CHAPTER XVIII

COMPETITION POLICY (Arts 85-86 and Art. 90).

A- TREATY PROVISIONS AND REGULATION 17

The framework of Competition Policy is comprised in the provisions of Article 85 and 86 of the Treaty which define anti-competitive behaviour of undertakings in general, whilst Article 90 is addressed specifically to public undertakings.

Article 85(1) prohibits "agreements, decisions and concerted practices" if they "prevent, restrict or distort competition" in the common market. It further enumerates typical practices which are considered to be harmful to interstate trade. However the list is not exhaustive. This broad prohibition has generated a wealth of case law which has to be considered in conjunction with the Treaty provisions.

Article 85(2) declares the prohibited practices void, i.e. without legal effect.

Article 85(3) lays down the conditions under which exemption from the rigour of Article 85(1) can be granted by the Commission.

Article 86 complements Article 85 as it prohibits "any abuse by one or more undertakings of a dominant position within the common market or any part of it in so far as it may affect trade between member states". Thus a dominant position on the market per se is not prohibited, but its abuse is. Here again case law elucidates every word of the article and has to be borne in mind. Unlike Article 85, Article 86 does not provide for exemptions.

Article 90 applies to "public undertakings" and "undertakings to which member states grant special or exclusive rights". Therefore they are obliged to "neither enact nor maintain in force any measure contrary to the Treaty, in particular, Article 7 and Articles 85 to 94"[1]. It means in effect that a state enterprise is, in principle, in the same position as a private enterprise if it carries on normal commercial activities[2].

Article 90 (2) provides an exception but only in the case of "undertakings entrusted with the operation of service of general economic interest or having the character of a revenue-producing monopoly". In the first category are public undertakings procuring general utility services such as water, gas, electricity or transport where the elements of manufacture and trade are in a secondary position, whilst service to the public at large is their primary function. In the second category are the traditional state monopolies (e.g. alcohol, tobacco) which, at any rate, have to be phased out. However even these have to be operated so as not to obstruct trade or, as provided in article 90 (2) "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

Regulation 17[3] as amended lays down procedural rules to complement the substantive law outlined above.

B- IMPLEMENTATION AND ENFORCEMENT OF COMPETITION RULES

The relevant Treaty provisions have a direct effect and thus superimpose a uniform system upon the member states some of which (e.g. Germany) had a set of rules dealing with unfair competition whereas others continued to live under a 19th century liberal system of civil law where the freedom of contract prevailed. Whilst implementing the Treaty provisions the member states must also establish a machinery of enforcement which operates either independently or in assistance to the Commission. Thus enforcement action can be commenced either in a member state or the Commission but, if the Commission is involved, the action within the national jurisdiction is not proceeded with though the national authorities must afford the Commission the assistance it requires (e.g. to help Commission officials to investigate the alleged breach of substantive rules).

However the Commission plays a significant role in the administration and enforcement of the system as it acts as an investigator, prosecutor, adjudicator and a rules-making body.

Whilst administering the system the Commission has the exclusive power to receive notifications of agreements and of granting exemptions under Article 85(3). The object of a notification is to obtain "negative clearance". It means that an undertaking engaged in a practice of a restrictive nature may apply to the Commission for a statement that, on the basis of information furnished to the Commission, the Com-

mission sees no grounds for action to be taken under Articles 85(1) and 86 of the Treaty. The advantage is that any doubt as to the legal position of the undertaking is resolved in so far as negative clearance protects it from prosecution and, where the undertaking is not entirely within the law, the Commission will make recommendations to adjust its position. The disadvantage is that the applicant must give all the required information. The Commission has power to impose fines upon undertakings supplying incorrect or misleading information.

Restrictive practices may be exempted from the rigour of Article 86(1) by the Commission (though not by the national authorities) if certain conditions are proved. The applicant has to show that the agreement or practice in question "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; affords such undertakings the possibility of eliminating compensation in respect of a substantial part of the products in question" (art. 85(3)).

There are two types of exemption: individual exemptions granted by the Commission to applicants following notification and block exemptions arising automatically from Community legislation.

Block exemptions have been introduced in order to speed up the process of exemptions as the Commission would not be able to cope with the flood of individual applications. Under Regulation 17/62[4] three kinds of exemption are authorized:

(1) agreements, decisions and concerted practices where the only parties involved are undertakings from one member state only and the transactions do not relate either to imports or to exports between member states;

(2 re-sale agreements between two undertakings;

(3) transactions involving no more than two parties which impose restrictions on the rights of the user or assignee of patents, trade marks, designs and utility models.

Regulation 2349/84[5] provides for block exemption to certain patent licensing agreements including the transfer of "know-how". Other exemptions include co-operation agreements between small and medium-sized undertakings where such co-operation enables them to work more rationally and increase their productivity and competitiveness on a larger market[6]; specialization agreements[7], exclusive dis-

tribution agreements[8]; exclusive purchasing agreements[9] which include beer supply agreements; motor vehicles distribution and servicing agreements[10]; patent licensing agreements[11]; research and development agreements[12]; franchise agreements[13]; know-how licensing agreements[14];and air transport agreements[15].

