

**COMPETITION RULES  
COMPLIANCE GUIDELINE**

**Association of Research-Based Pharmaceutical Companies  
ISTANBUL, 2013**

The Competition Rules Compliance Guideline (hereinafter referred to as “Guideline”) is prepared by Kaleğası & Gürmen Law Office for Association of Research- Based Pharmaceutical Companies (hereinafter referred to as “AİFD”). Information contained in this Guideline is for advisory purposes only, and should be used by AİFD and its members to comply with Competition Rules to the highest extent possible. Case examples used in this Guideline are selected from potential issues that may arise in the course of business. Since it is often difficult to clearly determine whether a contemplated action is compliant with Competition Rules, the recommendations offered in the Guideline are described using stronger language and a more restrictive approach compared to that used in the Law No.4054 on the Protection of Competition (“Competition Law”). In the event of uncertainty, an expert in Competition Law should be consulted for advice.

## FOREWORD

Recently, the pharmaceutical industry is undergoing substantial transformation. The industry is undertaking new initiatives to continue evaluating, developing and implementing projects to create greater added value for the Turkish economy, while helping to improve and prepare both structural and legal infrastructures to support the development of the industry.

**The pharmaceutical industry is undergoing substantial transformation**

To set a model for both its members<sup>1</sup> and sector stakeholders, AİFD is pioneering the way by contributing this lasting work to the competitive environment which AİFD helped create by its practices, and it also serves to demonstrate the importance AİFD places on compliance with Competition Rules.

**Making a lasting contribution**

AİFD desires to use this Competition Rules Compliance Guideline to further reinforce our prudence in complying with all legal and ethical rules, including Competition Rules. This Guideline highlights our past efforts and represents a commitment on the part of AİFD to do our best to ensure full compliance with the Competition Rules.

**Compliance with competition rules is an essential AİFD value**

In this premise, compliance with Competition Rules is more than a legal obligation for AİFD, as it is also a core value and obligation of our association. AİFD, and its members and employees, recognize the importance of this issue. We understand that not following the guidance provided in this Guideline will raise -doubts against the entire sector, and not following these rules will result in sanctions against us.

On the other hand, we also recognize that our efforts to support compliance with Competition Rules would not end with this Guideline. We intend to maintain compliance with Competition Rules as a habit and culture. We will continue to maintain this as a top item on our agenda, focusing both our efforts and training activities on this issue.

**Compliance entails consistency**

Competition is an ongoing process, and in striving to comply with the rules, we are hoping that a competitive pharmaceutical industry will yield most beneficial results for both our stakeholders and our economy.

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<sup>1</sup> This Guideline refers to compliance of Associations with competition regulations, which consider an Association as an entity that brings competitors together, whether comprising natural or juristic persons. Therefore, for consistency with the relevant section herein, different terminology such as competitors, competing undertakings, members, member companies or member undertakings have been used. It is important to regard these varying uses only in the premise of Competition Legislation, to ensure proper understanding of the topics covered herein.

## **Competition Rules Compliance Guideline**

### **Executive Summary**

It is highly important to ensure that the Competition Rules and policies of the Competition Authority are properly understood by all businesses operating in Turkey, and the mindset laid down in the Competition Law is communicated to both undertakings and associations of undertakings.

From this perspective, the Association of Research-Based Pharmaceutical Companies (AİFD) has defined the following main objective in its charter:

*“...to cooperate with the research-based pharmaceutical industry in Turkey, to broaden access to new medicines, information and technologies with a view to improving health in Turkey, to make any legal applications as may be necessary in this context, and to develop an ethical and open pharmaceutical environment which is typically found in developed countries.”*

As described in the above statement, AİFD needs to collaborate both internally with its members and externally with other sector stakeholders to obtain new drugs, knowledge and technologies. This means that every action of AİFD may be considered to carry competitive relevance.

In this premise, AİFD views it as an important priority to ensure compliance with the Competition Rules, and intends to reinforce its position as a leader and beacon of guidance on matters relevant to the Competition Rules, as with all the other areas in which AİFD is involved.

Competition Rules Compliance Guideline will represent a most important instrument for AİFD to achieve this purpose. In this sense, each AİFD employee and member company carries a responsibility. AİFD, together with its members, is willing to do its best to support Compliance with the Competition Rules.

The content of the Competition Rules Compliance Guideline is prepared based on a number of potential problem areas which may have competitive relevance. Thus, it is essential to internalize both the objectives and spirit of the Guideline.

The Guideline primarily provides general information on Competition Rules. It is important that this section is thoroughly understood by everyone

who has a role within AIFD at any level or position. From the perspective of associations, it is particularly important to gain a clear understanding of Article 4 of the Competition Law. In fact, detailed information – to a certain degree – on this matter is provided in the relevant section of the Guideline.

Exchange of information, another point specifically relevant to associations, is addressed in greater detail under the relevant heading.

One of the most important objectives of the Guideline is to provide AIFD with practical information on following Competition Rules and with guidance on practices and operational aspects.

- In this sense, an effort was made to provide a detailed discussion of information and recommendations contained in the Guideline, in view of the institutional structure of the AIFD and its relevant organs. To avoid any conflict with the Competition Rules from the institutional structure, institutional practices and operational aspects, each organ was defined and practical rules were laid down, which may have a competitive relevance.

- To support a practical character, Competition Rules of particular interest were highlighted, which are considered relevant as regards the ways that AIFD should follow, and stances AIFD should take while interacting with its members. Further, main guidelines were emphasized that should govern interactions of AIFD with other sector stakeholders, including government representatives, and other associations, unions and providers.

- An effort was made to illustrate the practical implications of Competition Rules using fictional case examples of direct relevance for the industry. The cases were built on particularly striking examples to better convey the implications of compliance with the Competition Rules. It is worth remembering that these are fictional scenarios, and each “competition” case should be handled according to its unique circumstances.

- Another important section of the Guideline covers practical rules which should be followed within AIFD, including procedural considerations for meetings, and points that must be regarded when developing a document. To aid those responsible to carry out work with the AIFD, practical notes and a text which expresses that participants of the meeting act in compliance with this Guideline that should take place in the beginning of the meeting attendance list were created, detailing the procedures that should be followed during meetings. Moreover, a number of “disclaimer” examples were provided for use when creating documents.

- The final section of the Guideline discusses ways to assess performance on compliance with the Competition Rules. Attentiveness to the points highlighted in this section will not only support the implementation of recommendations made in the Guideline, but also highlight that AIFD is taking this issue very seriously.

Simple side notes were used across the Guideline in an effort to highlight points that warrant particular attention. The notes reference a point of view that will enable deriving the greatest benefit from the discussion, and from the summaries and examples provided wherever appropriate.

As repeated in several places throughout the Guideline, seeking legal advice is strongly recommended when:

- I. a noncompliance occurs,
- II. there are concerns that a potential noncompliance may arise,
- III. circumstances arise which contradict the clear warnings provided in the Guideline,
- IV. the extent of a particular issue cannot be determined,
- V. circumstances arise which are not provided in the Guideline.

The matters discussed in the Guideline cover a substantial portion of compliance with Competition Rules. However, compliance with Competition Rules involves aspects that entail taking an institutional stand and further actions.

To ensure full compliance with the Competition Rules, AIFD will continue to offer regular courses on competition to train and educate all associates, whether they are an employee or a volunteer.

The main purpose of AIFD's effort to support compliance with Competition Rules is to build an understanding of competition matters both within the association and in the sector.

However, AIFD Competition Rules Compliance Guideline, being only a guidance document, is admittedly not exhaustive, and the advice of an expert should therefore be sought to clarify any ambiguities, and policies should not be implemented until it is established that such policies are compliant with Competition Rules.

Hopefully, the points discussed in this Guideline will be internalized and they will serve as a model for both our members and sector stakeholders, for the benefit of the whole of our industry.

## I. Introduction

The purpose of this Guideline is to provide a source of reference and offer information and practical guidance on compliance issues from an associational perspective of Competition Rules. Associations and unions can play a highly productive and competitive role for the development of an industry, and thereby they can support effective operation of markets.

**Competition rules are particularly important to associations**

However, there have been several cases where some associations operating in other sectors served as a forum to bring together rivals and engaged in practices that resulted in restriction of competition.

Thus, this Guideline aims to provide guidance for conducting advocacy activities preempt legal problems without preventing a competitive environment.

Particular care was taken during drafting of this Guideline to regard the unique characteristics of the pharmaceutical industry, the regulatory power and influence of the government on the industry, and the sensitivity of members to Competition Rules.

Both AIFD staff and volunteers from members who are holding a role with AIFD should carefully read and internalize this Guideline.

**The staff must internalize competition rules**

If uncertainties or issues warranting further discussion arise, legal advice should be sought to provide clarity and no steps should be taken before the matter is completely elucidated. This approach will be particularly important to maximizing the intended benefit of this Guideline.

It will be useful to pay specific attention to sections of this Guideline which provide practical information. Recommendations on developing documents and on the content and format of communications, and the guidance offered on meeting conduct should be followed to the letter.

Any detected instance of noncompliance with the recommendations and warnings laid down in this Guideline should be reported to authorities, and all the precautions should be implemented to the letter.

It is crucially important that every employee of the Association or “volunteer” expert / AIFD Committee member is knowledgeable in the practical implications of Competition Rules. Information on Competition Rules applied in Turkey is provided under the relevant headings in this Guideline, to the extent they are relevant to associations.

To ensure that issues are properly understood, AIFD or its members should attend courses on competition, where necessary, to enhance their knowledge.

For this Guideline to attain its purpose, information contained herein should be implemented, not by interpreting it from a critical point of view, but by trying to internalize the spirit of the recommendations and actions offered herein, and more importantly, any deficiencies or errors identified in the Guideline will be improved over time. In conclusion, complying with the Competition Rules entails a cultural process.

**Legal advice  
should be  
sought, where  
appropriate.**



## II. Purpose and Scope

The Association of Research-Based Pharmaceutical Companies (AİFD) has defined the following main objective in its charter:

**The Association's purpose**

*“...to cooperate with the research-based pharmaceutical industry in Turkey, to broaden access to new medicines, information and technologies with a view to improving health in Turkey, to make any legal applications as may be necessary in this context, and to develop an ethical and open pharmaceutical environment which is typically found in developed countries.”*

As described in the above statement, AİFD needs to collaborate both internally with its members and externally with other sector stakeholders to obtain new drugs, knowledge and technologies with a view to improving health in Turkey. This means that every action of AİFD may be considered to have competitive relevance.

**The nature of relations**

In this premise, AİFD views it as an important priority to ensure compliance with the Competition Rules, and intends to reinforce its position as a leader and beacon of guidance on matters relevant to Competition Rules, as with all the other areas in which AİFD is involved.

