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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Turkey**

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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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1. Introduction

1. The right of access to file has been ensured in Article 44 (2) of the Act on the Protection of Competition No. 4054 (Competition Act). The procedure and principles of the exercise and arrangement of the right has been regulated in Communiqué Related to the Arrangement of Access to File and Protection of Confidential Information No. 2010/3 (Communiqué)¹. The right of access to case file is regulated in order to guarantee the parties' right of defense. Any party under investigation should be entitled to defend himself/herself properly without harming the application of Competition Act.

2. The agency may obtain many information and documents from undertakings, associations of undertakings and real persons within the scope of the application of Competition Act. Article 25 and 53 of the Competition Act ensures the obligation of not disclosing the business secret and confidential information. Therefore, it is the agency's duty to treat those documents and information, which may include confidential information, sensitively. In that regard, the right of access to file has been balanced by protecting the business secret and confidential information, which has been also ensured in the Communiqué.

3. It should also be noted that, in Turkey, issues not covered within the scope of Communiqué has been provided under the Act on Right to Information No. 4982 (Information Act) since Communiqué covers only issues related to competition law.

2. Access to File

4. Article 44 (2) of the Competition Act states that, parties may ask for a copy of any documents drawn up within the agency concerning them, and if possible, a copy of evidence obtained. Article 6 of Communiqué elaborates and ensures that, parties may access all the documents produced and evidence assembled relating to them within the body of competition authority. However, in accordance with the Communiqué, internal correspondences and the business secrets and other confidential information² related to other undertakings, associations of undertakings and persons are not accessible. The regulations under Communiqué are arranged regarding the investigations, however they are also applied comparatively to mergers and acquisitions under final examination and to the process of revocation of the exemption³.

5. The elements of Article 44 (2) of the Competition Act and Communiqué are expressed as follows. According to the Article 44 (2) of the Competition Act, the right of access to file is only entitled to parties under investigation. However, the Communiqué also covers the parties related to mergers and acquisitions under final examination and the

¹ [https://www.rekabet.gov.tr/Dosya/communiqu%C3%A9s/dosyaya_giris_hakk-\(2016-2-ile-degisik-2010-3\)-20191022160924378-pdf](https://www.rekabet.gov.tr/Dosya/communiqu%C3%A9s/dosyaya_giris_hakk-(2016-2-ile-degisik-2010-3)-20191022160924378-pdf)

² Exception in business secrets and other confidential information is explained under the 4th part of this paper.

³ Article 16 of the Communiqué.

process of revocation of the exemption. Besides, those executives or employees of the undertakings and associations of undertakings of whom administrative fine was requested also has the right of access to file.

6. The case file consists of all the documents and information obtained, produced and assembled during the investigation⁴. However, the Board might decide to exclude some documents outside the scope which having a selective importance. In that sense, documents protected by the attorney client privilege are not considered within the scope of the case file according to the past Board decisions⁵. We should stress that the Board decided to return the mentioned documents to the relevant party, which constitutes cumulative conditions regarding the attorney client privilege.⁶

7. Internal correspondences are defined as correspondences of the units, which qualified as preparatory transactions for the Board's final decisions. They can be exemplified as; memos, opinions of departments, notice papers, preliminary inquiry reports⁷ etc.

8. Moreover, in accordance with the Communiqué, documents that are not directly respected but qualified as internal correspondences are also considered as not accessible, which are as follows;⁸

- Documents obtained by the Article 6 (3) and 9 (3) of Leniency Regulation,
- Correspondences made with other public institutions, professional organizations qualified as public institutions,
- Correspondences made with private sector real and legal persons asked for their information.

9. However, information provided within the scope of Article 6 (3) and 9 (3) of the Leniency Regulation or the internal correspondence (or the documents qualified as internal documents) which have incriminating or exculpatory evidential value are not entirely excluded from the scope of right of access to file and may be examined at the agency office.⁹

10. From now on, the procedure of access to file will be expressed in accordance with the Communiqué. Those parties that are notified of the initiation of an investigation may ask for access to file until they have requested for enjoying the right to hearing. However, the Board may delay the decision on access to file with the objective of ensuring of conducting a healthy and safe investigation and avoiding the danger of obscuring possible evidence, by explaining its delaying reasons. Delaying does not constitute a refusal. The

⁴ Article 4 (1-a) of the Communiqué

⁵ The Board decision, No: 15-42/690-259, 02 December 2015, No: 16-42/686-314, 06 December 2016.

⁶ The Board decision No: 15-42/690-259, 02 December 2015.

