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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Turkey

-- Session II --

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**ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE
OF AGREEMENT**

- 1. Does your competition law, either as written or as enforced, have a special definition for hard core cartels? If so, what is it? Does the definition require, as one element, that there be an explicit agreement among competitors, or does it also provide for the possibility of implicit agreements, perhaps through consciously parallel conduct “plus” one or more facilitating practices?**

1. The Law on the Protection of Competition No 4054 (the Law) does not have a special definition for hard core cartels. It has a general prohibition for agreements, concerted practices and decisions limiting competition with a non-exhaustive list of examples such as price fixing, market sharing, controlling supply and demand, and complicating the activities of competing undertakings, excluding firms in the market via boycotts, discrimination and tying. The prohibition does not require the existence of an explicit agreement. Rather, the Law overtly says that in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice (concerted practice presumption). Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

- 2. Apart from the definitional issues, do cartels have special status under your law? In particular, are they?**

- prosecuted criminally;
- subject to a per se rule;
- subject to harsher sanctions, particularly higher fines, than other violations of the law?

- 3. What effect do these special attributes, if any, have on the evidentiary burden that the cartel prosecutor must meet?**

2. The agreements limiting competition are not prosecuted criminally under the Law. Fines imposed to undertakings party to an agreement limiting competition are administrative in nature. The agreements fixing prices are cited among the most severe cases in competition law. An agreement itself or at least its clauses distorting competition are subject to a per se rule and as a result there is no need to prove their effects if it is obvious that the objective is to limit competition. Being a party to an agreement limiting competition is prohibited according to the Law even effects of the agreement have not been realised. Because of this per se rule and the existence of concerted practice presumption, it can be said that the standard of proof is loosened. Agreements that fix prices or share markets may be subject to higher fines because they are generally more harmful than other anticompetitive conducts.

4. Is it possible to prove a cartel agreement in your country without direct evidence? If so, what evidence is sufficient? In particular, what combination of type's ii-iv evidence (i- direct evidence of agreement; ii- indirect evidence of agreement, iii- practices that facilitate cartels, or make it easier for competitors to reach or sustain agreement iv- economic evidence) can suffice?

3. In *Cement* decision (2.12.2004; 04-77/1108-277), parallel price increases among four cement producers operating in Aegean region were the subject of the investigation. At the end of the investigation, an overt text of an agreement showing that undertakings violated the Law could not be found. However, there were many findings demonstrating existence of infringements of competition in the market. In this case, in line with the concerted practice presumption, cement prices in Aegean region were analysed and as a result parallel and high price increases were observed. The possibility that costs that might explain such increases was discarded as a result of cost-price comparisons proving that costs during the relevant year followed a stable course. Therefore, it was seen that price increases have been realised independent of costs.

4. To give a brief account of the analyses carried out during investigation in general, for instance, in 2002, despite price falls in bagged cement in January-April, prices charged by some cement producers doubled in a short period of four months beginning from April. Increase in inflation and exchange rate in this period was around 20% whereas costs incurred by the cement producers remain unchanged. To be more specific, prices increase by some cement producers was 100% whereas inflation rate was 21% and exchange rate was 23% in April-October in İzmir, the largest city in the Aegean region.¹ Moreover, in 2003 although there was no change in costs, a sudden increase in prices began in June when inflation rate was around 2% and exchange rate decreased by 2%. To give a more specific example for 2003, the increase in price of bagged cement in June-December in the Aegean region around 50% despite the inflation rate was around %2, 20 and increase in exchange rate was minus. Price comparisons with other regions demonstrated that price of the same product was up to 65% higher in Aegean region than for instance that in Ankara although changes in costs between the two regions were minimal.

5. Moreover, two documents found during on the spot inspections were regarded as signs of coordination among competitors in the sense that the competitors held a meeting to realise price fixing practice. In one these documents, it was written that one of the cement producers was appointed as the secretariat to organise the "business". To summarise, business was defined as to prevent unfair competition, unnecessary practices, price decreases, discounts and dumpings; preparing regional plans regarding production-consumption. The other document showed that the cement producers held meetings in certain cities and those cement producers operating in a certain city attended the relevant meeting. However, it must be said that these two documents were supporting documents indicating coordination among competitors and they were not the main element that the decision was based on. On the contrary, concerted practice presumption based on price increases is at the heart of the decision and the use of the presumption does not require the existence of such supporting documents.

6. The undertakings subject to investigation could not produce rational and economic facts such as increase in demand as the cause of price increase.

7. Without employing concerted practice presumption, it could be impossible to prove a cartel agreement of a secret nature in sectors in which competition law and instruments of proof are known and cement industry is such an industry and has experienced two investigations before.

1. The decision also includes price analyses in other cities such as Aydın, Manisa and counties such as Ayvalık, Burhaniye, Edremit. Because İzmir is the largest city of the region, it is selected here as example.

8. As a result this case is a good example of use of economic evidence (type iv) that is evidence of price increases that can not be justified.

5. Is there a difference in the sanctions that are applied to cases in which there is direct evidence of agreement and those in which direct evidence is lacking?

Imposition of sanctions does not depend on the existence of direct evidence of agreement. The concerted practice presumption is a good example that there is no difference in sanctions that are applied when direct evidence is missing vis-à-vis sanctions applied when direct evidence is available. While imposing fines, the Law just says that the Competition Board takes into account factors such as the existence of intent, the severity of fault, the market power of the undertaking or undertakings upon which a penalty is imposed, and the severity of potential damage.

6. The literature on cartels, including that produced by the OECD, urges that hard core cartels, because of their especially harmful effects, be prosecuted as aggressively as possible and punished by the most severe sanctions available. In your view, is this goal furthered or weakened by evidentiary rules that permit cartel prosecutions without evidence of explicit agreement?

7. Developing countries and those with little or no experience in prosecuting cartels will almost certainly find it difficult, at least initially, to generate direct evidence of explicit agreement in cartel cases. Should these countries employ a more lenient evidentiary standard? If so, should it become stricter over time?

9. The reasoning of concerted presumption is granted as “In a legal system in which agreements limiting competition are prohibited, such agreements are made secretly and proving their existence becomes very hard and sometimes impossible. Therefore, in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, a presumption that undertakings are in concerted practice has been adopted. As a result, the burden of proving that they are not in concerted practice has been shifted to the relevant undertakings and it has been aimed that the Law does not become inoperative due to difficulty of proof.” Consequently, strength of the Law has been consolidated against anticompetitive conduct in case it is hard to find an explicit agreement although the conditions in the market are similar to those where competition is prevented, distorted or restricted.

10. Although it may be hard for a country with little or no experience to draw a clear line to distinguish a secret cartel from parallel behaviours that have economic and rational causes, this presumption can be valuable to deal with anticompetitive conduct where it is hard to find a smoking gun provided that the presumption is used cautiously.