



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON FACILITATING PRACTICES IN OLIGOPOLIES

-- Note by Turkey --

This note is submitted by the delegation of Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 17-18 February 2007.

English - Or. English

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1. Scope of Facilitating Practices

1. Examples for “facilitating practices”, practices that enable undertakings reach uncompetitive compromises and continue those compromises, are price announcements which are made in advance and are not binding, delivery pricing, information exchange, most favoured customer requirement, respond to competition requirement, and vertical restrictions where certain conditions are met.

1.1 *Facilitating Practices: Information Exchange*

2. Regarding information exchange, attitude of the Turkish Competition Authority (TCA) may be given by citing two examples:

1. The expressions in the statement, which was sent to Turkish Cement Manufacturers' Association on 15.05.1998, specifying the conditions to be met in order to grant a negative clearance¹:

“...Together with the features of the cement market, information exchange systems including the interchanging of quantity data on an undertaking basis have the potential to facilitate the creation of structures and practices which the Competition Law aims to prevent. It is clear that in such market, frequent and detailed information exchange may be a means to create artificial market conditions containing abnormally transparent and stable flow of goods in order to eliminate the flexibility of the practices of economic units and risks inherently existing in competition. Similar information exchange systems carrying detailed information on an undertaking basis may lead to these consequences: determining undertakings' conducts according to factors other than individual choices made under free competitive conditions, coordinating market behaviour, supervising the operation of anticompetitive structures.

Due to the concerns mentioned above, practices that are still carried out by your Association cannot be granted negative clearance.

The following principles should be followed at data collection and distribution stages in order to eliminate the concerns and prevent infringements of Competition Law:

1. The tables showing the data related to quantities (production, sales, inventory, export, etc.) should be prepared in a manner that prevents their disclosure on the basis of an undertaking or groups of undertakings which form an economic unit. Therefore, these tables should contain only data related to total production, sales, import, export and inventory for each geographic region. If the number of groups of undertakings forming an economic unit is less than three in a region, the data related to that region should be shown in a table combined with the data from one of the neighbouring regions so that it would not be possible to make calculations on an individual basis.
2. Tables showing comparisons between undertakings depending on any kind of data should not be prepared.

¹ Negative clearance certificate is granted in line with Article 8 of the Act No 4054 on the Protection of Competition (Turkish Competition Act) if a certain agreement, concerted practice, decision or a merger and an acquisition do not violate the relevant provisions of the Turkish Competition Act.

3. Statistical data included in the tables should not be discussed in meetings where representatives of undertakings are present.
4. Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behaviour of undertakings should not be given.
5. Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information. Therefore, product types should be divided into three groups at the most and published in regional sums.
6. Estimations related to the future conditions of prices, sales and use of capacity rates should not be made.
7. Associations of Undertakings should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of the Association and third parties.
8. In case there is a possibility that competition sensitive information related to a particular undertaking could be inferred, summaries and total sums should not be published.
9. Tables showing monthly data should not be distributed in two months following the respective month.
10. The relationships with public bodies that request statistical information (TSI [State Statistics Institute], SPO [State Planning Organisation], etc) may continue in the same way.

In order for your practice which is the subject of the application to be assessed under the scope of negative clearance, it should be rearranged according to the principles cited above and draft tables showing the corrected version of the practice should be handed in to the [Turkish Competition] Authority urgently.”

2. The statements in TCA’s decision on Fertiliser Producers’ Association dated 08.08.2002:

“In order to prevent potential competition infringements and create competitive market structure, at data collection and distribution stages;

- 1- The tables showing the data related to quantities (production, sales, inventory, export, etc.) and use of capacity rates should be prepared in a way to prevent their disclosure on the basis of an undertaking or groups of undertakings forming an economic unit. Moreover, fertiliser producers should send these data to Fertiliser Producers’ Association (GUD) in sums instead of detailed information (e.g. summaries of fertiliser deliveries to their dealers on a city basis),
- 2- Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behaviour of undertakings should not be given,

- 3- Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information,
- 4- Information related to the future conditions of prices, sales and use of capacity rates should not be published,
- 5- GUD should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of GUD and third parties,
- 6- Tables showing monthly data should not be distributed in two months following the respective month,

and it was decided that GUD should be informed of the obligation to follow the aforementioned principles.”

1.2 Facilitating Practices: Delivery Pricing and Vertical Restrictions

3. As regards to delivery pricing and vertical restrictions, Cement II decision dated 01.02.2002 of the TCA can be seen as an example. Delivery pricing carried out by the undertakings under investigation and tacit collusion/conscious parallelism created by vertical restrictions imposed to apply those delivery pricing activities are laid down in the following extracts from that decision:

4. “In order to make an assessment related to the vertical restrictions in cement sector, first of all, the pricing system used in the sector should be explained.