Exemption can be lost either entirely or partially if the conditions under which it was obtained are not observed. Commission decisions are subject to judicial review by the European Court of Justice.

We should mention in this connection the "de minimis" principle which means that a practice escapes the prohibition of Article 85 when it affects the market only insignificantly[16]. Expressed in the currently applicable Commission Notice [17] this means exemption of agreements between undertakings engaged in the production or distribution of goods or in the provision of services if the goods or services involved do not represent more than 6% of the total market of such goods in the area covered by the agreement and the aggregate annual turnover of the participating undertakings do not exceed 200 million ECU. However, the Notice provides only a useful guidance to business; it is not binding upon the European Court.

In order to prevent large concentration of economic power, a control of mergers and acquisition has been introduced by Regulation in December 1989. The system consists of "a priori" Community control over proposed mergers with a combined world turnover of 5 billion ECU of which 250 million ECU of each company must be within the Community. This control is achieved by means of compulsory notification and preliminary authorization by the Commission. Mergers below the threshold are dealt with by the member states unless they ask the Commission to act on their behalf.

According to article 3 of Regulation 17 infringements of Articles 85 and 86 are dealt with by the Commission either ex officio or at the instance of interested parties. The former implies independent investigation of a case which comes to the notice of the Commission, the latter on instigation either by States, or companies or individuals who may, but need not, be affected. The Commission has a discretion whether or not to pursue a complaint but must advise the complainant if no action is to be taken.

The Commission may make a "search and seizure" order without giving an advance warning to the company under investigation. However it has to act in consultation with the appropriate national authorities.

Before taking a decision the Commission must give the parties concerned an opportunity to express their views and give them a hearing. If an infringement has been proved the Commission will take appropriate steps to terminate the infringement, make recommendations and apply sanctions prescribed by the Treaty and the Regulations.

In case of infringement of Article 85 three different sanctions apply: nullity of the offending practice, fines and penalties, and in case of Article 86 fines and penalties.

According to Regulation 17 (art. 15) the Commission may inflict heavy fines, ranging from 1,000 to 1,000,000 ECU, or a sum in excess of the limit but not exceeding 10% of the turnover, upon the company guilty, of an infringement of Article 85(1) and article 86, for submission of incomplete books or other documents required or for refusal to submit to an investigation. These sanctions are said to have no criminal or punitive character[18] but their severity suggests that they are meant to deter. For example, in a case of market-sharing and price fixing agreements the fines totalled 57.85 million ECU [19] and in the Polyethylene case[20] 60 million ECU.

The Commission has power to impose penalties in order to oblige the offenders to:

(a) put an end to an infringement of Articles 85 or 86;

(b) discontinue any action or decision obtained fraudulently or by false information;

(c) supply any information requested; and

(d) submit to any enquiries ordered by the Commission.

These penalties range from 50 to 1,000 ECU per day. The Commission fixes the fines and penalties which are collected by the member state involved.

Decisions of the Commission are subject to appeal and judicial review of the European Court.

C- IMPLICATIONS FOR TURKEY[21]

THE ROLE AND OBJECTIVES OF COMPETITION POLICY

At the present moment, there is no Competition Law enacted in Turkey. During the last fourteen years, there were several attempts to prepare a Competition Act. The first commission, set up in 1978 under the auspices of the Ministry of Trade and Industry, failed to bring the draft into existence and this was due to the political instability of the country. After the 1980 coup, Turkey has adopted much more liberal economic policies, and a need to have an effective competition policy came out as a necessity of the system adopted by the 1982 Constitution, where a duty to pass a competition Act was imposed on the subsequent parliaments.

Between 1984 and 1991 there were a couple of attempts to draft a Competition Code, but all failed. One of the reasons is that a large representation opportunity was given to the private sector which was not keen on any changes in this field. Furthermore, the Governments which were in power during this period, hoped to promote Turkish export by advocating concentration, which was contradictory to their competition policy. For the last couple of years, Turkish export figures have shown a decline which is a manifestation of this erroneous industrial policy.

In order to promote competiveness of Turkish industries in the World markets and to be in accordance with more democratic ideals, the present government has made a great effort in preparing a new draft, that will be submitted to the parliament at the beginning of the next parliamentary term which will be in August. The new draft has been prepared by a group of academicians commissioned by the Ministry of Trade and Industry in Competition Law Review Committee. In order to avoid any obstructive pratice, representation of the business circles in the Committee is kept at a minimum.

The Rationale Accepted By The Committee

The Committee has the view that no legislation can force undertakings to compete, but it is hoped that by eliminating anticompetitive practices and encouraging market forces, the Act will be successful in promoting a greater degree of competition in the internal markets. The Committee regards competition as an effective mean to achieve economic efficiency. It is believed that the Competition Act will play an important role in realizing more competitive market structures and hence, improve the productive efficiency as well as allocative efficiency. The ultimate goal is to make full

use of the scarce resources of the country more effectively so that people as a whole, will reach a higher degree of satisfaction.

