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COMPETITION COMMITTEE**

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**POTENTIAL PRO-COMPETITIVE AND ANTI-COMPETITIVE ASPECTS OF TRADE/BUSINESS
ASSOCIATIONS**

-- Turkey --

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Please contact Mrs Wendy Houët if you have any questions regarding this document [phone number:+33 1 45 24 95 59; email address: wendy.houet@oecd.org

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1. Introduction

1. The Act No 4054 on the Protection of Competition (the Competition Act) is applicable to anti-competitive agreements, concerted practices between undertakings, and decisions and practices of associations of undertakings. The Competition Act provides definitions for undertakings and association of undertakings under Article 3. Accordingly, undertakings are defined as “*natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole*” whereas association of undertakings is defined as “*any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals*”. Some of these associations of undertakings have their roots in the Constitution under the name of public professional organizations. For instance, according to Article 135 of the Constitution, such public professional organizations are “*... public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public ...*”. Apart from those, there are other associations of undertakings formed by undertakings operating in a certain field of the industry and their objectives are more or less similar to objectives cited in the Constitution. The Competition Act normally is neutral and equally applies to anti-competitive decisions and practices of the associations of undertakings, whether Constitutional or not.

2. Anti-competitive decisions and practices of associations of undertakings are prohibited by the Competition Act (Article 4). In case such anti-competitive decisions and practices also include some pro-competitive elements and these elements outweigh the anti-competitive ones, then such decisions and practices may be exempted (Article 5). Basically, there are four conditions to be satisfied cumulatively if exemption is to be granted and they can be cited as 1 - ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services, 2 - benefiting the consumer, 3 - not eliminating competition in a significant part of the relevant market, and 4 - not limiting competition more than what is compulsory for achieving the goals of ensuring new developments and improvements, economic or technical development, and consumer benefit. Moreover, in case decisions or practices of associations of undertakings do not violate the relevant articles of the Competition Act, the associations of undertakings may be granted a certificate clearing the decisions or practices in question (Article 8). A substantive fine up to ten percent of the annual gross revenue of associations of undertakings and/or the members of such associations is to be imposed in case the Competition Act is violated (Article 16). Moreover, associations of undertakings may be asked to terminate the infringement together with specific instructions on how to terminate the infringement (Article 9). Interim measures may be taken if it is likely that serious and irreparable damages occur (Article 9). Finally, advocacy powers may be used by the Turkish Competition Authority (TCA) before relevant state entities with a view to amending the relevant legislation producing anti-competitive impact (Article 27 and 30).

3. After citing the basic legislative framework in the Competition Act regarding anti-competitive as well as pro-competitive decisions and practices of associations of undertakings, the approach of the Competition Board, the decision-making body of the TCA, will be summarised below.

2. Restrictions of Competition and Exemption

4. As the members of the associations of undertakings are rival undertakings, it becomes a very sensitive matter to distinguish pro and anti-competitive activities of the associations of undertakings.

5. Beginning from its earlier decisions, the Competition Board had to deal with anti-competitive decisions and practices of the associations of undertakings. Therefore, in the case law of the Competition Board, there are many instances involving associations of undertakings' fixing prices¹, sharing markets², complicating the activities of competing undertakings or excluding firms operating in the market by boycotts or other behaviour or preventing potential new entrants to the market.³ In these cases, it is observed that the role of associations of undertakings changes in a wide range, from enabling the member undertakings to convene and act in concert through facilitating communication among them to taking an anti-competitive decision itself. The Competition Board, in most of these cases, prohibited the anti-competitive practices and decisions by the associations of undertakings together with imposition of fines. Moreover, it informed the relevant associations and its members on how to terminate the infringement and what to refrain in order to ease its concerns regarding the matter.

6. Generally, the Competition Board's attitude is strict in the sense that in most of the cases it has prohibited practices and decisions of association of undertakings fixing prices, sharing markets, and complicating rivals' activities and has denied exemption because the relevant conditions are missing. However, in rare occasions the Competition Board, taking into account the peculiarities of the case in question, has ruled that pro-competitive aspects of the decisions and practices by the association in question outweigh the anti-competitive ones and granted exemption.

