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**ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER
COMPETITION LAW**

-- Note by the Delegation of Turkey --

This note is submitted by the delegation of Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by Turkey --

1. Introduction

1. This contribution is intended to reflect the attitude of the Turkish Competition Authority (TCA) on exchange of information among competitors by considering the relevant decisions taken so far.¹ The contribution is mostly dependent on decisions of the Competition Board, which is the decision making organ of the TCA, and opinions forwarded by the TCA involving association of undertakings as exchange of information is mostly carried out with their involvement.

2. The Opinions and Decisions involving Exchange of Information between Competitors

2. 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) which, after gathering relevant information monthly, made short, medium and long term projections concerning production, domestic sale, export and stocks of cement and then sent them to all cement manufacturers.² In this application, the TCMA asked the TCA to forward its opinion on its practice of gathering information, making projections and sending them to cement manufacturers.

3. The Opinion of the TCA was as follows:

“...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.”

¹ This contribution repeats, updates and enriches the information on the topic already submitted in written contributions by the TCA mainly for the *Roundtable on Potential Pro-competitive and Anticompetitive Aspects of Trade/Business Associations* and partly for the *Roundtable on Facilitating Practices in Oligopolies* held in October 2007 within the Working Party No. 3 on Cooperation and Enforcement and Competition Committee respectively.

² The Opinion is dated 15.5.1998 and available in the following decision: *Cement* (dated 1.2.2002 and numbered 02-06/51-24). The decision is reassessed and retaken by the Competition Board upon repeal by the Council of State, the supreme administrative court. The new decision (dated 24.4.2006 and numbered 06-29/354-86) reiterates the findings of the initial decision regarding information exchange.

4. With these concerns, the TCA refused to clear the information exchange under Article 8³ of the Competition Act and provided that following principles should be followed at data collection and distribution stages by the TCMA 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.”⁴

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 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.”⁵

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. ...”⁶

³ Article 8 of the Competition Act empowers the Competition Board to grant a negative clearance certificate indicating that an agreement, decision, practice or a merger and acquisition do not violate the Competition Act.

⁴ Similar guidance is observed in subsequent decisions of the Competition Board. For instance, in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94), it was accepted that exchange of statistical aggregate data or information concerning the past would not cause negative impact on competition.

⁵ See also the explanations in ensuing decisions of the Competition Board. For example, in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94) it has been stated that exchange of information concerning future competitive behaviours and strategies of the undertakings removes the uncertainty of the future behaviours thereby facilitating coordination of competitive behaviours and emergence of cooperative effects. Moreover, in *Petder* decision (dated 20.9.2007 and numbered 07-76/907-345) concerning collecting and publishing information by Petroleum Industry Association on developments and size of various markets such as fuel and LPG, it was considered that information exchanges on future forecasts might create the risk of coordination among rivals in oligopolistic markets.

5. In another case⁷ 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. Accordingly, the Competition Board, especially, distinguished information exchanges in oligopolistic markets with homogenous products such as cement and fertilizer markets from less concentrated markets with heterogenous products.⁸

6. In this sense, the Competition Board took into account that concentration level of the motor vehicles market 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. Furthermore, it should be mentioned that in an ensuing decision⁹ of the Competition Board regarding exchange of monthly and weekly information on sales amounts of vehicles based on all submodels on the basis of individual undertakings (through Automotive Distributors' Association and Automotive Manufacturers Association and via individual communication among the members of these associations) and exchange of existing recommended price lists (via e-mails) it was considered that exchange of sales amounts did not lead to coordination effects as access to information in the automotive market was easy. Moreover, as the recommended price lists were

⁶ When the entirety of the opinion of 15.5.1998 is taken into account, the explanations in one of the subsequent decisions of the Competition Board (*Turkish Ready Mixed Concrete Association*, dated 23.5.2007 and numbered 07-42/466-178) are also relevant where it was decided that there was no infringement of competition rules when annual production data of ready-mixed concrete were collected and used for only scientific purposes, they were not directly or indirectly exchanged or shared between the undertakings, and were kept only within the relevant association of undertakings. Moreover, according to the decision the studies of the association of undertakings do not violate the Competition Act provided that they are not carried out to enable exchange of sensitive competitive information among undertakings, data subject to such studies are either not published on a monthly basis or are published only after lapse of a certain period of time and secrecy of sales data of the individual undertakings are ensured.