The Competition Rules Compliance Guideline will represent a most important instrument for AİFD to achieve this purpose. In this sense, each AİFD employee and member carries responsibility to achieve this goal. AİFD, together with its members, is willing to do its best to support Compliance with the Competition Rules.

**Why Compliance Manual is important**

The content of the Competition Rules Compliance Guideline is prepared based on a number of potentially sensitive areas which may have competitive relevance. Thus, it is essential to internalize both the purpose and spirit of this Guideline.

The Guideline primarily provides general information on Competition Rules. It is important that this section is thoroughly understood by everyone who has a role within AİFD at any level or position, including representatives of member companies.

**Understanding the Compliance Manual**

A most important objective of the Guideline is to provide AİFD with practical information on the following Competition Rules and with guidance on practices and operational aspects.

- In this sense, an effort was made to provide a detailed discussion of Competition Rules in this Guideline, taking account of AIFD’s institutional structure and its relevant organs. To ensure institutional structures, institutional practices and operational aspects are compliant with Competition Rules to the highest extent possible, and any potential competitive sensitivities are addressed at all levels, each organ was defined and practical rules were laid down, which have a competitive relevance.
- To support a practical character, Competition Rules of particular interest were highlighted, which are considered relevant as regards the ways that AIFD should follow, and stances AIFD should take while interacting with its members.
- An effort was made to illustrate the practical implications of Competition Rules using fictional case examples of direct relevance for the industry. The cases were built on particularly striking examples to better convey the implications of compliance with the Competition Rules. It should be remembered that these are fictional scenarios, and each “competition” case should be handled according to its unique circumstances.
- Another important section of the Guideline covers practical rules which should be followed within AIFD, including procedural considerations for meetings, and points that must be regarded when creating a document.
- The final section of the Guideline discusses ways to assess performance on compliance with the Competition Rules.

**Compatibility  
with  
institutional  
structure**

**Interactions  
with  
stakeholders**

**Practices and  
scenarios**

**Practical  
matters**

**Penalties**

Simple side notes were used across the Guideline in an effort to highlight points that warrant particular attention, and summaries and examples were provided wherever appropriate.

As repeated in several places throughout the Guideline, seeking legal advice is warranted when:

**Legal advice is  
important**

- there are concerns that a potential noncompliance may arise
- there is hesitation that a situation has arisen which contradicts the clear warnings provided in the Guideline
- the extent of a particular issue cannot be determined
- circumstances arise which are not provided in the Guideline.

The matters discussed in the Guideline cover a substantial portion of compliance with Competition Rules. However, compliance with Competition Rules involves aspects that entail taking an institutional stand and further actions.

**Institutional  
stand**

To ensure full compliance with the Competition Rules, AIFD will continue to offer regular courses on competition to train and educate all associates, whether they are an employee or a volunteer, including committee members.

**Competition  
training**

The main purpose of AIFD's effort to support compliance with Competition Rules is to develop and maintain an understanding of competition matters both within the association and in the sector.

**Competition  
knowledge**

While several competition terms are used throughout this Guideline, it is considered that providing a detailed definition of each term may confound the content and undermine the intent of this Guideline. To avoid these drawbacks, most terms are used in their simplest form to represent the most common usage in this Guideline. To gain a better understanding of what each of these terms mean, one should attend trainings offered by the Association and/or request clarification by seeking legal advice through the Compliance Officer.

### III. Competition Rules

In Article 167 of the Turkish Constitution, the government is given the mandate to take “measures to ensure regular and robust functioning of money, credit, capital, goods and services markets” and to prevent “monopolies and cartels in the market, whether actual or resulting from an agreement.”

**The  
constitution**

The EU – Turkey Association Council Decision #1/95, adopted with the European Union, contains various provisions that require implementation of European Union Competition Legislation provisions in Turkey to “safeguard effective competition in the markets.”

**European  
Union**

Thus, as both a “Constitutional” requirement and a part of Turkey’s pledges to the EU, a Competition Law was enacted in 1994 to secure competition in our national markets for goods and services.

The purpose of the Competition Law is to prevent agreements, decisions or practices that prevent, disrupt, or otherwise restrict competition in markets for goods and services , and to prohibit undertakings who have a dominant position in the market from abusing their power, introducing the regulations necessary to achieve this purpose with a view to protecting competition.

**The purpose**

The object of the Competition Law is undertakings, and according to the Competition Law, any natural or juristic persons producing, marketing or selling goods or services in a market, as well as any entities constituting an economic whole, which are capable of independent decision are an undertaking. This includes not only every company which fits the above description, but also natural person freelancers or artisans who produce and sell goods and services in the marketplace.

**The object**

The scope of the Competition Law also covers entities which bring together undertakings, such as unions and associations.

**Associations  
and Unions**

#### A. Law on the Protection of Competition

To achieve its purpose, the Competition Law introduces regulatory oversight of agreements, practices or decisions adopted by undertakings operating in markets for goods and services which are preventive, disruptive or otherwise restrictive of competition, of situations where an undertaking having a dominant position in a

market abuses such position, and of mergers and acquisitions that result in a dominant position in a market or that reinforce an existing dominant position.

In this premise, the implementation scope of the Competition Law and of its secondary regulations (“Competition Legislation”) comprise the following main headings:

### **A.1 Prohibited horizontal or vertical relations between undertakings**

Any agreements, concerted practices, or decisions adopted by association of undertakings with the purpose of restricting competition, or leading to the same effect, are prohibited by Article 4 of the Competition Law.

### **A.2 The exemptions**

Article 5 of the Competition Law provides that exemptions to prohibitions laid down in Article 4 may be granted for agreements, concerted practices and decisions between undertakings under specific circumstances, either upon the request of such undertakings or ex officio by the Board, and for specific types of agreements, either on a case-by-case basis or as a group, by notifications to be issued by the Competition Board. There are two types of exemptions: individual or group.

### **A.3 Dominant position and abuse of dominant position**

Article 6 of the Competition Law prohibits undertakings, acting either individually or as a group, from abusing their dominant position.

According to the Competition Law, a dominant position exists when one or more undertakings operating in a market are able to set various economic parameters without regard to their competitors or customers, including price, supply, and production and distribution quantities.

It should be noted, however, that it is the abuse of a dominant positions which is prohibited by the Competition Law, and not the dominant position, per se.

The Competition Law aims to prevent undertakings enjoying a dominant position from using their power to eliminate market competition.

#### **A.4 Mergers and acquisitions subject to permission of the Competition Board**

Article 7 of the Competition Law considers it illegal and prohibits any mergers and acquisitions which are aimed at building or further reinforcing a dominant position in a market and which will substantially deteriorate competition in a market for goods or services in all or a part of Turkey.

In the “Notification #2010/4 on Mergers and Acquisitions Requiring Permission of the Competition Board,” the Competition Board lays down the types of mergers and acquisitions which, to be lawful, must be notified to and approved by the Competition Board.

#### **A.5 Competition Authority**

A “Competition Authority” was established as an administratively and financially autonomous public juristic person to enforce the Competition Law with a view to fostering development of markets for goods and services in a liberal and robust competitive environment.

The Competition Authority is commissioned to perform the duties and functions assigned to it by the Competition Law, within the confines of power granted to it, again, under the Competition Law.

The Competition Authority consists of:

- a) a Competition Board,
- b) an Office of the President, and
- c) various operational units.

In the organizational structure of the Competition Authority, the Office of the President is tasked with representing and ensuring general coordination of the Authority, while the Competition Board, consisting of seven members, oversees compliance with the Competition Law across goods and services markets and takes appropriate steps to address any violations of the Competition Law.

### **B. Prohibited Practices under the Competition Law**

Practices between undertakings are considered a violation of the Competition Law, to the extent they prevent, disrupt or otherwise restrict competition.

Therefore, modern jurisprudence provides regulations for the oversight of practices and actions which may potentially limit competition, in consideration that a competitive environment which must prevail in the markets may be disrupted by certain concerted practices, agreements and decisions of undertakings.

In order for a practice between competitors to fall in the scope of Competition Law, such relation must give rise to, or have the “potential” to give rise to, a “detrimental effect” on competition in a specific “market for goods.”

Note that the Competition Law mentions “a relevant market.”

Thus, it is necessary to determine primarily both the geographical area and the relevant market for goods in such geographical area which were affected by such detrimental effect on competition. In their practice to date when dealing with the Pharmaceutical Industry, the Competition Board has used the ATC (Anatomical Therapeutic Chemical Classification System) as basis.

Any practice, whose purpose or actual or potential effect is to unfavorably effect competition, constitutes a violation of the Competition Law and is thus prohibited.

Therefore, in practice, the first step is to scrutinize the intent of agreement. If it is determined that the intent is restrictive of competition, it may be concluded that the agreement is unlawful, without going into further detail of actual competitive implications of the agreement.

And in cases where it cannot be clearly determined whether the intent of the agreement is restrictive of competition, it is necessary to base such conclusion on the actual impact of the agreement on the market and on competition.

In this premise, it may be concluded that a practice between parties is unlawful where the intent and/or effect of such relation may be potentially detrimental to competition in the future, even if no such detrimental effect exists at present.

## **B.1 Agreements, concerted practices, and decisions**

Under the Competition Law, unlawful practices are classified under three categories of “agreements,” “concerted practices,” and “decisions.”

### ***B.1.a) Agreements***

The term agreement means that parties have “concurred” on specific matters. Thus:

- a. an “agreement” may be unwritten;
- b. being legally binding is not a requirement (includes gentlemen’s agreements).
- c. any formal or informal written, verbal or actual concurrence of intentions may qualify as an agreement, whether or not it has legal implications.

As can be seen, the legal nature or form of a collusive relationship between parties is irrelevant to identifying existence of agreement. The relationship between the parties may be written, verbal, explicit or implied, independent from its form.

#### ***B.1.b) Concerted practices***

A “concerted practice” signifies a situation where undertakings “deliberately restrict” competition by adopting similar behaviors.

From this general definition, we can derive that a concerted practice is a form of coordination which, without evolving to an agreement, practically amounts to a collaboration, deliberately constructed to mitigate the usual risks of competing against one another.

#### ***B.1.c) Decisions and practices of associations of undertakings***

An association of undertakings, whether constituting a formal or informal body, platform, or unity and whether operating under the designation of association, union, federation or confederation, is an entity which brings together natural or juristic persons to voice professional or sectoral needs, to develop on them, and to achieve a common goal. While serving its members is the primary purpose of any association of undertakings, they may also have a political function, including developing industrial and/or professional policies or developing sectoral/professional policies at both national and international platforms.