7. For instance, in one case⁴ where the goldsmiths' association sent its members a recommended price list, the Competition Board decided that this practice satisfied the exemption conditions. More specifically, the Competition Board mentioned that recommended price list removed the necessity for every goldsmith to establish a technical infrastructure to follow rapidly changing prices for gold, and the recommended list not only facilitated the goldsmiths to monitor the fluctuations in prices but also ensured consumer awareness. Moreover, the consumers might also buy products cheaper depending on the level of competition because the goldsmiths no more needed to invest in technical infrastructure to follow prices for gold and therefore they would enjoy decrease in their costs. As the market operators were numerous and mostly small and medium size undertakings, the recommended price list would not likely to eliminate competition among goldsmiths operating in the city of Antalya. Finally, as the relevant legislation empowered the goldsmiths' associations to determine maximum prices⁵, the practice of recommending prices was less restrictive of competition than fixing the maximum level. As a result, the Competition Board exempted the practice of the association of goldsmiths in Antalya to recommend price for gold.

¹ See, among others, *Bakery Associations of İstanbul* (27.10.1999; 99-49/536-337(a)), *Customs* (26.4.2001; 01-21/191-49), *Opticians* (31.08.2001; 01-42/424-107), *Bodrum drinking water* (22.1.2002; 02-04/39-20), *TMMOB* (22.1.2002; 02-04/40-21), *Turgutlu Goldsmiths' Association* (26.3.2002; 02-16/176-70), *Advertising Agencies' Association* (25.07.2002; 02-45/530-219), *Insurance* (30.10.2003; 03-70/844-366), *Turkish Doctors' Association* (30.10.2003; 03-70/851-369), *Turkish Bar Association* (13.11.2003; 03-73/876(a)-374), *Turkish Dentists' Association* (13.11.2003; 03-73/876(b)-375), *Gaziantep Association of Bakeries* (7.1.2005; 05-02/18-9); *Manisa Goldsmiths' Association* (28.3.2007; 07-28/255-88), *Şanlıurfa Goldsmiths' Association* (28.3.2007; 07-28/256-89).

² See, for instance, *Bakery Associations of İstanbul* (27.10.1999; 99-49/536-337(a)); *Bodrum drinking water* (22.1.2002; 02-04/39-20), *Konya Mechanical Engineers* (19.9.2003, 03-63/764-354), *Konya and Isparta Milk Market* (26.7.2006; 06-56/714-204).

³ See, *BIAK* (4.3.1999; 99-13/99-40), *TÜRSAB* (17.12.2003; 03-80/967-397), *Association of Industrialists of Friction Equipments* (4.10.2005; 05-64/925-248), *Association of Dubbing Artists* (15.6.2006; 06-44/566-152), *Şanlıurfa Goldsmiths' Association* (28.3.2007; 07-28/256-89).

⁴ *Antalya Goldsmiths' Association* (23.5.2007; 07-42/461-176).

⁵ See Article 62 of the Tradesmen and Craftsmen Occupational Organizations Law numbered 5362.

8. However, in an earlier case⁶, the Competition Board decided that exemption conditions were absent regarding a notification of a recommended price list to be prepared and sent to member opticians by five opticians' associations and the federation including these associations after considering specific features of the market in question. Among other considerations, the Competition Board took into account that there were appreciable price differences in the market (approximately 20%) in the absence of the recommended price list and the basic aim of such a list was to remove the current price competition in the market. Therefore, the Competition Board decided that the price list had the potential to restrict the price competition significantly.