There are various different views on industrial economics and the effects of competition policies on the trade and industry. The Committee is aware of all these views stressing that a perfect functioning market is utopia, but still holds the idea that aiming the ideal should be taken as principle as long as it does not create an obstacle to economic and technical progress. A lack of competition in the internal market increases the cost and places of the private sector into the same line as state owned industries which are quite unsatisfactory in terms of efficiency. In this respect, internal competition will help those firms that engage in international trade.

The Committee accepts the fact that each firm will try to monopolize its own market to raise the monopoly profit. In a competitive market, the mechanism of monopolization is done by improving productive efficiency or by innovation. Although this is a contradiction with the competition ideals, the benefit to the society by these activities is far greater than their harms.

Research and development spending are minimum in the country and Turkey has been struggling with high inflation for the last fourteen years. Turkish markets show the characteristics of oligopolistic and monopolistic markets. A few groups own almost all the major industries and economic power is vested in the hands of a few people, and this threatens the political and economical stability in the conutry. Unfortunately, the idea of economic and political stability which was propagated by those circles between 1980 to 1991 has not improved the inflation and deficit problems of the country, but had a negative effect on the market structures.

The Committee, for the reason given above, adopted a stricter position on competition policy, and all the implementations of this policy will be carried out by an autonomous body.

General Outline of The Draft

The Competition Act, which will be debated at the Turkish parliament at the beginning of the next term, includes forbidden practices as well as procedural rules and the foundation of an independent agency. The principles laid down in the draft on the foundation of the agency and procedural rules are of extreme importance in terms of the implementation of an effective competition policy and show divergence from the

principles of Turkish Administrative Procedures, where all the governmental activities are carried out in complete secrecy.

The Draft prohibits all kinds of agreements and practices contrary to the idea of competition and the basic the wording is adopted from the Rome Treaty Article 85. After the general definition, the acts which may be the result of prohibited agreements are listed as:

-directly or indirectly fixing purchase and selling prices or any other contractual conditions;

-limiting or controlling production, market outlets or access, investment and technical development;

- applying dissimilar conditions to equivalent transactions in commercial relations with other contracting parties for the same services, thereby placing them at an unjustified competitive disadvantage;

-making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

However, this list is not exhaustive.

The draft also lays down the conditions under which exemption from the rigour of the Act, can be granted by the Competition Authorities. These conditions are very similar to the conditions set in Article 85(3) of the Rome Treaty.

The draft forbids the abuse of dominant position within the national territories or in any part of it. To be a monopoly or the act of monopolization is not illegal per se. A list of situations that might be regarded as abuse of dominant position is also included in the draft. This list is not exhaustive, too.

Acquisitions and mergers are also regulated in the Draft. An advanced notice of acquisition or merger must be submitted to the Authorities and a permission is necessary for the execution of the acquisition or merger agreements.

Conclusion

Turkish Competition Law experience is very premature at this stage. We must wait till the debates in the parliament are over, and then make our projections for the future.

NOTES :

1 Art. 7 prohibits discrimination on the ground of nationality and Arts. 85-94 comprise rules on competition and state aids

2 Case 10/71 Ministere Public Luxembourgeois v Müller (1971) ECR 723; Case 41/83: Italy v EC Commission (1985) 2CMLR 368

3 6 February 1962, OJ. 204/68

4 Reg 17/62 (OJ.1962, Febr. 21,1962 p.204)

5 OJ. 1984, L.219/15 corrected OJ. 1985, L.113/34

6 Commission Notice OJ. 1968, C.75/3

7 Commission Reg. 2779/72 (OJ. 1972, L.292/23), amended and finally replaced by Reg. 417/85 (OJ. 1985, L.53/1)

8 Reg. 1983/83 (OJ. 1983, L.173/1; and interpretative guidelines Commission Notes OJ. 1984, C.101/2

9 Reg. 1984/83 (OJ. 1983, L.173/5)

10 Reg. 123/85 (OJ. 1985, L.15/16)

11 Reg. 2349/84(OJ. 1984, L.219/15)

12 Reg. 415/85 (OJ. 1985, L.53/5)

13 Reg. 4087/88, (OJ. 1988, L.359/46)

14 Reg. 559/89, (OJ. 1989, L.61/1)

15 Reg. 3975/87 (OJ. 1987, L.374/1) and Reg. 2344/90 (OJ. 1990, L.217/15)

16 See Case 5/69: Völk v Vervaecke (1969) ECR 295

17 OJ. 1986, C.231/2

18 Reg. 17, art. 15(4)

19 Commission Decision in Re Polypropylene (OJ, 1986, L.230/1), (1988) 4CMLR 347

20 Commission Decision in Re PVC (OJ. 1989, L.74/1); (1990) 4CMLR 345

21 Ateş Akıncı