⁷ Status of the preliminary inquiry reports have been controversial in the early ages of Board's decisions. However, in the current situation, they are deemed as preparatory transactions and they can only be accessible in the agency office in case of having an incriminating/exculpatory evidential value.

⁸ Article 7 (2) of Communiqué.

⁹ Article 10 (2) of the Communiqué.

right for access to file should be exercised within the shortest time possible after the investigation report is notified.

11. As a rule, parties may use right of access to file only once during the investigation period if no new evidence is discovered. If new evidence is obtained at the later stages of the investigation, parties may have a second right to access to file. In this case, there are no conditions set whether the evidence's nature is incriminating or exculpatory.

12. Request for access to file should be done by filling the form correctly and completely, which can be found in the appendix of the Communiqué. The investigation committee evaluates the request of access the file by considering the issues stated in the form. If the request is accepted, the method of accessing the file, time and other issues regarding the access to file is notified in writing to the requested party. In case of the investigation committee refuses the request fully or partially, the Board is entitled to make the decision. In every case, where the access is granted or denied partly, the request is deemed as refusal; such as making the file accessible by deleting the business secrets or granting access to the files at the agency.

13. The investigation committee may evaluate and decide which procedure will be applied by considering the qualification of the documents inserted in the form. There are three procedures of exercising the right of access to file¹⁰, which are:

- Handing or sending the electronic copies of the documents (via CD-ROM or other electronic data storage devices)
- Handing or sending the versions of documents via photocopies
- Examination of the documents at the agency office.

14. The procedure of examination of the documents at the agency office need more of an explanation since that the Board has various approaches to this issue. In the past, Board has decided that¹¹, the documents that granted access at the agency office might be examined by without having any electronic or mechanic copy of it and without having any device for taking notes by hand. However, in recent cases¹², The Board has changed it's approach and starts to give permission for taking notes while the examination of documents in the agency office. Consequently, it is now possible to take notes while the examination of the file in the agency office but taking copies of them is restricted.¹³

15. In case of sending or handing the documents, the agency officials note the number of pages given and the qualifications of the documents. In addition, within the power of discretion, a fee can be requested from the relevant party as necessitated by the cost of amount.

¹⁰ Article 10 of the Communiqué.

¹¹ ¹¹ The Board decisions, No: 17-16/233-98, 15 May 2017; No: 17-16/234-99, 15 May 2017; No: 17-16/235-100, 15 May 2017; No: 17-18/272-116, 01 June 2017; No: 17-18/273-117, 01 June 2017; No: 17-18/274-118 01 June 2017.

¹² The Board decisions, No: 18-06/92-47, 20 February 2018 and No: 17-39/624-271, 28 November 2017

¹³ Exercise of the Right of Access to File Regarding the European Union and Turkish Law, Unpublished Thesis, Cansu Topak, Assistant Competition Expert in Turkish Competition Authority, June 2019

16. It should be noted that, the documents obtained by the right of access to the file may only be used in defenses relevant to the case accessed within the scope of Competition Act and in the applications made to the administrative jurisdictions¹⁴. Those documents cannot be used in a potential action for damages.

3. The Right of Access the Case File of the Complainants and the Third Parties

17. The right of complainants and the third parties access to the file is not legislated in the Competition Act or the Communiqué. Therefore, request of those should be examined within the scope of the general rules¹⁵. In that manner, general rules refer to the Information Act which is the fundamental regulation of right to access the information under Turkish Law.

18. According to the Article 4 of the Information Act, everybody¹⁶ (real or legal person) has the right to acquisition of information. In accordance with the Information Act, it is not compulsory for the applicant to prove any interest with the requested information and documents. The scope of persons, which might access to the information and document, is arranged wider in Information Act then the Competition Act and the Communiqué. However, there are some limitations set regarding the requested information in the Information Act.

19. The documents and information that are excluded from the scope of the right of information has been set in the 4th part of the Information Act. The following documents are considered outside the scope of Information Act and cannot be accessed^{17 18}:

- Information and documents regarded as business secrets in various codes and business knowledge and financial information provided from real and legal persons which specified as confidential information (Article 23 of the Information Act),
- Internal opinion, annotation and suggestions (Article 26 of the Information Act),
- Requests of recommendation and legal opinion (Article 27 of the Information Act),
- The following documents related to the administrative investigations, if timely declared or prematurely declared (Article 19 of the Information Act);
 - Documents which results in an explicit unlawful interference to person's private life,

¹⁴ Article 11 of the Communiqué.