⁷ *Automotive Distributors' Association* decision (dated 15.4.2004 and numbered 04-26/287-65).

⁸ For instance, in *Flat Steel* decision (dated 16.6.2009 and numbered 09-28/600-141), it was considered that information exchange may restrict competition and coordinate competitive behaviours in markets where there are few undertakings, high concentration levels and entry barriers as was the case in flat steel market.

⁹ *Automotive Distributors' Association/Automotive Manufacturers Association* decision (dated 9.9.2009 and numbered 09-41/998-255).

announced on the websites of the undertakings, changes in the lists following price announcements was not regarded as restrictive of competition. Finally, it was considered that sharing of forecasts regarding sales amounts for the entirety of the market in terms of passenger cars, light commercial vehicles and commercial vehicles through meetings in Automotive Distributors' Association and Automotive Manufacturers Association, phone calls and e-mails aimed to determine the state of the sector and was not restricting or distorting competition when the existing structure of the automotive sector was considered.

7. The sensitivity of the Competition Board regarding information exchanges is justified when a decision 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*¹⁰ decision, 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 the transparency in the market and the predictability of the behaviours of the rival undertakings. In another decision,¹¹ member rival undertakings, after coming together within the relevant association, exchanged information, took decisions and reached understandings having anti-competitive object and effect. It should be said that these enabled the undertakings to infringe the Competition Act via cartels fixing prices, purchase and sales conditions, and controlling supply.

8. A similar and a more recent decision in which the relevant association of undertakings also played an important role is the *White Meat*¹² decision. In this case, rival undertakings tried to increase market transparency by sharing future price lists to serve the cartel involving price fixing and restricting supply. Moreover, the practices of the association of undertakings facilitated the cartel. For instance, the association of undertakings increased transparency in the market by sharing confidential company information with the rival undertakings and facilitated the violations of competition. The association prepared a projection including confidential company information which contributed to restriction of supply.¹³ Furthermore, the association submitted to the undertakings a plan regarding future production

¹⁰ The decision is dated 8.2.2002 and numbered 02-07/57-26. Following this case, the Competition Board reiterated more or less the guidance it provided to TCMA in its Opinion of 15.5.1998 upon a request by Association of Fertiliser Producers regarding the publication of information in its Monthly Statistical Information Bulletin. See *Association of Fertiliser Producers* (dated 8.8.2002 and numbered 02-47/586-M) the content of which is available in *Ceramics* decision (dated 3.8.2007 and numbered 07-64/794-291). It should be said that the initial decision (dated 8.2.2002 and numbered 02-07/57-26) was reassessed and retaken by the Competition Board following repeal by the Council of State, the supreme administrative court. The new decision (dated 26.7.2007 and numbered 07-62/738-266) reiterates the findings of the initial decision regarding information exchange.

¹¹ *Cartel in Iron and Steel Market*, dated 14.10.2005 and numbered 05-68/958-259.

¹² The decision is dated 25.11.2009 and numbered 09-57/1393-362.

¹³ The decision mentions that the activities of the association of undertakings concerning scientific data collection and its sharing with the undertakings are not competition concerns. Moreover, it is also not a competition concern to satisfy information requests from the public entities. The information requests by public entities concerned export data of the past belonging to individual undertakings or predictions of aggregate production quantities of the following year whereas the projections of the association of undertakings in this case included more detailed information such as production quantities by individual undertakings.

quantity and controlled whether the undertakings complied with it. Besides increasing the transparency in the market, the association enabled a more advantageous position to some undertakings in the market vis-à-vis others by sending the results of the projection to those undertakings. These practices of the association were regarded as *per se* violation of the Competition Act and it was decided that exemption conditions were not satisfied.¹⁴

9. Apart from decisions involving association of undertakings, there are also various decisions of the Competition Board where exchanges of information among competing undertakings facilitated cartels. For instance, in *Chipboard and/or Fibreboard*¹⁵ decision it was considered that the exchange of information was used to facilitate and set the stage for price fixing; in *Imported coal*¹⁶ decision relevant undertakings exchanged information on the amount of coal in the market and in their inventories with an aim to fix the amount of supply; in *Aerated Concrete*¹⁷ decision the rival undertakings sent price lists to each other as part of the attempts to fix sales prices and discounts and selling terms and they shared customers or business and exchanged information on prices and amounts with respect to individual customers. Finally, in *Ready-Mixed Concrete in Aegean Region*¹⁸ decision, rival undertakings exchanged monthly and even daily information on sales amounts and market shares calculated based on them. It was considered that this would obviously increase the transparency in the market for ready-mixed concrete having an oligopolistic structure and lead to anti-competitive effect. The information exchange on market shares and sales amounts in this case was regarded as a presumption that a concerted practice to share the market existed.

