investigation is not only presented to the members of the Board in the Committee, but also to all members of the Board. This information and documents are assessed by all the members objectively. The members of the Board who are in the Committee are not in the rank of a district attorney. Not only do the members of the Board in the Committee decide on initiating an investigation, but it is the Board who decides on the initiation. Furthermore, the members of the Board administering the investigation do not receive information different from the others. The members of the Board in the Committee only undergo the responsibility of extra coordination to administer the investigation in a sound and disciplined way. This legal duty does not have content for the members of the Board who are in the Committee to receive information different from the other members of the Board and to drive another decision as a result. Consequently, with regard to Article 51 of the Act this is explained as: "For its final decision, the Board shall convene by at least eight of its members including the Chairman or the Deputy Chairman and the decision shall be taken by at least six affirmative votes of the attending members.

The parties, who are informed that an investigation has started against them, may, from the date of initiation of the investigation up to the date of request for hearing, request a copy of all the documents issued in the Authority and if possible, all types of evidence obtained. (Article 44 /II)

The Board cannot base its decision on any issue about which the parties are not informed or have not been given the right to defense. (Article 44 / III) At this point the here mentioned "adequate information" refers to all of the information necessary for the defense of parties concerned.[10]

[10] YILMAZ Ejder, Rekabet Kanunun Uygulanmasında Usul ve İspat Sorunları, p.91

When notifiying all Board members and to the parties concerned about the report prepared at the end of the investigation stage; (Article 45 / I) those who are decided to have infringed this Act, shall be notified to submit their defenses in writing to the Board within thirty days.

In the following stage, upon defense arguments, the experts authorized to carry out the investigation shall submit their additional views in writing within fifteen days and this shall also be notified to all Board members and to the parties concerned. The parties may reply to these views within thirty days. In cases where the parties have justified reasons, this time period may be extended for only once to another thirty days. (Article 45 / II) Replies of the parties that not made within the specified time period shall not be taken into consideration. In the rational content on not extending the allegation, the principle of not extending the defense accepted, which may delay the decision period is.

3. Hearing:

In the content of the decision method of the Board, a method which emphasises the verbal defense of the parties is considered and due to the fact that this is a two sided judgement by providing the parties benefit from the evidence tools which are arranged in the Act of Civil Procedure (Hukuk Usulü Mahkemeleri Kanunu), a new method which takes the individual rights under sounder guaranties, is tried to be arranged.[11]

A hearing shall be held if the parties concerned have requested a hearing in their defense or reply petitions, and also the board may all decide on hearing on its own initiative. (Article 46 / I)

The hearing should be held within at least thirty days and in no longer than sixty days following the end of the investigation stage, and invitations to the hearing should be sent to the related parties within at least thirty days before the date of hearing. (Article 46 / II)

Even if the hearings are decided to be held public, as a principle in Law, the Board is given the power to, on the grounds of protection of public morality or the trade secrets, decide that the hearing shall be in camera. (Article 47 / I) The principle of clarity gives to the public the

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[11] ASLAN Zehreddin - BERK Kahraman, Rekabet Kurumu'nun Oluşumu, Görev ve Yetkileri ile Yargısal Denetimi, Alfa Yayınları, 2000, İstanbul, p. 130

opportunity to attend the hearings. The ones who can attend are "the parties who shall set forth any evidence, means of proof that they are the parties are alleged to have infringed the Law or their representatives and those who prove to the Board before the session that they have a direct or indirect interest or their representatives may attend the hearings. The determination of the interest is left to the Board. In cases where the parties bring the incident into court on grounds they, are not accepted to the hearing despite having interest, this requires the Board to determine whether the principle of publicity is infringed or not.