Associations are closely watched by Competition Authorities as they not only play an important role in enhancing the functionality and performance of the industry they represent, but they provide a forum for bringing together competitors as well.

Organs assembled by undertakings for the purpose of professional solidarity, discussing sectoral issues, undertaking social events and other similar functions are also considered an “association of undertakings ” and subject to Article 4 of



the Competition Law. No decision taken by association of undertakings through their relevant organs may involve any practices which are contrary to the Competition Law. As the matter of detrimental effects on competition from such decisions are discussed under the section of this Guideline on concerted practices and restrictive agreements, this section will discuss admission of members to the association, and dismissal from membership.

The most important point is to be emphasized herein is that: membership in, or dismissal from, an association may be even considered a violation under the Competition Law, if it has a particular detrimental effect on market competition. Therefore, any association of undertakings which brings together competitors must remain at an equal distance to all undertakings operating in an industry. Particular care must be taken to ensure that the admission and dismissal procedures are compliant with the Competition Law. In this context, membership admission and dismissal procedures should be free from any arbitrary elements, and care must be taken to avoid procedures that are inconsistent with current regulations, in particular the Competition Rules. In other words, the criteria must be clear, objective and absolute. Membership should be accessible to everyone who meets the membership criteria, and anyone whose membership application has been declined should be given a rationale for the decision, based on objective criteria, and allowed a recourse for objection. Also, no restriction should be imposed on individual decisions of members throughout their membership; the association's practices should not influence individual business decisions of its members; and any dismissal decision must be based on objective criteria – as with during admission – applied equally to all members, and on reasons which must not be objectionable under the Competition Law.

#### ***B.1.d) Examples of agreements, decisions and concerted practices restrictive of competition***

Certain types of agreement are considered a “hardcore violation” and are thus always prohibited, including mainly:

- direct or indirect fixing of prices;
- fixing of purchasing terms;
- exchange of confidential information of competitive relevance between competitors;
- partitioning/sharing, controlling or limiting markets;
- partitioning /sharing sources of procurement;
- controlling or limiting production;

#### (B.1.d.1) Fixing prices and other terms of sale

In Competition Law, “price fixing agreements” are considered the most typical and objectionable type of a restrictive arrangement.

The provisions of the Competition Law covers not only directly fixing of prices, but also other factors that have an indirect bearing on the price, such as costs, margins, and even the transaction terms.

It is a most essential rule of market economy that prices can be formed freely according to market dynamics, without any outside intervention.

Therefore, from a perspective of relation between competitors, there is no doubt that competing undertakings’ coming together to fix prices or other terms of sale, or to adopt a common set of behaviors, will have restrictive implications on competition.

#### (B.1.d.2) Partitioning/Sharing markets

Another case of a restrictive arrangement, addressed in the Competition Law, is “partitioning/sharing markets for goods or services, and sharing or controlling all kinds of market resources or elements.”

The same provision regulates not only partitioning of markets for goods or services, but also sharing of any market resources or elements. For instance, partitioning of commodity markets or customers or geographical markets between undertakings may qualify as an act of partitioning market elements.

And partitioning of sources of procurement occurs when undertakings collude to maintain control of channels, such as those of raw materials or semi-products, through which a product can be procured. For example, any instance of undertakings joining forces to control entry of raw materials, or agreeing on carrying out production, distribution or selling activities of products through specific undertakings are typical acts which constitute partitioning.

#### (B.1.d.3) Controlling supply and demand

The third restrictive act addressed in the Competition Law is “controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,” which relates exclusively to lateral relations.

The economic science requires prices to form freely, depending on supply and demand dynamics in a free market.

Thus, any outside intervention in these factors will represent an intervention in the price and in the functionality of free competition.

Therefore, from the perspective of Competition Rules, any exposure of supply and demand, and indirectly the price, to intervention by undertakings will constitute a clear violation of free competition in that market.

#### (B.1.d.4) Discriminatory Practices

It is considered “discrimination” when multiple undertakings collude to apply different terms and conditions to persons of equal standing, for equal entitlements, obligations and liabilities.

The Competition Law, however, does not bar discriminative policies of an undertaking, where such an undertaking does not have a dominant position and the policies are adopted through individual decisions of such undertakings.

What is prohibited by the Competition Law is several undertakings’ colluding to discriminate against persons of equal standing.

This provision concerns situations where multiple undertakings collude to artificially alter competitive conditions for other undertakings with whom they engage in a business relationship.

#### (B.1.d.5) Demanding unusual obligations

It is considered a violation of the Competition Law when competitors collude against other undertakings whom they engage in a business relationship, in order to force them to purchase other goods or services alongside a specific product or service, against agreement and against common commercial practice, or to make it a condition to showcase other products or services, for selling a product or service to a reseller which such reseller wishes to purchase, or to impose conditions on the resale of supplied products or services.

## **B.2 Exchanging information**

### ***B.2.a) Introduction***

Information exchange is a most delicate matter under the Competition Law, right next to agreements, concerted practices and decisions and practices of association of undertakings. In undertaking or planning their activities, undertakings are prohibited from sharing information which reduces or eliminates market

uncertainties or which have or may have impact on independent decision making of undertakings, with implications detrimental to competition.

The main reasons why competition authorities focus on information exchange is that such arrangements facilitate collusive conduct, by enabling monitoring of competitors' activities.

In terms of applicability of Competition Rules, information exchange may take place in one of two ways. In the first form, the exchange takes place directly between undertakings, while in the second form, information is collected by a central sector organization, or a private undertaking, and then distributed to members in the agreed format and frequency.

Information exchanged between undertakings in one of these two ways may comprise various forms of data, including individual or collective information, where individual information means data relating to a single undertaking whose identity is specified or who is otherwise identifiable, and collective information means data on at least three undertakings. On the other hand, data on only two undertakings and data exchanged through a system where, although the data relates to a larger number of undertakings, participants can extract data of individual undertakings are not considered collective information.

Under the Competition Law, serious differences exist between cases of information exchange which are adjunct to prohibited activities listed in Article 4 of the Law and situations where the exchange of information solely involves sharing of statistical data on a sector. Competition authorities prohibit and harshly penalize information exchange conducive to practices that disrupt competition, but they encourage exchanges for statistical purposes.

### ***B.2.b) Information Exchange – Evaluation Criteria***

Evaluation of information exchange under Competition Rules depends on (1) Market structure, (2) the type the information exchanged, and (3) the frequency of exchanges.

We understand that competition authorities are not seriously opposed to distribution of statistical information by professional organizations or research companies, even if the figures are broken down, to the extent such information excludes any possibility of identifying individual undertakings making up the data. However, exchange of individual data in an organized manner relating to specific undertakings' value creation or quantities or sales, price and discount terms, lowest and highest rates applied, credit ratings and general terms of sale, delivery or payment is prohibited, as it involves elements and effects that may

restrict or diminish competition in practice. Any evaluation of an act of information exchange to determine whether it is acceptable must be based on a case-by-case analysis, and take account of the nature of the relationship between the undertakings involved, the structure of the market, and the nature of the information that was actually exchanged.

In conclusion, we must underline that information exchange falls within the scope of Competition Law, and particular care must be taken with exchange of “strategic” information between competitors, as it will certainly constitute a violation of the Competition Rules. Exchanging information can impact on the market in one of two ways: it may either increase competition due to increased flow of information, or it may lead to coordination between undertakings which may have disruptive implications for competition.

Evaluation of information exchange under the Competition Law should separately take account of the market structure, product market, the nature of information, the way of information exchange, the place of information exchange, the time interval covered by the information, and with whom the information was exchanged.

### **C. Dominant Position and Abuse of Dominant Position**

The Competition Law defines dominant position as the ability of an undertaking to prevent effective competition and determine price, supply, demand, distribution and technological development in a market, without regard to its competitors, suppliers and customers.

Every undertaking aims to achieve a leader position and dominate in their field. Note that the Competition Law does not prohibit undertakings from achieving a dominant position.

What is prohibited is the abuse of such position of domination.

It is unlawful and prohibited for one or more undertakings to abuse their dominant position, whether achieved alone or by joining forces with other undertakings, through practices which they take alone or together or in agreement with others.

After giving this broad definition of prohibition, the Competition Law lists examples of “abuse.”

To establish “dominant position,” the product market in question should be:

- reviewed to determine the products that constitute the relevant market, and whether the product or service in question can be substituted by other products and services, from both a supply and demand perspective; and
- reviewed to determine the geographical area through which the product in question is marketed.

Although market share is the first consideration in determining whether a dominant position exists, it certainly is not the sole determinant.

It should also be explored whether the undertaking possesses a certain degree of market power in the product market concerned.

Competition authorities determine whether one or more undertakings have a dominant position after technical analysis, taking account of a company's technological, brand-dependency and financial situation, the extent of its distribution channels, the variety of its product range, and competitive advantages, such as vertical integration capabilities, as well as existing and potential competition in the market, with consideration to barriers to market entry – due to legal reasons or market dynamics or competitors' behavior – and companies' absolute and relative market shares and supply and substitutability considerations.

After it is established by the competition authority that a dominant position does exist, any behavior that seriously and unfairly prevents competition is regarded as an act of abuse.

Typical examples include:

- Preventing market entry, and making it more difficult for competitors to operate
- Discrimination
- Conditional selling/tying
- Abusing a dominant position one has in a market, in another market
- Limiting production, marketing and technological development to the detriment of consumers
- Refusing to supply
- Unfair pricing
- Applying discount systems, exclusivity – loyalty premiums and other binding agreements.

Notably, the above examples resemble examples of agreements made among undertakings which are disruptive of competition, the difference being that it is

now a single undertaking, rather than a group of undertakings, who enjoys a dominant position.

## **D. Implementation of the Competition Law by the Competition Board**

### **D.1. Exemption**

The Competition Law authorizes the Competition Board to evaluate and grant exemption – whether on an individual basis, or through a Notification – for a relationship where, although prohibited or may be prohibited under the general rule, the restriction in question is favorable to consumers, and for market and technological development.

#### ***D.1.a) Individual exemption***

Individual exemption is granted by the Competition Board upon the request of the concerned (the request is made using the “Negative Clearance / Exemption Notification Form”) or upon an ex officio assessment of the Board, with regard to a relationship which is restrictive of competition under Article 4, but which fulfills all of the conditions listed under Article 5.

By a decision to grant individual exemption, the Board exempts a specific agreement, concerted practice or decision from penalty, which the Board has been notified about or has otherwise become aware of.

With the granting of an exemption, invalidation, administrative fines and compensation defined in Competition Law under the legal sanctions regime are no longer applied against the agreement, decision or concerted practice for which an exemption had been granted.