3. Conclusion

10. To summarise¹⁹ the attitude of the Competition Board regarding information exchanges, it can be argued that exchange of information sensitive for competition among competitors may limit competition. Information sensitive for competition relates to prices,²⁰ 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.²¹ Exchange of such

¹⁴ See also *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) and *Flat Steel* (dated 16.6.2009 and numbered 09-28/600-141) decisions where exemption was also denied. Information exchanged in the latter case concerned amount of purchase and sales in the domestic market and that of exports, and shipping premiums, all on a monthly basis. It was considered that information exchanged, which was enabled by minority shares and the resulting right to appoint one member in the board of directors in the relevant undertaking, had the object and effect of restricting competition and therefore violated the Competition Act.

¹⁵ The decision is dated 22.5.2006 and numbered 06-35/441-113.

¹⁶ The decision is dated 25.7.2006 and numbered 06-55/712-202.

¹⁷ The decision is dated 30.5.2007 and numbered 06-37/477-129.

¹⁸ The decision is dated 25.9.2008 and numbered 08-56/898-358.

¹⁹ See *Automotive Distributors' Association* decision (dated 15.4.2004 and numbered 04-26/287-65). Another decision, namely *Petder* (dated 20.9.2007 and numbered 07-76/907-345) also refers to the guidance provided in this earlier decision.

²⁰ According to *Milk Market in Konya and Isparta* (dated 26.7.2006 and numbered 06-56/714-204) and *Chipboard and/or fibreboard* (dated 22.5.2006 and numbered 06-35/441-113) decisions, price is the most important variable and tool of the competitive strategy of the undertakings and its exchange is restrictive of competition.

²¹ See also *Chipboard and/or Fiberboard* decision (dated 22.5.2006 and numbered 06-35/441-113). Similarly, in *Milk Market in Konya and Isparta* decision (dated 26.7.2006 and numbered 06-56/714-204) it is argued that exchange of such information would lead to awareness of competitive strategies of each other and therefore coordination of their market behaviours.

information among competitors increases transparency of the market and results in coordination of competitive 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.²² 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.²³ 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.²⁴ 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.²⁵ This makes it necessary to take into account such agreements in their economic context and observe them carefully in oligopolistic markets. Finally, it could be argued that information exchanges are not regarded as *per se* violations of competition and case-by-case analysis is required.²⁶

²² For the same guidance, see also *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) and *Flat Steel* (dated 16.6.2009 and numbered 09-28/600-141) decisions.

²³ Among beneficial impacts of information exchange, it is argued in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94) that exchange of statistical aggregate data or information concerning the past could contribute to efficiency by enabling planning of especially the investment strategy in a more correct manner and by preventing incorrect decisions. Moreover, another decision in the same market, namely *Chipboard and/or fiberboard* (dated 22.5.2006 and numbered 06-35/441-113), also mentions that information exchange may increase efficiency.

²⁴ The same guidance is also granted in *Petder* decision (dated 20.9.2007 and numbered 07-76/907-345) where it was taken into account that data regarding the past could be used to control compliance with an existing agreement or concerted practice. In *Ready-mixed concrete in Aegean Region* decision (dated 3.10.2006 and numbered 06-69/931-268) involving market sharing, the relevant undertakings regularly exchanged information on monthly and annual sales amounts to follow compliance with market shares agreed between the rival undertakings. In *Ceramics* decision (dated 3.8.2007 and numbered 07-64/794-291), exchange of information not only had the role of enabling the parties to reach an agreement but also enabled to detect and punish those who did not comply with it.

²⁵ According to *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) decision, frequency of the information exchange and its scope are also important in competitive analysis of the information exchange. Moreover, involvement of a great deal of the market players in the exchange of information may also increase its probability to facilitate potential cooperation.

²⁶ See *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) and *Automotive Distributors' Association/Automotive Manufacturers Association* decision (dated 9.9.2009 and numbered 09-41/998-255).