5. Almost all of the undertakings under investigation apply a pricing policy that is similar to what is called “multiple basing-point pricing system”. These practices are akin to the system which was prohibited by the Supreme Court of the United States in 1948.² The similarity results from the fact that other cement factories make sales in their region at a price that is parallel to the prices applied by the nearest cement factory to that region. In this system, as price is determined according to the transportation costs of other factories to a region, price levels in factory centres are generally high. However, sometimes higher price levels occur in supply-demand balance in some regions, therefore there are price differences in two regions at the same distance away from the factory centre. In these cases, dealers in the lower price region are prevented from making sales to higher price region. The difference between the system in Turkey and in the US is that there are no standard transportation tariffs. While the system in the US ensures that prices remain the same once it has been established, in Turkey, transportation is carried out by the dealers, creating uncertainty and consequently causing differences in transportation costs, which requires that the agreements should be renewed.

6. When this system is used with a distribution system that depends on dealers’ transportation means, like the Turkish system, dealers naturally want to sell cement to regions where prices are at the highest level. At this point, there are controls and sanctions on dealers. Different packaging for different regions, watching transportation vehicles, giving prices to dealers who inform that goods are delivered to a different region are among the controlling mechanisms. Sanctions range from restrictions on cement volumes given to dealers, giving fines equal to the price difference between purchasing region and selling region or fines at predetermined amounts to refusing to supply and even termination of contracts. It is clear that these practices impose additional restrictions to dealers. According to Turkish competition legislation,

² Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

those dealers could only be imposed active sales prohibitions like “not to search customers, open branches or establish distribution depots outside the contract area”. However the existing system stipulates that goods are delivered to the area where they are purchased without making discrimination between active and passive sales. This “hardcore infringement” does not have to be analysed under “rule of reason”. Nevertheless, a broad analysis was made about this system in order to dispel the suspicions. These analyses show that the practices have three objects:

7. First object is to charge high prices by relying on the dominant position or market power, in factory area where the competitors do not enter due to the agreement or unilateral company policy. The system mentioned above enables market sharing, the main condition for price differentiation, and allows profit marginalisation via higher prices in markets where dominant position or market power occurs, without being affected by the price levels in other markets. Undertakings that do not carry out this practice completely are regarded “weak” in the sector.

8. The second object is to make a distinction between markets where prices are lower as a result of competition and agreement regions.

9. The third object is to prevent competition which may occur thanks to dealers. Cement dealers whose main field of activity is transportation or who simultaneously carry out transportation activities with their own trucks have, at least in theory, the opportunity to make sales to regions that they want, independent of transportation costs. When large price differences are added to the abovementioned issues, it means that all of the conditions for parallel trade are met. It is clear that interregional trade would distort market balances which are created by an agreement or unilateral company policy and which are based on the rule of not entering to the primary market of the competitor. Therefore, dealers’ sales areas are attempted to be controlled and usually this attempt is successful. When this control is not gained, high price levels to be established depending on the agreement or unilateral company policies are impaired.

10. Undertakings under the investigation defended themselves stating that “prices are set through subsidisation in order to compete with the cement factory holding a dominant position in the region where the goods will be sent, and therefore intervening to this system will eliminate competition provided by the system.”

11. On the contrary, the TCA has found that although cost and price structures allow, undertakings could not enter to the market where competing factories are established because of agreements or unilateral company policies that rely on the fear of retaliation. The TCA has also found that there are high anticompetitive prices due to dominant position or market power in the factory area, where competing undertakings could not enter because of the agreement or unilateral company policy even if it is profitable. Besides it has been found that in markets where market power is lower or does not exist at all prices are not below cost. Undertakings who think that price policies are competitive maintain their activity without violating the Turkish Competition Act (for instance by extending the allegedly subsidised prices to all regions). At this point a question arises: why does the defence stating “intervention to the system will eliminate competition” object to “the situation that will be favourable to undertakings”? The answer to this question will explain the nature of the existing practices which eliminate economic efficiencies. In order to decrease fix and total costs in cement sector, use of capacity rates should be increased. However the increase in production and sales, i.e. the supply, in the framework of basic principles of economy, generally lead to a decrease in prices. The way to prevent this, to some extent, without reducing the profitability is to make differentiation between markets where dominant position or market power exists and other markets. The existing system pursues also this object in addition to the abovementioned issues. Thanks to the intervention of the TCA to practices violating the Turkish Competition Act, capacities cannot be reduced on account of the nature of the cement sector and the excess supply will provide competitive prices in the framework of existing conditions. The existing system, as laid down in D.E.

Waldman's article dated 1988³ in detail, promotes uncontrolled increase of the capacities. It is expected that, after the TCA's decision, those conditions that reduces economic efficiencies will be removed."