An individual exemption may be granted indefinitely or for a limited period of time.

#### ***D.1.b) Block exemption***

In addition to individual exemption, the Competition Law also provides for block exemption, regulated with Notifications from the Competition Authority.

Agreements and decisions that meet the criteria of Block Exemption Notifications issued by the Board are automatically considered compliant with the Competition

Law and enjoy exemption, without having to submit a specific notice to the Board.

Thereby, the system grants protection for these types of agreements from regulatory sanctions, including invalidation, compensation requirement and administrative fines.

Since its inception, the Board issued block exemption notifications, amongst others, for Vertical Agreements, for Vertical Agreements and Concerted Practices in the Motor Vehicles Industry, for Technology Transfer Agreements, for the Insurance Industry, and for Research and Development Agreements.

## **D.2. Investigation Process**

### ***D.2.a) Directly Launching of an Investigation***

The Competition Board may directly launch an investigation when it receives a notification or complaint regarding a situation disruptive of competition, or when it identifies a violation ex officio.

In this case, media releases and reports play an important role.

### ***D.2.b) Preliminary investigation***

The Competition Board may decide to directly launch an investigation, or to undertake a preliminary investigation to determine whether the circumstances warrant launching an Investigation.

If a preliminary investigation is decided, a rapporteur is appointed to conduct the preliminary investigation, and to report his or her opinion to the Competition Board in writing within 30 days, together with all the information and evidence supporting his or her view.

Within 10 days after submission of the preliminary investigation report to it, the Board meets and evaluates the information submitted to decide whether launching an investigation is warranted.

### ***D.2.c) Investigation procedure***

When launching an investigation, the Board appoints the rapporteur(s) who will conduct the Investigation under supervision of the relevant department head. An



investigation must be completed within six months. Where necessary, the Board may grant an additional six month extension for one time only.

The Competition Law grants the investigation subject the right to submit three written and one oral statements of defense. The clock on the first written defense statement starts when the Board sends the relevant parties a notice, attached with sufficient information on the type and nature of the allegations.

#### ***D.2.d) Information request***

In fulfilling its mandate under the Competition Law, the Board may require any public agency or institution and private undertaking or union of undertakings to submit information needed by the Board (Competition Law Article 14).

Undertakings are required to present the Board with the requested information within the prescribed deadline. Otherwise, the Board is entitled to impose an administrative fine under Article 16.

#### ***D.2.e) On-site audits (Dawn-Raids)<sup>2</sup>***

##### **(i) On-site Auditing Authorization of the Competition Board**

According to Article 15 of the Competition Law, in fulfilling its mandate the Competition Board is authorized to perform “on-site audits” when it deems necessary.

Under this mandate vested in the Board by the Competition Law, experts and assistant experts appointed by the Competition Board (hereinafter referred to as “experts”) may conduct on-site audits in connection with:

- a pre-investigation, or
- an investigation, launched by the Competition Board.

To perform an on-site audit, Experts may visit:

- undertakings or
- associations of undertakings.

Experts may:

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<sup>2</sup> On-site audits are a delicate matter for any undertaking or union of undertakings, and an explanatory note is provided in Appendix 1 hereto, detailing the main rules that must be followed by undertakings during an on-site audit.

- review and take copies of any documents or records of undertakings or association of undertakings;
- require undertakings or association of undertakings to provide a written or oral clarification on a specific matter; or
- visit any physical premises of undertakings to examine their assets, including any virtual media where data and information are stored (e.g. computers, external disks, or servers).

## IV. Corporate Governance

At the time this Guideline was being drafted, AIFD was operating via the following committees and working groups.<sup>3</sup>

All groups and committees operating within AIFD act according to Competition Rules and fully recognize the importance of complying with them.

As the groups and committees operate within and work for AIFD, their work and the content they create is always subject to revision by AIFD.

When AIFD:

- modifies the mandate of a committee, it will be ensured that the new job description and all activities are compliant with the Competition Rules.
- forms new committees, it will be ensured that the mandate and activities of such committees are also compliant with the Competition Rules.

The following groups and committees are currently operational within AIFD:<sup>4</sup>

- Board of Directors and General Managers Meetings
- Strategic Management Committees
- Specialist Committees
- Working Groups

General rules for Board of Directors and General Managers meetings are described in this Guideline under the section titled Meetings. The mandate of the Board of Directors consists of elements described in the Association Charter, and it has been determined that the Association Charter contains no elements which may be objectionable under Competition Rules. Moreover, there is consensus on the Board of Directors to not include in the agenda nor discuss matters which may be delicate under Competition Rules. In this respect, in case of any uncertainty, advice on compliance with Competition Rules should be sought to ensure that the matter is handled in a manner commensurate with its importance.

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The terms “committees and working groups,” “committees” and “groups” include all groups operating within AIFD which bring together competitors to fulfill a technical or commercial function which is compliant with the Competition Rules.

It has been necessary to vest the current AIFD management and administrative staff with some new duties to ensure compliance with Competition Rules. In this respect, two specific functions need to be highlighted.

#### **A. COMPLIANCE EXECUTIVE/OFFICER**

Implementation

The compliance officer has three main functions:

- Enforcing Competition Rules within AIFD
- Enforcing Competition Rules in AIFD's relations with third parties
- Fulfilling the roles prescribed in this Guideline for compliance with Competition Rules.

Legal  
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In fulfilling these functions, the compliance officer needs to utilize appropriate consultancy services to ensure a most optimal competitive standing. The compliance officer is also responsible to provide internal organs with both administrative and practical developments.

Other important roles of the compliance officer include:

- ensuring regular and continual training of personnel (both staff and volunteers);
- developing and maintaining awareness of competition matters across the association;
- ensuring proper conduct of relations with outside parties;
- monitoring the secretariat to ensure administrative functions are fulfilled as expected, and taking appropriate action when a deficiency is detected.

The Secretary General and Compliance Officer are responsible to ensure that the purpose, agenda and content of any meetings of the Board of Directors and General Managers are developed taking account of Competition Rules.

Implementation

#### **CONSIDERATIONS FOR BOARD OF DIRECTORS AND GM MEETINGS:**

- These high-level meetings represent the most delicate type for compliance under Competition Rules.
- At these meetings, particular care must be taken with both the expressions used during discussions and meeting notes, and the unity of practices and actions resulting from such meetings.
- For every meeting where the agenda contains items of particular competitive sensitivity, it is important to seek legal advice and ensure availability of an

Legal  
Consultancy

expert during the meeting to consult on matters relevant to compliance with Competition Rules.

- Every aspect discussed in this Guideline under the section titled Meetings should be regarded during the meetings.
- The responsibility to ensure compliance with all prescriptions of this Guideline ultimately rests with the Board of Directors.

Other groups and committees, the leadership of the group concerned, or members specifically designated for this purpose, are obligated to ensure the practices described in this Guideline are followed for compliance with Competition Rules.

## **B. SECRETARIAT**

**Implementation**

The secretariat has three main roles, in terms of compliance with Competition Rules:

- Keeping a regular record of internal and external reports and communications, and notifying the Compliance Officer when necessary.
- For the meetings:
  - Arranging the time and place of meetings;
  - Ensuring that appropriate records are kept during the meetings (i.e. meeting attendance, agenda, and meeting notes) on the basis of the associations;
- Notifying the Compliance Officer if any deficiencies in the mandatory records are detected.

## **C. STRATEGIC MANAGEMENT COMMITTEES (“SMC”)**

Strategic Management Committees (SMCs) usually consist of senior executives from companies or AIFD executives to work on areas of specific interest to AIFD. Considering the importance of their work for AIFD, SMCs handle issues which carry competitive sensitivity and are therefore required to follow Competition Rules to the highest extent possible. Some of the important functions of SMCs include developing position papers, identifying communication messages, and creating communication plans for AIFD. For example, three Strategic Management Committees, recently formed in line with the recommendations of a study by the BCG, discussed the main strategy for AIFD’s efforts and developed alternatives. At every stage of their work, the topics were filtered for compliance with Competition Rules. Strategic Management Committee for Access, Strategic Management Committee for a Financing Model, and Strategic Management Committee for the Investment Environment, and their

respective roles, are described in detail on AIFD website and in the Charter, which is also available on the website.

The following considerations apply for Strategic Management Committees:

- Every committee must be led by a committee head, who is directly responsible to ensure compliance of committee work with Competition Rules.
- Every committee head must undergo training on Competition Rules, either at the association or at his or her company, and take account of this Guideline in his or her activities.
- Where necessary, the committee head should notify and collaborate with the Compliance Officer on matters related to compliance with Competition Rules.
- In the event of uncertainty, the committee head should consult the Compliance Officer for clarity, to exclude any possibility of noncompliance.
- The committee head is also responsible to implement the actions described in this Guideline under the section, titled Procedures.

## **D. SPECIALIST COMMITTEES AND WORKING GROUPS**

### **D.1. SPECIALIST COMMITTEES:**

Solution proposals developed by AIFD specialist committees carry particular value in the implementation of new decrees and notifications, and in development of specific directives and guidelines. Specialist Committees also provide technical input for Strategic Committees.

### **D.2 WORKING GROUPS:**

Essentially, these are a group of members that come together and work on regulatory and access issues, supporting their projects using own resources. As these groups are formed by volunteers on a discretionary basis, it is important to specify some general guidelines.

The following main guidelines apply to Working Groups:

- Leadership and secretariat of a working group should be appointed among its members.
- Working groups are to discuss only matters of general concern.

**Implementation**

- Business matters cannot be discussed at working group meetings. The responsibility to identify competitive sensitivities and obtain appropriate support lies with the group leadership.
- AIFD leadership must be notified of any decisions for practices adopted in line with the working group's purpose, regarding Regulatory, Pricing and Reimbursement matters.
- The same requirements laid down in this Guideline for meetings must be followed for working group meetings. Further, any content generated by the working group during meetings must meet the requirements described in the section herein on procedures.
- Information and meeting notes from any meetings held at or on behalf of AIFD must be shared with AIFD leadership.
- When actions contemplated by a working group requires funding, the group should solicit Associations to raise support, and vendors should be instructed to directly invoice the sponsor.
- Working groups may make a request with AIFD leadership to form an e-mail group, and hold meetings by giving notice to the secretariat.

A description of Specialist Committees and Working Groups, and of their respective roles, are described on the AIFD website, and detailed in the Charter, which is also available on the website.

## V. Competitive Relations

### A. Internal Governance and Relation with Members

Implementation

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Associations are entities that bring together competing undertakings, and because they provide a common forum for competitors, they receive specific attention under competition rules. An association must make sure that its activities are conformant to its purpose and vision, and take utmost care to uphold competition and ensure compliance with Competition Rules to the greatest extent possible. .

