Roundtable on
"Procedural Fairness: Transparency Issues in
Civil and Administrative Enforcement Proceedings"
Working Party 3 on Cooperation and Enforcement
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This contribution aims to explain the rules concerning confidentiality and will be based on the relevant provisions of the Act No. 4054 on the Protection of Competition (the Competition Act), and the secondary legislation adopted by the Competition Board, the decision making body of the Turkish Competition Authority (TCA).

The Competition Act[1] prohibits the staff of the TCA from using trade secrets of the undertakings and associations of undertakings that they learned during the implementation of the Competition Act even if they have left their office[2]. Moreover, decisions of the Competition Board are published on the internet page of the TCA in such a way not to disclose the trade secrets of the parties.[3]

Moreover, the parties which are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the TCA in connection with themselves, and if possible, a copy of any evidence obtained.[4]

By taking these provisions in the Competition Act, the Competition Board recently adopted the Communiqué No 2010/3[5] on the Regulation of the Right of Access to the File and Protection of Trade Secrets (Communiqué No. 2010/3).

According to the Communiqué No. 2010/3, the parties can have access to any document and evidence in the file prepared within the scope of investigation except for internal correspondences of the TCA and those including trade secrets and other confidential information about other undertakings, associations of undertakings and persons.[6]

The Communiqué No. 2010/3 provides for definition of trade secrets and certain examples that may constitute trade secrets. For instance, trade secret is defined as "*any information and document relating to the field of activity of undertakings, that undertakings have the freedom to keep secret, that is known to and can be obtained by only a certain and restricted group, and that is likely to result in serious damage to the undertaking concerned when disclosed to third persons, especially competitors, and to public.*"[7] Depending on the characteristics of the incident and the undertaking, following information and documents may be considered as trade secrets:

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[1] Article 25(4) of the Competition Act.
[2] Despite the fact that the Competition Act does not envisage a specific sanction in case of not respecting confidentiality, the General Law on State Officials no:657 and Criminal Code envisage administrative and criminal sanctions respectively.
[3] Article 53(2) of the Competition Act.
[4] Article 44(2) of the Competition Act.
[5] The Communiqué was published in the Official Gazette dated 18.4.2010 and numbered 27556.
[6] Article 6(1) of the Communiqué No. 2010/3.
[7] Article 12(1) of the Communiqué No. 2010/3.

- the internal institutional structure and organization of undertakings,
- their financial, economic, credit and cash position,
- research and development activities,
- operational strategy,
- raw material resources,
- technical information related to production and manufacturing,
- pricing policies,
- marketing tactics and costs,
- market shares,
- wholesale and retail customer potential and networks,
- contractual connections that are subject to or not subject to authorization.[8]

It should be said that information and documents relating to contracts, agreements, settlements and actions violating the competition law legislation are not considered trade secrets even if their disclosure is likely to result in damage to the relevant undertaking or its competitors.[9] Furthermore, information that has been published, made public, or included in official registers or balance sheets as well as annual reports, together with information that has lost its trade significance due to causes such as the fact that it is five years old or more, may not be deemed trade secret.[10]

Essentially, it is the responsibility of the undertakings to determine whether information or documents in the records of the TCA include trade secrets and to put forward the justifications for them.[11] The undertakings have to notify the TCA of the information and documents including trade secrets, the grounds explaining the trade secret nature of such information and documents, and the versions of documents that do not include trade secrets.[12] The undertakings claiming secrecy should indicate trade secrets one by one in the relevant documents.[13] Statements that the documents about which secrecy claims have been filed have the nature of trade secret as a whole are not accepted.[14] Undertakings can file secrecy claims only for those trade secrets that have been obtained from them or that relate to them.[15]

Although the relevant information and documents are deemed not to include trade secrets if the undertakings do not claim secrecy, the TCA may ask the undertakings for an assessment, by allowing time, or make an ex officio assessment for possible trade secrets likely to be included in the information and documents.[16] The TCA may also call the undertakings to its premises to screen the documents obtained from them and related to them for trade secrets if it deems necessary.[17] The undertakings

[8] Article 12(2) of the Communiqué No. 2010/3.
[9] Article 12(3) of the Communiqué No. 2010/3.
[10] Article 12(4) of the Communiqué No. 2010/3.
[11] Article 13(1) of the Communiqué No. 2010/3.
[12] Article 13(2) of the Communiqué No. 2010/3.
[13] Article 13(5) of the Communiqué No. 2010/3.
[14] Article 13(5) of the Communiqué No. 2010/3.
[15] Article 13(6) of the Communiqué No. 2010/3.
[16] Article 14(1) of the Communiqué No. 2010/3.
[17] Article 14(2) of the Communiqué No. 2010/3.

can not file trade secrecy claims if they have not made trade secrecy assessment upon request of the TCA.[18]

In case the TCA accepts the claims for the confidentiality of trade secrets, they are not disclosed.[19] In case the information and documents are indispensable to be used as evidence to prove an infringement of competition, the TCA may not take into account secrecy claims related to them.[20] Therefore, the TCA can disclose such information and documents that have the nature of trade secret, respecting the balance between public interest and private interest and in accordance with the proportionality criterion.[21] However, it should be said that trade secrets, which are not indispensable to prove an infringement, cannot be disclosed merely for the purpose of strengthening the grounds of the decision of the Competition Board.[22] However, depending on the nature of the information, methods such as giving approximate values or ranges can be adopted.[23]

Finally, provisions of the Communiqué No. 2010/3 in relation to trade secrets are applicable, by comparison, to other confidential information that does not have the nature of trade secret but is likely to result in significant damage to the relevant parties or third parties when disclosed, to the extent that their nature allows.[24]

[18] Article 14(3) of the Communiqué No. 2010/3.

[19] Article 15(1) of the Communiqué No. 2010/3.
[20] Article 15(2) of the Communiqué No. 2010/3.
[21] Article 15(2) of the Communiqué No. 2010/3.
[22] Article 15(3) of the Communiqué No. 2010/3.
[23] Article 15(3) of the Communiqué No. 2010/3.
[24] Article 16(2) of the Communiqué No. 2010/3.