9. To clarify one point, in the case law of the Competition Board, it is not required that the decision by an association of undertakings is binding.⁷ Therefore, recommended decisions can be regarded as violating the competition rules although they are not binding. It is taken into account whether members of associations have shown a tendency to follow the recommendations in the past and the recommended decision has caused a significant impact in the market. In making this assessment, it is also important that the members feel they are bound by the decision. As a result, the decision is considered binding if the members of the association comply with it because they feel they are actually bound by it. Moreover, it is not required that the relevant association of undertakings has provided sanctions against those members failing to comply with the decision in order to consider it anti-competitive.⁸

3. Information Exchange

10. Information exchange facilitated by associations of undertakings has been evaluated various times in the past under the Competition Act. For instance, the TCA has formulated its opinion as a response to an application by Turkish Cement Manufacturers' Association (TCMA) who gathered relevant information monthly and made short, medium and long term projections concerning production, domestic sale, export and stocks of cement and then sent them to all cement manufacturers.⁹ In this application, TCMA asked the TCA to forward its opinion on its practice of gathering information, making projections and sending them to cement manufacturers.

11. The Opinion of the TCA can be given in the following:

"...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 behavior, supervising the operation of anticompetitive structures."

⁶ *Spectacle Glasses*, (4.1.2006; 06-01/6-3).

⁷ See especially *Insurance* (30.10.2003; 03-70/844-366).

⁸ See *Opticians* (31.08.2001; 01-42/424-107), *Bodrum drinking water* (22.1.2002; 02-04/39-20), *Advertising Agencies' Association* (25.07.2002; 02-45/530-219); *Konya and Isparta Milk Market* (26.7.2006; 06-56/714-204).

⁹ See *Cement* (1.2.2002; 02-06/51-24).

12. With these concerns, the TCA refused to clear the information exchange under Article 8 of the Competition Act and provided that following principles should be followed at data collection and distribution stages in order to eliminate its 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 neighboring 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.*
- *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 behavior 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. ...”*

13. In another case¹⁰ concerning a decision by Automobile Distributors’ Association to prepare a website that would include, among others, statistical information on monthly and annual aggregate sales and import data for new automobiles and light commercial vehicles sold in Turkey, countrywide monthly and annual aggregate sales data and market shares on the basis of brands, brand based domestic-import distributions regarding the sales of automobiles and light commercial vehicles, the Competition Board emphasized market peculiarities. The Competition Board, especially, distinguished information exchanges

¹⁰ *Automotive Distributors’ Association, (15.4.2004; 04-26/287-65).*

in oligopolistic markets with homogenous products such as cement and fertilizer markets from less concentrated markets with heterogeneous products.

14. In this sense, the Competition Board took into account that concentration level of the market of motor vehicles has decreased to a great extent compared to the past ten years as a result of the increase in the number of producers and in imports. Demand in the motor vehicle markets was also characterized by high volatility from year to year depending on the economic situation of the country, the stagnation of which in recent years (at that time) had deep impact in the motor vehicle market. Moreover, the products are far from being homogenous and competition in the market is not totally dependent on price. Apart from price, quality, efficient marketing, rapid response to changing demand, ability to develop new models, product variety and widespread service network constitute very important elements of competition in this market. With these facts in mind, the Competition Board thinks that probability of information exchange to result in coordination of competitive behaviours among market players is limited in motor vehicle sector. As a matter of fact, the information in the website would include only quantities sold and market shares of the brands in the whole country with no detailed statistics prepared on the basis of regions or cities. Furthermore, statistics regarding brands would contain aggregate sales data of automobiles and light commercial vehicles with no detailed information on price, quantity, and market shares in different sub-segments. Moreover, there would be no data including projections on prices, production, sales and capacity utilization rates. Therefore, these features of the statistical information also do not have the potential to coordinate the competitive behaviours in the market. As a result, the Competition Board cleared the decision by the Automobile Distributors' Association to prepare a website on the condition that it would not cause exchange of information and data that could prevent formation of a competitive market at gathering, publishing and distributing stages in the future.