Relations with members is an important part of the practices which are based on this essential principle.

As regards compliance with Competition Rules, relations with member companies can be classified under three main headings:

- Admission and dismissal
- Information exchange
- Concerted practices

These aspects were covered above, under the section dealing with Competition Rules.

Under no circumstances may the conduct of an association be incompliant with the rules in performing any of the above functions. Otherwise, it may expect to face accusations and penalties, if a violation is established.

#### **Main rules for engaging members:**

- Every member must maintain its independence, particularly on business matters, and take business decisions in an independent manner, as Competition Rules require them to take their decisions as independent entities.
- Internal competitive behavior within the association can be discussed under two main headings:
  - Non-business/financial Matters: Examples of non-business matters include issues that do not directly impact on dynamics of competition, such as technical regulations or standards. In so far as it remains at technical level and excludes any information on competitors, such discussions are unlikely to trigger any competitive sensitivities. However, it may not be possible to clearly categorize every specific issue, in which case legal advice must be consulted.



- **Business/financial Matters:** Under no circumstances should business matters be discussed among competitors (association members). However, since pharmaceutical industry is subject to close oversight, there may be cases where a government agency directly asks disclosure of opinion on a business matter. In that case, it must be ensured that any action taken is guided by appropriate legal advice.

## **B. Relations with other Associations**

**Implementation**

By virtue of its position, AIFD is in contact with other sector organizations in the vertical or lateral plane. The lateral plane includes other associations or unions representing undertakings which may qualify as a competitor, and the vertical plane includes unions representing distributors of goods or services.

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These contacts include, often with the involvement of government agencies, discussion of government regulations and/or forming of a position, and exchanges on the current situation of the sector or potential future concerns.

In its horizontal relations, AIFD should avoid any conduct which may be in violation of any rules governing relations with competitors, or which may constitute a prohibited act under the Competition Law, which are discussed under the relevant sections in this Guideline. To outline, the following types of relations with other associations must be avoided, on both the horizontal and vertical plane:

- Any communications which may be construed as a direct or indirect fixing of prices,
- Sharing information which may be considered commercial or strategic,
- Discussing prices, cost components (e.g. term, discounts, bonuses, or free goods), commercial terms, production, stocks, partitioning of regions or products, or exclusion of specific competitors,
- Participating in tenders or boycotts, or similar actions.
- Appropriate legal advice must be consulted for any projects involving a joint transaction of purchase, sale or commercialization.

Particular care must be taken when forming an opinion through meetings with other, potentially competing associations operating in the lateral plane, ensuring always that any correspondence with such associations remains within the confines of Competition Rules.

### C. Relations with Service Providers

To achieve its purpose, an association may purchase services from several providers. However, both the manner by which the services are purchased and the output so generated must remain within Competition Rules.

For AIFD, there are two major types of service providers. The first type is vendors who collect information and data from the market on AIFD members and commercialize such information. The activities of these types of vendors are important from a competitive perspective, since in some cases the information compiled may include business or non-business information of competitors.

While the responsibility for the manner by which a vendor collects and uses or distributes such sensitive information and data primarily rests with the vendor, AIFD should nevertheless take account of the following considerations when dealing with such vendors:

- Most importantly, AIFD should never and under no circumstances have any role in the distribution or sharing of data collected by such vendors.
- AIFD may – within Competition Rules – purchase information from vendors to achieve its purpose and vision, provided such information includes no company details. Where it is necessary to include company details, such information must not be shared with members under any circumstances, and legal advice should be consulted to gain clarity on whether to collect such information in the first place, whether to retain them at the association, or whether to use them.

The second type is vendors who prepare opinions and proposals from whom AIFD purchases consultancy services. These vendors usually support AIFD on benchmarking, ideation and content development, and strategy development. Any purchase of services from these vendors should take account of the following considerations:

- Helping to ensure optimal conduct of relations with outside parties.
- The scope of services purchased should be clearly and unambiguously defined and respected at every stage of the process.
- Only public information of members should be shared during relations with these entities.
- When it becomes necessary to disclose nonpublic information, legal advice must be sought, and how this information will be used and where it will be stored should be clarified. If the information will be published, first it should be ensured that nonpublic information are collected and stored by a third party, and any data to be published is sufficient solely to provide a general

picture of the issue in question, never including any data on individual members.

- On the other hand, in the course of such studies it may be necessary to exchange views on specific scenarios. Even if the discussion relates only to a fictional scenario, legal advice should be consulted to address any hesitations or concerns.
- It is not objectionable to obtain and/or publish a work which is conducted based on legal advice and whose content is within the agreed scope.

In the above types of transactions, or in other transactions for purchasing or selling goods or services, care should be taken of competitive restrictions such as exclusivity, noncompetition or duration, and legal advice should be sought where appropriate to clarify any uncertainties.

#### D. Relations with Government Agencies

Implementation

The pharmaceutical industry operates in an environment where relations with government agencies carry utmost importance. The government uses its regulatory power to closely supervise both sectoral activities and most competitive dynamics, and leverages its position as the largest buyer and consumer of goods and services when negotiating with the pharmaceutical sector.

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From a regulatory perspective, AİFD conducts its relations with the state on the basis of mutual cooperation, giving its opinion, where appropriate, regarding regulations the government has put into force, or intends to do so. And developing such opinions may involve collecting data and information from member companies. In such a case, AİFD must take special care of Competition Rules.

Considering that most competitive dynamics are controlled and regulated by the government, it should be considered natural for AİFD to engage in lobbying activities on these issues. In some countries, lobbying activities are excluded from Competition Rules, which, however, is not the case in Turkey. Thus, adopting, when necessary, a common stance in conducting lobbying activities is the most likely problem area in terms of Competition Rules.

Any stance taken against government control of competitive dynamics must be compliant with the Competition Rules.

Independent decision of member companies must not be precluded.

- Member companies who, in acting on their independent decision, choose to deviate from the AİFD line may not be punished by penalties, or by dismissal from membership.

- In these situations, the opinion of AIFD should be strictly of an advisory nature. No actions aimed at influencing independent decision of members may be taken under any circumstances whatsoever.
- When the AIFD and its members happen to agree on a specific matter regarding relations with the government, and thus adopt a common stance, it must be ensured that such decision is supported by legal advice, taking account of the circumstances of the issue and any practice taken must be compliant with the Competition Rules.

## VI. Scenarios

As can be derived from the heading, the following scenarios are fictional events, created based on specific assumptions and exemplified to ensure a better understanding of specific topics in competition law. Hypothetical events inspired by past rulings were created, which may potentially arise in the sector. None of the scenarios depicted below are based on any observation, experience, conclusion or actual event.

From the perspective of Competition Rules, as these examples may have differences in terms of the market structure, operational undertakings, and the course of events, each instance of competitive relevance should be evaluated by experts and any decision should be based on such evaluations, even when an actual event closely resembles the scenario depicted herein. Interpretation of Competition Rules has both static and dynamic aspects, and not every two case may be necessarily comparable.

## SCENARIO 1:

**Scope:** Relation with members, Membership conditions

**Legal Scope:** Competition Law Art. 4, Restricting Competition

### **Incident:**

The Association's Charter provides the following under the section on Admission to Membership:

*“Any natural or juristic persons who wish to become a member must:*

*a- submit a written application;*

*b- be recommended by two members who have been a member for not less than two years;*

*c- not have any obstacles under the Law on Associations and the Civil Code, which precludes them from becoming a member;*

*d- have nothing in their past record which constitutes an activity that is detrimental to industry's image, or considered an act of unfair competition, or disruptive of fair competition in the market.”*

An executive from a company which has been actively operating in the industry for the past 20 years applies for membership, and receives the following response from the association:

Dear .....

We thank you for your interest in becoming a member of our association. Your application was given consideration during a board meeting on ..... and rejected, taking account of your recent practices in the market and your conduct during public tenders, which were considered indicative of your incapacity to demonstrate associational solidarity.

### **Assessment:**

Membership should be accessible to all natural or juristic persons who meet all legal requirements to become a member. And the decision to accept a person into membership, or to dismiss one from membership should be based on legal grounds. Aggressive competitive behavior in the marketplace or disinclination to stand in solidarity with competitors at the association level, in other words, engaging in competition within the confines laid down by the Competition Law,

must not disqualify a person from becoming a member. Any action to the contrary would be unlawful.

**What to do:**

- Membership should be open to everyone who meets the legal requirements.
- Denying membership unfairly or on the grounds of competitive behavior may constitute a violation of the Competition Law.
- Any provisions which are incompliant with the Competition Law, or which may be construed as such, must be removed from the Association's Charter.
- Anyone should be allowed to become a member, in so far as they meet the legal requirements within the confines of the purpose and limits laid down in the Charter. Membership must not be denied without justification, or in a manner which may be interpreted as a violation under the Competition Law.

## **SCENARIO 2:**

**Scope :** Relation with members, Decisions of the association

**Legal Scope:** Competition Law Art. 4, Restricting Competition

### **Incident:**

At a board meeting on ....., it was resolved to retain an independent research company to investigate the commercial terms that member companies apply to wholesalers.

The report issued by the research company highlights that commercial terms applied by member companies varies widely.

At a board meeting where this report was discussed, a decision has been taken to harmonize the discount rates, payment terms and various other commercial terms applied to wholesalers.

### **Assessment:**

Commissioning of a survey may be acceptable, as it is aimed at gaining a better understanding of sectoral dynamics. However, using the findings of such study to resolve on concerted practice by members on a business matter is in violation of the Competition Law. It is very likely that such a practice would result in both the association and its members being penalized by the Competition Board.

### **What to do**

An assessment from a competitive perspective should be performed, and competition experts should be consulted, before proceeding with collecting data and launching a sectoral survey.

Members of the association must not come together to form a common business practice, nor should they engage in any discussion relating to these matters, nor take a decision or action thereon.



### SCENARIO 3:

**Issue:** Relation with members, Decisions of the association

**Scope:** Competition Law Art. 4, Restricting Competition

**Incident:**

A member of the association sends the following e-mail to other members.

*From: .....*

*Subject: Urgent action*

*Date: May 2, 2012 4:16:36 PM*

*To: all.members@association.org*

*Dear colleagues,*

*The decisions taken by professional organizations in provinces ..... carry serious implications for all of us. Being an association means displaying a united stand at times like this. Therefore, let us not be cowed by such practices which will fundamentally alter our commercial terms, and let us counter them with commercial terms of our own.*

*Let us not remain silent, and let us act!*

*Sincerely yours,*

**Assessment:**

The nature of the decision to be adopted by the association would be highly relevant in the above illustrated case. It is against the Competition Law for member companies to agree on taking concerted practice against professional chambers, and would very likely result in both the association and its members being penalized by the Competition Board.