¹⁵ Article 5(3) of the Communiqué.

¹⁶ The foreigner residents in Turkey or foreign legal entities operating in Turkey can benefit from the Information Act according to the principle of reciprocity and with the condition of the requested information must be relevant to them.

¹⁷ The given exempted documents do not cover all the exemptions regulated in the Information Act but only covers (including but not limited), the ones that might be considered important regarding the competition law.

¹⁸ Exercise of the Right of Access to File Regarding the European Union and Turkish Law, Unpublished Thesis, Cansu Topak, Assistant Competition Expert in Turkish Competition Authority, June 2019

- Documents which cause danger in persons' or investigating officers' life or security,
- Documents which cause danger to the security of the investigation,
- Documents led source of the information come out which required to be confidential or documents which make it difficult to provide the quasi information and document sources relevant to the investigation.

20. In the practice of the Board, it is observed that, requesting of the investigation report by the complainant at the investigation period is very common. The stance of the Board on this request is to send the investigation report by deleting the business secrets¹⁹. In various decisions, Board denied the access to file request of the complainant, grounding that complainant is not considered as a “party” according to the Competition Act and Communiqué. However, Board might only base its denial reason of the complainant concerning the Information Act.

21. The administrative court, which evaluates the denial decision of the Board regarding the request of the complainant's access to file, has concluded that, there are no legal obstacles detected of lending the investigation report to the complainant by deleting the business secrets from it²⁰.

22. To sum up, the request of access to the case file of the complainants and the third parties is the subject matter of the Information Act and should be evaluated by the Board within that regard.

4. Protection of Confidential Information

23. The right to access to file has been balanced with the protection of confidential information and business secrets. In accordance with the Article 6 of the Communiqué, parties may access to file except the business secrets and other confidential information related to undertakings, associations of undertakings and other persons. The request of access to file may be fully or partially denied if the documents include any business secrets and other confidential information. However, access will be granted, where possible, by deleting the business secrets and confidential information.

24. Business secret is defined as, the documents and information relevant to the undertakings' scope of activity and those which undertakings hold the will to keep confidence; and those documents only known and obtained by specific and restricted sector, and the kind of information that disclosure of it to the rivals, third parties and public would possibly harm the undertaking²¹.

25. In the Communiqué, business secrets, are exemplified almost the same with the EU law, which are; technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources,

¹⁹ In the past, The Board has sent the investigation report as it is; The Board's BIAK Decision: No: 99-13/99-40, 04 March 1999.

²⁰ Decision of Ankara 1st Administrative Court No: E. 2015/548, K. 2016/140, date 27 January 2016.

²¹ Article 12 of the Communiqué.

quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

26. The 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. These kinds of documents are especially the applications and interviews with confidentiality claims. Provisions of the Communiqué are also applied to the other confidential information.

27. In that regard, the documents with confidentiality claims cannot be accessible by the applicant party. Considering the past decisions of the Board, it is possible to grant access to those kinds of documents by deleting the confidential information and darkening the applicant's identity. The Board may deny access to file, in case of the document would enable to identify complainants or the third parties identity.²²

28. If it has the characteristic of breaching the competition law, any type of contract, conciliation or documents are not be considered as business secret even though they might harm the undertaking or its rivals. Besides, publicized documents and information that has lost its commercial importance due to the passage of time (5 or more years) may not be considered as business secret.

29. According to the Communiqué, undertakings can request for confidentiality and it is essentially undertaking's responsibility to specify and provide justifications whether the documents and information include business secrets, which are submitted to the agency. The confidentiality requests should involve specification and reasons related to the documents including business secret, and non-confidential version of the information provided. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and cannot be disclosed by the agency. The undertakings also send business secret assessments of the documents and information obtained from the on-site inspection.

30. Business secrets must be specified separately; the declaration of all the documents and information including business secrets are inadmissible. In case the undertaking would not submit any of confidentiality requests, the documents and information are considered as non-confidential. After all, if the agency asks from the undertaking to make a business secret assessment and if the undertaking would not fulfill this duty, the undertaking cannot submit business secret claims anymore.

31. The Board has the right to discount confidentiality requests if such information is necessary to prove an alleged infringement. In this case, the agency disclose the said business secret considering the balance between public and private interest and regarding the proportionality criteria.

32. The Communiqué also involves provisions regarding the protection of business secrets in terms of staff member and Board members. It is forbidden for them to disclose or use the business secrets in their interests even though they leave the office.

²² The Board decision No: 18-31/541-266, 12 September 2018.