15. The sensitivity of the Competition Board regarding information exchanges is justified when a case is taken into account where grave violations of competition have been detected and which involved an association of undertakings gathering information sensitive for competition. In *Fertiliser*¹¹ case, Association of Fertiliser Producers played an important role in exchanging information via meetings and a monthly statistical bulletin. For instance, regular Board of Directors meetings of the association in question were held with the participation of general managers of fertiliser producers. Some of these meetings were also held in headquarters of these producers. In these meetings, discussions were held on the state of supply and demand, sales policies, prices, costs, and sales systems. With the documents found during inspections by the TCA, it was seen that such information exchange that could lead to price fixing and market sharing was being carried out for years in meetings within the association with the participation of high level people of the relevant fertiliser producers. Moreover, publication of statistical information including data on individual producers enabled the producers to learn production and sale amounts of the rivals which contributed to transparency in the market and the predictability of the behaviours of the rival undertakings.

16. To summarise the attitude of the Competition Board regarding information exchanges,¹² exchange of information sensitive for competition among competitors may limit competition. Information sensitive for competition relates to prices, costs, sales, production, capacity utilization, stocks and information having the character of trade secrets which, when known by undertakings operating in a market, increase predictability of prospective behaviours of competitors. Exchange of such information among competitors increases transparency of the market and results in coordination of competitive

¹¹ 8.2.2002; 02-07/57-26. Following this case, the Competition Board reiterated more or less the guidance it provided to Turkish Cement Manufacturers' Association in its Opinion upon a request by Association of Fertiliser Producers regarding the publication of information in its Monthly Statistical Information Bulletin. See *Association of Fertiliser Producers* (8.8.2002; 02-47/586-M).

¹² See *Automotive Distributors' Association* (15.4.2004; 04-26/287-65).

behaviours. Therefore, exchange of such information should be limited and be far from creating coordination among competitors. While considering the impact of information exchanges, structure of the market and the characteristics of the information are important. In competitive markets, flow of information is beneficial for manufacturers as well as consumers and enables the market to reach equilibrium in a shorter time period by transmitting signals regarding changes in supply and demand. In oligopolistic markets, however, information exchange is a more sensitive matter. In these markets, it is easier for competitors to meet each other, reach agreement and implement it. Information exchange not only becomes effective in concluding anti-competitive agreements or entering into concerted practices, but also turns into an instrument in monitoring whether the relevant agreement or concerted practice is implemented. Limitation or prevention of competition is easier in markets especially where the product is homogeneous. As product differentiation increases, it would be hard to agree on a price and cartel agreements would easily be broken. While making assessments regarding agreements and practices enabling information exchange, nature of the market, level of concentration, entry barriers, and characteristics of information exchanged gain importance. This makes it necessary to take into account such agreements in their economic context and observe them carefully in oligopolistic markets.

4. Standard Setting

17. Approach of the Competition Board regarding standard setting can be seen in one case¹³ where a decision by an association of undertakings to produce medium density fibreboard and chipboard with a thickness of 16 mm instead of 18 mm has been evaluated under the Competition Act. 16 mm is the standard thickness in European Union and the Middle Eastern countries whereas consumption in Turkey concentrates on 18 mm leading to differentiation of Turkish production from world standards. By changing the industry standard to 16mm, it is aimed to avoid restrictions faced by the industry in imports as well as exports.

18. While evaluating an agreement or a decision by an association of undertakings under Article 4 of the Competition Act, the Competition Board mentions that it should be taken into account that participation of the relevant undertakings in the standard setting process has not been restricted and transparency has been ensured. Although it is not a relevant criterion under the Competition Act whether the market share represented by the undertakings participating in the process is high, standardization decisions become effective as the combined market share of the undertakings participating in the setting and implementing the standard increases. Therefore, it is important that all undertakings in the industry participate in the decision making process. However, if the standard agreed via a decision by the association of undertakings is used with an aim to drive current or potential rivals out of the market or such effects occur, then the decision would be contrary to competition rules. To understand if such an aim exists or such an impact is likely, the main issues to be considered by the Competition Board are whether participation of the relevant undertakings in the process has been restricted, a transparent environment where relevant undertakings or persons can obtain information regarding the standard exists, the standard is applied to create discrimination, and undertakings are constrained to sell and market their products that do not comply with the standard.