However, it should be noted that it will not be objectionable under the Competition Law if members reach an agreement to take legal action against professional chambers – rather than agreeing on common commercial terms in retaliation – and take class action against the offender, or seek recourse with relevant government agencies via the association leaders.

**What to do**

Members of the association must not act together to apply common commercial terms, nor should they engage in any discussion relating to these matters, nor take a decision or action thereon .

#### **SCENARIO 4 :**

**Issue:** Relation with government agencies, Decisions of the association

**Scope:** Competition Law Art. 4, Restricting Competition

**Incident:**

At a meeting of the Intellectual Property Rights Committee, held at the association, concerns are voiced regarding the lengthiness of the review process of applications made to the Turkish Patent Institute, and a decision is taken for all member companies and the association leadership to take a united stand to press for reducing the review times.

**Assessment:**

Initiatives similar to the one illustrated above, which would be raised with any government agency, including without limitation the Ministry of Health, the Medicines and Medical Devices Agency of Turkey, the SGK, and the Competition Authority, are not objectionable under the Competition Law.

**What to do**

It is a primary role of an association to raise issues with government institutions, whether for the benefit of their members or the entire industry, and nothing in the Competition Rules prohibit such collaborative practices.

## **SCENARIO 5:**

**Issue:** Relation with members, Decisions of the association

**Scope:** Competition Law Art. 4, Restricting Competition

### **Incident:**

A decision taken by a professional organization, with dominant position over the whole of the retail distribution chain in the sector, includes the following statement:

*“until distributors and manufacturers revise their payment terms and discount rates in our favor, we will not purchase products from companies who refuse to make such revision, and we will penalize our members who purchase their products...”*

After the above decision is posted on the professional organization’s official website, the association’s board of directors meets and discusses the following issues:

- As refusing to purchase products and imposing sanctions on members are prohibited acts under the Competition Law, a complaint will be filed with the Competition Authority against the Organization’s conduct and practices;
- Considering that it would take time for the process with the Competition Authority to yield any results, all trade discounts by manufacturers will be withdrawn, as a show of unified stand against these acts.

### **Assessment:**

According to 4th Article of the Competition Law, agreements and concerted practices among undertakings, and decisions and practices of association of undertakings which have as their object or effect or likely effect the prevention, disruption or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. Therefore, such decision of a professional organization to not purchase products or to impose sanctions against members is in violation of Article 4.

It is possible for all member companies of the association to take legal action against such decision, whether acting individually or jointly – upon adopting a decision therefor – or through the association, and such action is not objectionable under the Competition Law.

However, if members of the association take a unified stand where all of them apply the same discount rate or withdraw trade discounts all together, such practice would put the Association in breach of the Competition Law, no less than the offending professional organization, although it should be remembered that there is nothing that prevents individual companies, acting on their individual discretion and business expediencies, to reconsider their commercial terms. What is prohibited by the Competition Law is for undertakings to engage in concerted practice or enter into an agreement to collectively take such action, in violation of the Law.

### **What to do**

1- Complaints raised with government agencies, like the Competition Authority, for members or for the sector is a lawful recourse, and such collaboration is not in any way prohibited under Competition Rules.

2- However, members of the Association should avoid coming together to establish a common business practice, as illustrated in the above scenario, and should not engage in any discussion of any matter relating to common business practices nor take or implement decisions to that effect. Members should always act independently when taking a decision on a business matter.

## **SCENARIO 6 :**

**Issue:** Relation with government agencies, Decisions of the association.

**Scope:** Competition Law Art. 4, Restricting Competition

### **Incident:**

In a letter sent to the Association by the Authority, reference is made to certain members of the Association who refused to grant the discounts provided under a protocol entered into between the Association and a Head of Union, the Minister of Finance and the Minister of Labor and Social Security, governing “General guidelines for a protocol to be executed for drug purchases of government agencies,” and the Association is asked to take steps to make those companies abide by the protocol.

Meeting to discuss this issue, the Association’s Honor Board asks the companies to abide by the protocol, and warn them that they are acting contrary to customary conduct of the Association, which requires members to honor the protocol. One of the member companies complies with the Honor Board’s decision, but the other one refuses to comply, on the grounds that the decision of the Honor Board is related to a business matter. Because the member company persistently refuses to honor their decision, the Honor Board suspends the company’s membership and the Board of Directors ratifies this decision.

### **Assessment:**

The pricing manner of medicinal products at every stage of production, importation and marketing is regulated by the legislation. But the discounts applied to government agencies and institutions on their drug purchases is purely a business agreement, binding on the parties concerned. According to customary business practice, such agreements can only be modified upon mutual agreement of all counterparties. An association’s providing guidance to its members regarding trade discounts, or applying pressure on members or penalizing them for failing to honor Association’s commitments are prohibited acts under the Competition Law, and represent a violation of Article 4 thereof.

### **What to do**

Instead of applying pressure on members, the Association should send a response letter to the Agency concerned, explaining them that calculation of discounts is a business matter which must be decided independently by individual members, and that the Association has no power over its members on matters of business.

## **SCENARIO 7 :**

**Issue:** Association and its members, Work undertaken at the Association

**Scope:** Competition Law Articles 4 & 6; Restricting Competition & Abuse of Dominant Position

### **Incident:**

Studies undertaken by the relevant committee of the Association reveals that discounts requested by the government side create a serious burden on companies' budgets, and the committee recommends the Board of Directors to take an advisory decision to "not grant discount on products without a marketed generic."

At a board meeting where the issue was discussed, the following resolutions are adopted:

- 1- No trade discount will be granted on products without a marketed generic.
- 2- A committee will be assembled to monitor implementation of the decision in the marketplace.
- 3- Each member will deposit TL 1,000,000 in a pool to be created by the Association.
- 4- Members failing to abide by the decision will be penalized by forfeiture of their deposits, recorded as revenue for the Association, and such member will be obligated to deposit TL 1,000,000 into the pool again.

### **Assessment:**

- 1- The decision to not grant a trade discount on products without a marketed generic is restrictive of competition and prohibited under the Competition Law.
- 2- The pharmaceutical companies have a dominant position, as they hold 100% market share for products without a generic. Thus, it is very likely that they will face an accusation of abusing their dominant position.
- 3- Forming a committee to monitor compliance with the decision and introducing a penalty against members are factors that aggravate the violation.

### **What to do**

- 1- Members of the association should avoid coming together to discuss or agree on setting commercial terms, and the Association should avoid adopting a decision to that effect.

2- Any decision regarding products without a marketed generic which involves a business practice, including without limitation free product policies, bonuses, rewarding systems, or campaigns, must be based on the advice of a competition consultant, even if the decision is an individual one.



## **SCENARIO 8 :**

**Issue:** Relation with other associations, Collaborations

**Scope:** Competition Law Art. 4, Restricting Competition

### **Olay:**

Heads of two associations, both operating in the pharmaceutical industry, enter into a protocol for undertaking a joint effort to initiate a common lobbying effort on GMP (Good Manufacturing Practice) issues, and a joint study into simplifying the patent application procedures and determining the sponsorship criteria for scientific meetings.

### **Assessment:**

Collaboration between associations which do not result in restricting competition in the marketplace, including without limitation lobbying efforts with government agencies on non-business matters, or studying criteria for holding scientific meetings and regulatory amendments, is not objectionable under Competition Rules.

### **What to do**

Inter-association collaboration, not intent on or resulting in restricting competition is acceptable.

## **SCENARIO 9 :**

**Issue:** Relation with government Agencies, Activities undertaken within the Association

**Scope:** Competition Law Art. 4, Restricting Competition

### **Incident:**

The Board of Directors takes a decision to form a common opinion on the draft notification prepared by the Ministry of Health, which represents a fundamental change of policy.

Each member nominates a member to sit on the working group, and after two months of work, a common position on this issue is developed for the association.

During the development process of the position, members have mutually exchanged information on their margins, business decisions which they will have to take to remain within the band, and which specific terms they will be applying for which particular product.

### **Assessment:**

Forming an opinion on regulatory acts is a frequent and legitimate function of Associations.

However, although a legitimate purpose is served, the nature and content of information exchanged between competitors while developing such opinion carries utmost importance. Exchange of information between competitors which eliminates present or future uncertainty represents a grey area, if such exchange enables companies to adjust their dispositions in the market according to that of their competitors. In this scenario, the information exchanged includes highly sensitive data of competitive relevance, such as margins, business practices and specific terms of sale. Such exchange will enable companies to overcome several uncertainties regarding business activities of their competitors, and to adjust their own activities based on those of their competitors. Therefore, such exchange of information sits in a very high risk area under the Competition Law.

### **What to do**

Although it may be deemed necessary for a legitimate purpose, any exchange of information between competitors must be strictly avoided where such exchange may be detrimental to market competition, including any information on output volume, sales projections, terms of sale, campaigns, free goods, payment terms, or discount rates.

## **SCENARIO 10 :**

**Issue:** Relation with members

**Scope:** Competition Law Art. 4, Restricting Competition

### **Olay:**

During an ordinary annual general meeting of the Association, the vice-president takes the floor and gives the following speech:

Dear President, valuable members,

Thanks to our devoted efforts throughout last year, we have managed to patch up many a bleeding wound of our industry (applause), and it is gratifying to see that we all have started working with wholesalers on comparable terms. Our united practices against wholesalers who resisted our demands made a huge bang (applause), and for that we thank you. You have expended great efforts to abide by our gentlemen's agreement on trade discounts, and those of us who wavered were properly dealt with by our board of directors, setting them straight (applause). Personally, looking at our performance over the past year, I am highly hopeful for the year ahead. And I salute you all, trusting that the synergy we have achieved during our administration will well carry on through the next year (applause).

### **Assessment:**

The content of this speech reveals the existence of an agreement between member companies to act together against wholesalers for setting commercial terms and discount rates, which is contrary to Competition Rules. Any concerted practice or gentlemen's agreement on business matters is considered a violation under the Competition Law.

### **What to do**

Members should avoid coming together to form a common commercial practice, nor should they discuss these matters in any manner whatsoever, nor take or implement any decisions to that effect. Neither the Association nor its leaders should guide members' business decisions, and they should warn members who they detect to have taken a decision for joint action that acting together on a business matter might violate the Competition Law.

## **SCENARIO 11 :**

**Issue:** Relations with government agencies, Activities undertaken within the Association, Relation with members

**Scope:** Competition Law Art. 4, Restricting Competition

### **Incident:**

During a meeting held at the association, a committee studies international reimbursement practices to develop a proposal for submission to the SGK, and agrees to make a proposal to the SGK to remove certain products from the reimbursement list. The board of directors discusses the proposal, and agrees to contact the SGK, in consideration that implementing the proposed model carries no unfavorable implications for members' product portfolios.