Hearing presided by the Chairman or, in his absence, by the Deputy Chairman and at least seven members of the Board (Article 47 / II) has to be concluded within no longer than five consequent sessions.[12] (Article 47 / III) The parties who are alleged to have infringed this Act or their representatives and those who prove to the Board before the session that they have a direct or indirect interest or their representatives may attend the hearings. (Article 47 / V)

However, there is no specific arrangement in the content of the Act on the Protection of Competition about who will be entitled to represent the parties. In our point of view, great attention should be given to representation of the solicitors during hearings in the Board, because representation by a solicitor is a rule accepted to prove legal security.

The parties are to inform the Board of the means of the proof set forth. Otherwise, any means of proof, which the Board has not been informed of within the specified time limit cannot be relied on by the parties. (Article 47 / IV)

If the Board has decided without requesting a hearing or taking the statement of defense of the person the judiciary appeal, that is Council of State, shall directly cancel[13] the decision due to defect of form without considering the substance. By means of this the rights of defense of the

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[12] A variety of sessions during a day is evaluated as a session

[13] İNAN Nurkut, Rekabetin Korunması Hakkındaki Kanun ve AB Rekabet Politikasına Uyum, Avrupe Birliği El Kitabı, Ankara, 1995, p. 253. In cases where a penalty is given without defense, and the processes on dicipline penalties are cancelled by judiciary appeals. For deatiled information see: ASLAN Zehreddin, 657 Sayılı Devlet Memurleri Kanununa Göre Disiplin Suç ve Cezaları, AlfaYayınları, 2001, İstanbul, p. 108

relevants and the accepted method of verbal defence are prevented as a whole.[14]

The following enforcement is foreseen in the last two paragraphs of the Act nr. 4054 Article 4: "In cases where the existence of an agreement cannot be proved, if the price changes or the balance of supply and demand or the areas of activity in the markets of the enterprises concerned are similar to those of the markets where competition is prevented, distorted or restricted, this constitutes a presumption that the enterprises concerned are engaged in a concerned practice.

Each such party thereto may avoid liability, if the contrary is proven on economical and rational grounds.

By means of this arrangement not only is the legal indication is foreseen in favor of the Board contrary to the principle of enforcement for everybody to proove their allegation, but also it may cause rather unjust and unfair consequences in practice.

4. Final Decision:

The final decision shall be made on the same date, if this is not possible, together with its reasoning within fifteen days following the hearing. (Article 48 / I) As a result, the late coming justice term is tried to be prevented which is seen in administrative and legal judgement and conflicts which are brought into decision stage are prevented to be in conflict.[15]

In cases where a hearing is neither requested by the parties nor decided by the Board on its own initiative, the final decision shall be given within 30 days following the end of the investigation stage. (Article 48 / II)

That the investigation shall be completed in no longer than six months is emphasized. (Article 43) Where it is deemed to be necessary, this period may be extended by the Board for once up to an additional six months.

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[14] ASLAN İ.Yılmaz, Rekabet Hukuku, Ekin Yayınları., 1993. p. 114

[15] AKINCI Ateş, Rekabetin Korunması Hakkında Kanun'un Ticari Hayatımıza Getirdikleri, p.18

In cases where the parties despite a decision on a hearing fail to attend, the decision shall be made within one week following the specified date of hearing in accordance with the examination to be made on the file. (Article 48 / III)

Board decisions shall be taken upon meeting in camera and announced in public. Members of the Board cannot abstain from voting. Except those who have an excuse, the members who have attended the hearing have to attend the meeting. (Article 49)

The Chairman in his absence the Deputy Chairman shall preside the meeting and specify the issues to be decided. The Chairman collects the votes after a free debate on those issues and states his vote in the end. (Article 50)

For its final decision, the Board shall convene by at last eight of its members including the Chairman or the Deputy Chairman, and the decision shall be taken by at least six affirmative votes of the attending members. (Article 51 / I)

This arrangement has a conflict with the sufficient number above. With regard to Article 51 the number is determined to be 8, it is not rational to pronounce that the members who have not seen issues debated on personally and who have not attended the hearings presided by the Chairman or the Deputy Chairman and the 7 seven member shall give sound decisions.[16]