19. First of all, the decision in question has been favoured by most of the undertakings operating in the market representing a very large part of the market. The members of the association as well as non-members were aware of the nature and subject of the decision and participated in the decision-making process by presenting their views. The number of undertakings favouring the decision, the high market share they represented, the nature of the decision and transparency of the decision-making process were taken as indications that the aim was to create a new standard for the industry and there did not exist a practice by some undertakings with a purpose to restrict competition. Moreover, that the decision did not

¹³ *Medium Density Fiberboard and Chipboard* (14.8.2003; 03-56/650-298).

aim to drive any actual or potential competitors out of the market was also apparent from the fact that any undertaking could produce the 16mm product without any additional cost, investment or difficulty. Furthermore the decision did not include any restriction preventing the undertakings from producing the 18 mm product on demand.

5. Membership Rules

20. In *BIAK*¹⁴ case, membership rules of an association of undertakings were regarded as anti-competitive by the Competition Board.

21. Joint Industry Committee on National Readership Survey (BIAK) was an association of undertakings whose members included advertising agencies, advertisers and media entities providing advertisement space. BIAK aimed to commission a joint press readership survey (the Survey) that would be made available for use both by the media and the advertisement sector. The Survey would enable advertisers to have economic and efficient expenditures for advertisements, and advertisement agencies to reach the right target audience by efficient media planning. Moreover, it would expand the advertisement market and increase advertisement revenues for media entities providing advertisement space.

22. The Survey would be the single currency as named in the sector because it would be the most comprehensive survey carried out in Turkey in terms of the size of the sampling and the number of publications included; it would be reliable as all units who would increase the reliability of the Survey such as advertisers, those preparing advertisements and media entities providing advertisement space would be involved, quality control of the Survey would be done by an independent supervisory unit, and a software programme enabling optimum media planning that would use the data of the Survey would be given to the relevant parties.

23. However, according to membership rules, membership to BIAK of those media institutions using distribution channels other than those of BIAK required approval by the founding members of BIAK. In line with this rule, BIAK refused membership to an undertaking named Universal Yayıncılık (Universal Publishing). This was regarded as complicating the activities of Universal Yayıncılık when market conditions, the value of the Survey as single currency and the characteristics of members of BIAK were all taken into account. Since the results of the Survey regarding publications of Universal Yayıncılık would not be available, it would be hard for these publications to attract advertisements. As a result, the Competition Board asked BIAK to re-determine membership rules and the criteria regarding use by third parties of the relevant data obtained via the Survey and send them to the Competition Board for consideration.

24. In *TURSAB* case, admission fee determined by the General Assembly of TURSAB (Association of Turkish Travel Agencies) was the subject of an investigation by the TCA. TURSAB was founded according to Act concerning Travel Agencies and Association of Travel Agencies and according to that Act it was obligatory to be a member of TURSAB in order to operate as a travel agency. Moreover, according to the Act in question, admission fee was to be determined by the General Assembly of TURSAB whose participants were representatives of the travel agencies. The admission fee determined by the General Assembly was regarded by the Competition Board high enough to prevent new entry after extensive analyses on its nature as entry barrier. Among the factors taken into account while deciding whether admission fee constituted an entry barrier were the facts that admission fee that had to be paid in cash was a separate element of cost in addition to start-up costs, it was paid in order to enter the market and the certificate obtained in return was not always transferable or was an element of cost that could not be recoverable in its total, and admission fee could not be turned into liquidity immediately or total amount of

¹⁴ 4.3.1999; 99-13/99-40.

the cash paid could not be taken back in case of exit from the market. It was taken into account that representatives of the travel agencies in the General Assembly were encouraged to determine a high admission fee as this would ensure few entry to the market and increase the value of the current operation licences that were transferable. This was a good example that membership rules may be used by the members in an anti-competitive manner.