### **Assessment:**

It is a usual function of Associations to help in the development of regulations, and make proposals to government agencies.

However, the nature and content of such work undertaken by working groups within the association, and its potential impact on the market are also highly important. If implementing the model developed during such work will impact competition, as in the above scenario where some products may be delisted as a consequence of the illustrated action, then one enters the grey area in terms of the Competition Rules.

### **What to do**

The activity undertaken within the association in the above example serves a legitimate purpose. However, the evaluation of these matters should involve a two-tiered approach: First, taking account of the nature of the issue at hand, the competitors' coming together to discuss matters of competitive relevance "even if it does not serve a legitimate purpose," must be qualified from a legal perspective. Although it may not be objectionable to discuss the matter, the implications of the work should be scrutinized by an expert, as it carries the potential to hinder competition in the marketplace.

## VII. Procedures

### A. Meetings

Association meetings, teleconferences and any other means of communication which bring competitors together are of competitive relevance. In other words, although the outcome of such gatherings is usually lawful and competitive, they are still sensitive, as they carry the potential to result in disruption of competition. If proper rules are not followed, misunderstandings and potential problems may arise, and to eliminate them it is necessary to implement some important rules.

First, we need to clarify what exactly a gathering means, as any common forum which brings together competitors may give rise to a sensitive situation under Competition Rules. Formal or informal meetings, social get-togethers, meetings via electronic means, and any follow-up discussions are examples of such gatherings.

Also of note is that such gathering of competitors need not necessarily result in a written agreement or understanding. According to Competition Rules, any behavior by which a common decision can be taken, including oral agreements and gentlemen's agreements, may lead to a violation. Even a simple nod, a wink or a shoulder shrug may be interpreted as being indicative of agreement or common understanding.

Although proving the above cases may be rather difficult, it is nevertheless important to establish and follow a clear set of rules for formal meetings.

#### A.1. Actions before a meeting

- Every meeting must have an agenda.
- An attendance list should be kept in every meeting. The attendance sheet should indicate the name, company and position of each attendee and also indicate the place, date and agenda of the meeting. A text which expresses that participants act in compliance with this Guideline should take place in the beginning of the list and each participant should sign the list.
- The committee, board, working group, subcommittee or other group holding the meeting should be identified, and their purpose and authorization described for every meeting.
- Attendees are obligated to abide by the meeting agenda. Off-the-record discussions and altering the meeting agenda should be avoided.

- In the event that the meeting agenda has been changed, sufficient advance notice should be given to attendees, and legal advice sought on revising the agenda.
- If uncertainty arises as to the compliance of meeting agenda, legal advice must be consulted for clarity.
- Each of the meeting attendees must be relevant to the meeting agenda, from either a regulatory or technical perspective. For instance, persons responsible for business affairs should not be invited to attend meetings that are technical in character.

#### **A.2. Actions during a meeting**

- Every meeting must have a designated officer responsible for it.
- Depending on the level and content of the meeting, it should be standard procedure to have legal advisors present during meetings, or to seek legal advice at any stage.
- Attendees should abide by the meeting agenda.
- If items with potential competitive relevance are identified on the meeting agenda, or if the discussion gains such a character, the designated responsible officer should advise the Association's Compliance Officer. The meeting must be adjourned until any competitive ambiguity is resolved, or until the questionable item is removed from the agenda.

#### **A.3. Actions after a meeting**

- The Association is responsible for meetings held at the association, and must ensure that nothing during such meetings contradicts the Competition Rules. Thus, the obligation to take appropriate steps to ensure compliance with the Competition Rules lies with the Association.
- The responsible officer should forward the attendance sheet, indicating the names, companies and positions of attendees, to the Association's secretariat..
- Any change in the meeting agenda, or any off-agenda matters discussed or resolved on during a meeting outside the agenda, must be reported to the Compliance Officer, who is responsible to compile descriptive details on the matter, and seek legal advice where appropriate.

#### **A.4. Actions that must be strictly avoided during a meeting**

- Any discussion of business matters, whether informal, must be avoided. Even when it becomes necessary to discuss a potentially business matter on which a government agency requests opinion and/or which is regulated by a

government agency, it is important, nevertheless, to seek legal advice to address any uncertainty. Even if a matter discussed is not of a commercial nature, legal advice must be sought if it involves a concerted decision or practice.

- Prices, price levels, pricing policies, price anticipations, regional or product restrictions, partitioning customers, partitioning markets, sales terms, discount terms, price margins, output levels, capacity level and quantity, individual production and distribution costs, costing methods or formulas, market shares, sources of goods and services, prospective production technologies, production and sales plans, and details of individual clients, providers or distributors may be considered delicate business information, and therefore must be excluded from any meetings and discussions.

## **B. Documents**

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Every association generates a large volume of documents in fulfilling its functions. Even if documents are created complying with all applicable rules, the fact that documents are compliant will obviously not negate any actual violation. Such documents, however, are an indispensable instrument to dissipate ambiguity and eliminate uncertainties.

Particular care should be taken with the wording of documents, including any electronic or hardcopy documents such as e-mail messages, letters, memos, reports and assessments, presentations, media releases, postings on the Internet, meeting notes, special notes, notes taken on organizers, business plans, or post-it notes.

Documents which may lead to misunderstandings from a competitive perspective may be encountered in both internal and external correspondence. Documents drafted by the Association without any intention to restrict competition may contain expressions which may be misinterpreted as being such. Therefore, it is of utmost importance to pay attention to the content of each and every document being developed.

### **B.1. New documents**

- The source of every document must be identified. The source means the person/unit who created the document, the date the document was created, and the purpose for which the document was created, all of which must be specified in the document.
- Legal advice should be sought if uncertainty arises with respect to the content of a document being developed.



- If a document potentially open to misinterpretation is received from a member, legal advice should be sought on how to respond to that communication.

- Documents being generated containing competitor information:

If the information carries strategic value (business data):

- Normally, competitor data should not be collected. Even when a government agency requests collection of such data, the inquiring agency should be informed (based on legal advice) that the Association cannot collect information which violates the Association's purpose or applicable legislations.
- If possible, the inquiring government agency should be advised to request the information directly from members.
- In exceptional circumstances requiring collection of such information, however, the purpose for which the information is being collected and how they will be used should be clarified, and legal advice must be strictly consulted before commencing with collecting data. If the information contains company data, such information should be collected solely by the Compliance Officer, and never under any circumstances be shared with members (receiving prior legal advice is essential).
- The documents should be retained only by the Compliance Officer.
- If the documents were generated by other employees, the source of the document and the sources from which the data were collected should be clearly specified. Legal advice must be strictly sought in the event of any uncertainty.
- Collecting strategic data is always a delicate matter.

If the information is of a technical nature:

- Normally, any technical information and documents not containing confidential information of companies may be collected, used, and distributed by an association.
- Legal advice should be sought in the event of any uncertainty.

## **B.2. Old documents**

- Old documents may be retained by an association in hardcopy or electronic form.
- Any documents aged more than five years and documents which need not be retained according to regulatory rules should be destroyed on a regular basis.
- In particular, working drafts of documents should be destroyed within not more than six months, as they may be misinterpreted.

### **B.3. Legally protected documents**

- Correspondence with external competition consultants is normally under legal protection.
- For such documents, the source should be clearly identified and the document should be clearly archived, if possible. It is not a mandatory requirement to disclose such protected and clearly archived documents to competition authorities.

### **B.4. Important Document Types**

#### ***B.4.a) Presentations and Reports***

- The source and place of use of presentations and reports should be clearly specified.
- The person who created the presentation or report should be clearly indicated.
- The source of any information contained in the presentation or report should be specified.
- If the information/data are member information/data, it is important to put them into use after proper legal review.

#### ***B.4.b) E-mails***

- The content of e-mail messages should be clear and free from any ambiguity.
- The recipient should be clearly specified. In this respect, particular care should be taken when determining the recipient groups.
- Any potentially delicate content should be subjected to legal review.
- After the legal review, and after a consensus is reached that the e-mail can be distributed, the message should be forwarded only to relevant recipients, and recipients should be asked to avoid sharing it with anyone outside the intended recipient group.
- The subject line of the e-mail message should be clear.
- Any attachments should also be reviewed for compliance with Competition Rules.

## **C. Communication**

It is expected for an association to communicate both internally, with its members, and externally with other institutions and agencies, to protect the

interests of its members in a manner consistent with its purpose. However, as with the documents policy, the wording of such communications is highly important.

It should not be falsely presumed that a communication cannot be of competitive relevance unless it is made in writing or electronically. It should be remembered that an oral communication can be transferred to written or electronic form, and such transfer may result in a completely unintended and undesirable outcome.

- Particular care must be taken when wording any types of communication. Some imaginary examples of expressions<sup>5</sup> which go beyond the intended purpose and which represent a style of wording that must be AVOIDED at all times include the following:

- *We would have preferred to take a different stance with pricing and supplying the products. Unfortunately this is the decision of the Association.*
- *This business practice is uniformly adopted by all our members.*
- *Following the negotiations with competitors, we are unable to shorten the term.*
- *According to a Board Decision, all members are required to adopt a common stance.*
- *The right thing to do against this government regulation is to launch a boycott.*
- *Our collaboration to reduce output has started to bear fruit.*
- *We must take a united stand and fight on.*
- *Eye for an eye! We must take a united stand to counter theirs.*
- *Our consistent refusal to supply goods yielded results.*
- *By our common decision to not enter the generics market, we managed to maintain prices at a high level.*
- *Our power and joint stand on single products yielded results.*
- *Although they are a manufacturer of original products, declining ..... 's membership application was the right thing to do.*
- *Exchanging business information helped us gain a clearer outlook.*
- *It will not be a problem if the Association collects this information from companies.*

- Care must be taken to never use an emotional tone that may over-reach the intended purpose.
- It should be remembered that a piece of communication may be viewed by persons other than the intended recipient, which may cause the message to over-reach its purpose.
- Care must be taken with the subject matter and recipients of communications.

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<sup>5</sup> These fictional expressions are included here as an example only to support a point.

As in all matters, legal advice should be sought to clarify any ambiguities.

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## **VI. Penalties**

To achieve an acceptable level of compliance with Competition Rules, the recommendations laid down in this Guideline should be followed to the letter, and any in-compliant behavior should be penalized.