If the sufficient number of votes cannot be obtained in the first meeting, the Chairman shall ensure the attendance of all the members to the next meeting. In cases where this is not possible, the decision shall be taken by a simple majority of the attending members. In such a case, however, meeting quorum cannot be less than the quorum stated in the first paragraph. In the case of equality of the votes in the second meeting, the vote of the Chairman shall be a weighted voted. (Article 51 /II)

Decisions other than the final decisions and in particular, interim measure decisions and recommendation decisions shall be taken by the attendance of at least one third of the members and by a simple majority voting of those who have attended. (Article 51 / III)

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[16] For the contrary opinion see ASLAN İ. Yılmaz, ibid., p. 116 With regard to ASLAN; It is not accounted as very practical for everybody to attend the court in an age the technology has been improved at a level.

The decisions shall consist of the following items:

a) The names and the surnames of the Board members who have taken the decision,

b) The names and the surnames of those who have carried out the investigation and the inquiry,

c) Names, trade names, domiciles and other descriptive particulars of the parties,

d) Summaries of the allegations of both parties,

e) Summary of the inquiry and the legal and economica subjects discussed,

f) Opinion of the rapporteur,

g) The assessment of all evidence and the defense,

h) Legal basis of the decisions and statement of reasons,

i) Conclusion,

j) Dissenting opinions, if there are any.

The decisions and the obligations imposed and the rights conferred on the parties shall be written in an explicit manner in order not to cause any doubts or hesitations. (Article 52)

In this frame the principles, which are dominant in the Procedural decrees we have seen in the Law of Competition, are as follows:[17]

1. The principle of acting directly: The Board shall decide to initiate a preliminary inquiry or investigation directly
2. The principle of direct inquiry: the Board shall make any inquiry without being limited merely to issues set forth by the applicant
3. The principle of announcing and taking defense publicly: In cases where this principle is put into practice, it is rather important upon the decision which the Board has given shall not turn out from judiciary way and accordingly the establishment of "the esteem on the decisions".

[17] For detailed information see: YILMAZ Ejder, Rekabet Kanunu Uygulamasında Usul ve İspat Sorunları, p.89.

4. The principle of Procedural Eonomy: This principle, which is normally foreseen by the courts, has also been validated by the Competition Law. By means of this, it is aimed to take the decision with the minimum expenditure and in the quickest way.
5. The principle of publicity: As it is expressed in the Law, the hearings are made publicly. However, this publicity has been limited as; " the parties who are alleged to have infringed this Act or their representatives and those who prove to the Board before the session that they have a direct or indirect interest or their representatives may attend the hearings."
6. The principle on deciding by stating the reasons: By means of the statement of reasons, the deciding organ both gets the advantage of supervising itself and also the one who is decided about understands the reason of his being right or faulty.

As it is obvious, The Competition Board functions like a sort of court. However, it is impossible to evaluate the Board as an official appeal, it although it functions as a semi- judiciary process.

Because the Competition Board is also an administrative organ, it funds administrative processes and the processes of it are controlled under judiciary supervision just as the other administrative organs. Because, with regard to the Article 9 of the Constitution "The Judiciary Power is used by independent courts in the name of the Turkish Nation". What to conclude from the Independent Courts, which perform the judiciary function upon the power of Justice, is designated again in the Constitution. When we have a look at the Article 138 and the following articles of the Constitution, what The Constitution understands from independent courts is that they are institutions which cannot secure Judges are performing, whose decisions are absolutely in force for legislation and administration organs which cannot be advised or indoctrinated, cannot be sent any printed notices, and cannot be ordered or regulated by any ranks, appeals or persons. On the basis of the Articles in the Constitution, it can be pronounced that the use of judiciary force, performing of the judiciary function, it is necessary to be a part of the appeals that are totally independent from the parties who have conflict and who demanded a solution for these conflicts. When seen in this point of view, activities of solving the conflicts amongst the administrative organs shall not be described as activites included in the activities of judiciary function.