1.3 Facilitating Practices: Price Announcements

12. Private Schools' Association Decision of the TCA dated 11.02.1999 can be given as an example for price announcement. In the decision, first of all, the drawbacks of information exchange about prices in respect of competition law are stated. On the other hand, it has been found that there were not any negotiations about price in annual meetings held by Private Schools Association. Therefore it has been ruled that the Turkish Competition Act was not violated.

2. Circumstances Facilitating Practices are considered Unlawful

13. Facilitating practices that are not part of explicit hardcore cartel agreements can be considered unlawful in two conditions. One of them is the case where facilitating practices are the result of agreements and concerted practices between undertakings, and decisions of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition according to Article 4 of the Turkish Competition Act. The decisions cited above are taken under that article. Second case is where more than one undertaking abuse their dominant position in a market for goods or services within the whole or a part of the country through concerted practices in the framework of Article 6 of the Turkish Competition Act. It should be noted that there are not any TCA decisions on this issue; however, there are arguments that there may be practices in this respect. According to these arguments unilateral actions that do not depend on any agreement, concerted practice or decision of an association of undertakings and therefore do not fall under Article 4 may be considered as abuse under Article 6 of the Turkish Competition Act in case of collective dominance and may be prohibited.

14. Factors that can be used to distinguish between unilateral actions by firms and actions created by agreements and concerted practices are the same as those used to find cartels.

2.1 Liability regarding Facilitating Practices

15. As it is stated under the previous heading, in order for facilitating practices to be unlawful under Article 4, agreements and concerted practices between undertakings, and decisions of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition should be proved to exist. On the other hand, unilateral practices cannot be intervened under Article 4. Although it is suggested in the doctrine that these can be intervened under Article 6 of the Turkish Competition Act, the TCA has not given a related decision up to now.

2.2 Factors affecting the Analysis

16. As it is emphasised in Cement II and Fertiliser decisions, the structure of the market, the nature of competition and similar factors are important for analysis. In this framework, whether the market is oligopolistic, transparency of the market, barriers to entry, cost structures, the nature of demand, technological innovations, capacity, past practices, buyers' power and similar factors should be taken into account.

³ WALDMAN, D.E. (1998), "The inefficiencies of 'unsuccessful' price fixing agreements", The Antitrust Bulletin, Spring 1998, p. 67-93.

2.3 *Facilitating Practices Intervened that are not part of a Hard Core Cartel*

17. In the Turkish Cement Manufacturers' Association, Fertiliser Producers' Association and Cement II decisions, facilitating practices were intervened although they are not part of a hardcore cartel agreement. The decisions in question are examined in detail above.

18. There have been no cases where the TCA decided against intervening because certain conduct, even though it may have been harmful, likely would not have been considered unlawful under the Turkish Competition Act.

3. **Standard of Liability**

19. It should be kept in mind that facilitating activities may be the result of competition or in some cases may increase competition. For example as regards to price announcements, informing customers individually increases costs in some markets and sometimes it is impossible. Likewise, announcements allow customers to make plans. Undertakings that make an announcement may sometimes have to confront considerable cost burden because of an increase in sales at low prices. Therefore, consumers in the market may object to competition authorities' intervention to price announcements. As a result, per se approach, which ignores the characteristics of the market and undertakings, should not be adopted.

20. However, it should not be thought that facilitating practices should always be subject to rule of reason analysis and detailed examination should be done in relation to the restrictive effect on competition in every case. For instance, if there are factors such as transparency, entry barriers, stagnant demand, and stagnancy in technology in an oligopolistic market that witnessed cartels in the past, information exchange agreements may not be allowed without a detailed analysis in terms of restrictive effects on competition. In this framework, the approach in the UK Tractors Decision⁴ of the European Commission, which was approved by CFI⁵ and ECJ,⁶ is thought to be correct. In fact, a similar approach was taken by the TCA in the abovementioned Turkish Cement Manufacturers' Association, Fertiliser Producers' Association decisions.

21. Regarding countervailing efficiencies, a broader balancing exercise of restrictive effects and efficiencies is necessary.

4. **Remedies**

22. The regulation made by "market investigation mechanism" in UK is thought to be ideal. In this framework, competition authorities should find, via conducting sectoral inquiries, anticompetitive conditions in the market resulting from undertakings' unilateral facilitating practices that are not part of any agreement, concerted practice or a decision of association of undertakings⁷. The decision on the termination of the relevant facilitating activities should be taken afterwards. On the other hand, undertakings should not be imposed penalty due to those unilateral actions or liability to pay damages as a result of damages actions.

⁴ Case C-7/95P etc., John Deere Ltd v. Commission (UK Tractors) [1998] ECR I-3111.

⁵ Case T-35/92 etc., John Deere Ltd v. Commission (UK Tractors) [1994] ECR II-957

⁶ UK Agricultural Tractor Registration Exchange (1992) OJ L68/19.

⁷ There should not be any obstacles to intervene upon these.