There is no doubt that AIFD, together with its entire staff and leadership, will be doing their best to ensure compliance with compliance rules. The first step in ensuring such level of compliance is for AIFD Board of Directors and leadership to adopt policies that support the guidance provided in this Guideline. In other words, in the event of non-compliance with Competition Rules, both AIFD and the member company concerned should take steps to penalize the offender.

Persons who undergo training offered by AIFD or member companies will be issued a “Participation Certificate,” and employees or volunteer workers holding such a certificate will be given priority for participating in meetings. Those that did not undergo training should be encouraged to do so.

Penalties can be classified under two categories: Penalties to penalize violation of Competition Rules, and penalties to penalize behavior contrary to the procedure laid down in this Guideline.

### **A. Violation of Competition Rules:**

If a non-compliance with Competition Rules is detected, AIFD Board of Directors will consider the severity of the violation and take whatever action it deems appropriate, and impose an administrative penalty against offenders.

- Any suspected case of non-compliance with Competition Rules should first be reported to the Compliance Officer.
- Depending on severity, the Compliance Officer may escalate the matter to the Board of Directors, or personally take action without delay where appropriate.
- If there is uncertainty as to whether non-compliance has actually occurred, the Compliance Officer should seek legal advice for clarity.
- If it is concluded that a violation is in place, the Compliance Officer will initiate steps to immediately stop the violation.

If a violation is clearly established, the offenders will be subjected to administrative penalties, including termination of employment, or – in the case of volunteer workers – barring from association activities. It is a priority objective to take measures to prevent recurrence and further to rehabilitate offenders through training and other administrative penalties.

### **B. Violation of Guideline Procedures:**

The following points should be regarded when evaluating compliance with the recommendations laid down in this Guideline.

The responsibility for any matter of competitive concern lies with the COMPLIANCE OFFICER.

The Compliance Officer:

- fulfills the roles described under the section Corporate Governance.
- regularly reviews the procedural rules described in this Guideline to identify potential drawbacks during meetings.
- regularly alerts staff and volunteer workers to check their work with communications and documents for compliance. The compliance officer may perform this oversight either personally, or through a third party consultant.
- periodically reviews official documents, such as Board Resolutions, personally or through a third party consultant.
- issues warnings to persons who have been identified to deviate from the guidelines provided in this Guideline. If a person violates the Guideline procedures twice during a calendar year, the Compliance Officer may require the offender to undergo competition training and/or temporarily bar him or her from participating in meetings.

## VII. Conclusion

It is highly important to ensure that the Competition Rules and policies of the Competition Authority are properly understood by all businesses operating in Turkey, and the mindset laid down in the Competition Law is communicated to both undertakings and association of undertakings.

AİFD Competition Rules Compliance Guideline is a guideline document. AİFD will continue to operate with due prudence and respect all applicable laws to ensure compliance with Competition Rules. In this premise, the staff, leadership and members of AİFD are unquestionably resolved to implement the Competition Rules.

AİFD Competition Rules Compliance Guideline lays down essential information on Competition Rules and practices using basic and comprehensible language in a “guideline format,” developed specifically for AİFD to aid both AİFD and its members in their efforts to harmonize their business practices and culture with Competition Rules and policies.

However, AİFD Competition Rules Compliance Guideline is not exhaustive, and the advice of an expert in Competition Law should be sought to clarify any ambiguities, and policies should not under any circumstances be implemented until it is established that such policies are compliant with Competition Rules.

Hopefully, the points discussed in AİFD Competition Rules Compliance Guideline will be internalized and they will serve as a model for both our members and sector stakeholders, for the benefit of the whole of our industry.

## **Appendix 1**

### **General Rules for On-site Audits**

Rational use of time should be ensured.

Attitudes should be marked by cordiality, and entering into any argument or controversy with the officials should be avoided.

Behaviors should support confidence in examiners.

Any potential misunderstandings should be clarified.

#### **During an On-site Audit**

Make sure a competition expert is available (if applicable)

Clarify the reason for the visit.

Respond only to questions relevant to the subject matter.

Submit only approved documents relevant to the subject matter.

When unsure about a matter, state your desire to respond in writing.

Maintain a calm and cooperative attitude at all times.

Take three copies of every document requested.

Read the report, and clarify and demand correction of any matters raised which may lead to misunderstandings.

If your request for correction is dismissed, enter your reservation when signing the report.

#### **REMEMBER:**

Experts from the Competition Board should be accompanied at all times, to ensure any question they may have is properly answered and they are sufficiently assisted on any relevant matters.

If experts break out into groups, an assistant should be assigned to each.

Notes should be kept of any matters discussed with examiners.

Documents should be provided as is to experts from the Competition Board.

If a document is construed erroneously, its true character or origin should be immediately explained.

Privacy privilege should be invoked for any reports that had been prepared using External Competition Consultancy and for any correspondence with External Competition Consultants.



## **APPENDIX 2**

### **Meetings Held at AIFD**

#### **Competition Rules – Best Practices - Confidentiality**

The Association is responsible for meetings held at the association, and must ensure that nothing during such meetings contradicts the competition rules. Thus, the obligation to take appropriate steps to ensure compliance with the competition rules lies with the Association.

There must be strict rules in place that require keeping of an attendance sheet, indicating the name, company and position of each attendee.

Any change in the meeting agenda, or any off-agenda matters discussed or resolved during a meeting, must be reported to the Compliance Officer, who is responsible to compile descriptive details on the matter, and seek legal advice where appropriate.

#### **Actions before a meeting:**

- Every meeting must have an agenda.
- The attendance sheet should identify the names, positions, and companies of every attendee, and include a clear indication of the meeting place, date and agenda.
- Attendees are obligated to abide by the meeting agenda. Off-the-record discussions and altering the meeting agenda should be avoided.
- In the event that the meeting agenda has been changed without sufficient advance notice to attendees, legal advice should be sought and provide basis for revising the agenda, where necessary.
- If uncertainty arises as to the meeting agenda, it is important to seek legal advice for clarity.
- Reserving exceptions, each of the meeting attendees must be relevant to the meeting agenda, from either a regulatory or technical perspective.

#### **Actions during a meeting:**

- Every meeting must have a designated officer responsible for it.
- Depending on the level and content of the meeting, it should be standard procedure to have legal advisors present during meetings, or to seek legal advice should the need arise or when in doubt.
- Attendees should abide by the meeting agenda.
- If items with potential competition law relevance are identified on the meeting agenda, the designated responsible officer should advise the Association's Compliance Officer. The meeting must be adjourned until any competition law ambiguity is resolved, or until the questionable item is removed from the agenda.

**Actions that must be strictly avoided during a meeting:**

- Any discussions of a commercial nature, even informal ones, must be avoided at all times. Exceptions to the avoiding discussion of commercial matters rule may include requests for opinion received from government agencies and/or matters regulated by government regulations. It is important, however, to seek legal advice in the event of any uncertainty. Even if a matter discussed is not of a commercial nature, legal advice must be sought if it involves a concerted decision or action.
  
- Prices, price levels, pricing policies, price estimates, regional or product restrictions, partitioning customers, partitioning markets, sales terms, discount terms, price margins, output levels, capacity level and quantity, individual production and distribution costs, costing methods or formulas, market shares, sources of goods and services, prospective production technologies, production and sales plans, and details of individual clients, providers or distributors may be considered sensitive commercial information, and therefore must be excluded from any meetings and discussions. These matters involve private commercial information and decisions of companies. Any attempts must be avoided which may hinder independent decision making of companies.

**Confidentiality Provisions:**

AIFD’s confidential information includes any projects, activities, projections and predictions, plans, know-how, working models, policies and processes, databases, any records, any analyses, studies, reports or discussions resulting from the work of AIFD working groups, whether in written, oral, visual or electronic form, and any communications and correspondence used in accessing the same, whether electronically or on paper, including without limitation any information, disclosed or to be disclosed to a person or previously known, including any copies thereof.

AIFD staff and employees of member companies having a role within AIFD, also representatives or consultants of AIFD and/or member companies having a role within AIFD (all referred to as “employees/representatives/consultants” hereinafter) will maintain the confidentiality of the information described above. Therefore, employees/representatives/consultants must protect the confidentiality of AIFD information at all times, in and outside AIFD, in the working groups and/or during and after project work. Unless instructed otherwise by AIFD, they may not use or transfer confidential information, nor may they store it anywhere but in the workplace or on work computers, nor disseminate, disclose, make personal copies of and/or report the same.

## APPENDIX 3

### DISCLAIMERS AND DISCLAIMER TEMPLATES

By developing a competition rules compliance guideline, AIFD is clearly demonstrating the importance AIFD is placing on this issue. No objective or action undertaken by AIFD may under any circumstances be incompliant with the competition rules, nor may AIFD pressure its members to take any action incompliant with the competition rules, nor penalize its members.

In this premise, a number of disclaimer templates have been developed for use with documents prepared by AIFD. Naturally, it may not always be possible to have a predefined disclaimer for each probability. In such cases, the association's Compliance Officer may develop a specific disclaimer for the document, based on relevant legal advice.

“Unless indicated otherwise, information contained in this document are compiled from government sources or from sources otherwise available to public.”

“The views described in this document are based on the findings of a study conducted by our Association on these issues, and is not binding on our members, who are at liberty to make their decisions independently, as it suits their respective business interests.”

“The data contained in this document comprise information collected from our members upon an explicit request of government representatives. The data herein will not be shared with our members under any circumstances. This collection of data is intended to provide a compilation of information and/or data per the request of government representatives.”

“Information and views contained in this document are confidential and intended solely for use during negotiations with government representatives, and are not in any way representative of a common stance or resolve of our members.”

“The scenarios depicted in this document should not be considered as reflecting the common view of the AIFD. The scenarios are only intended to provide an assessment of the probable outcome of potential implications. In the event that circumstances arise which warrant taking a common stance, the AIFD is obligated to act on relevant legal advice to ensure compliance with all applicable legislations, and to support any efforts toward that end.”

## **APPENDIX 4**

### **MEETING PARTICIPANT LISTS - INTRODUCTORY CLAUSE**

In order to ensure a healthy development of the sector, compliance with the Competition Rules is considered one of the essential values of AIFD.

The undersigned attendees do hereby agree, represent and warrant that they have read and understood the competition rules compliance guidelines and the meeting guidelines prepared by AIFD and they will comply with the Competition Law during any meetings they attend at AIFD, urgently notify the Association's compliance officer about any violations that they become aware of, maintain confidentiality of any information that come to their possession during Association's activities, never, whether directly or indirectly, use, transfer elsewhere, publish, disclose, make personal copies of or report such information to any external third parties, and abide by any penalties issued against them by AIFD Disciplinary Committee in the event of a violation of competition rules or confidentiality of information as a result of their actions.