

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

**Working Party No. 3 on Co-operation and Enforcement**

**UNILATERAL DISCLOSURE OF INFORMATION WITH ANTICOMPETITIVE EFFECTS (E.G.  
THROUGH PRESS ANNOUNCEMENTS)**

-- Turkey --

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## 1. Introduction

1. This contribution is intended to reflect the attitude of the Turkish Competition Authority (TCA) on unilateral information disclosure of undertakings which may constitute concerted practices within the context of competition rules. The contribution mainly depends on decisions of the Competition Board, which is the decision making body of the TCA, where appropriate.

## 2. The legal standard of review and enforcement related issues on unilateral communications

2. Turkish competition regime is based on European Union (EU) competition rules. In fact provisions of Article 4 of the Act No 4054 on the Protection of Competition (Turkish Competition Act) prohibiting anti-competitive agreements, concerted practices and decisions are almost identical to those of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Therefore “concerted practices” falling short of an agreement, which have anticompetitive effects, may well be captured by Turkish competition regime. Also in this context meetings of the minds (i.e. mutual agreement) of the undertakings concerned, whether written or oral, tacit or explicit, formal or informal, which have as their object or effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are regarded as infringements of Turkish Competition Act. Moreover, according to Article 4, the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings which are similar to those markets where competition is prevented, distorted or restricted constitute a presumption that the undertakings are engaged in concerted practice, even if the existence of an agreement cannot be proved.

3. As stated by the Secretariat<sup>1</sup>, making a distinction between purely unilateral communications that fall outside the reach of laws against concerted practices which fall within these laws can be a difficult task for competition authorities. Also it should be noted that the TCA does not have much experience in this field. However, it can be argued that in order to make a proper assessment a distinction should be made in the context the disclosure practices took place. That is, first, it should be taken into account whether these unilateral communications are private, which are available only for rivals or public, which are available for both competitors and buyers alike.

### 2.1. Private Communications to Competitors

4. The TCA believes that, in a situation where only one undertaking discloses information about its intended market conduct such as future prices, quantities, and strategies only to its competitors who accept it can constitute a concerted practice. In such a situation both the undertaking disclosing strategic information on its future plans and each competitor which receives strategic data from its rival without responding with an immediate and clear statement that it does not wish to receive such data should be deemed to be responsible for an infringement. This implication is clear from the case law of European Court of Justice (ECJ)<sup>2</sup> and the case law of the Turkish Competition Board alike. Attitude of the Turkish Competition Board on this issue is apparent in several cases like *Work and Travel Agencies*<sup>3</sup>, and recent

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<sup>1</sup> See OECD Policy Round Tables Information Exchanges Between Competitors under Competition Law 2010 ([DAF/COMP\(2010\)37](#), p.21).

<sup>2</sup> See Joined Cases T-25/95 etc., *Cimenteries CBR and Others v Commission*, [2000] ECR II-491; Case C-8/08 *T-Mobile Netherlands BV and Others v RAD van bestuur van der Nederlands Mededingingsautoeriteit*, Judgement of 4 June 2009.

<sup>3</sup> *Work and Travel Agencies* decision (dated 11.04.2007 and numbered 07-31/325-120).

*Automobile Manufacturers and Distributors*<sup>4</sup> and *Private Schools II*<sup>5</sup>. Related parts of the latter case are as follows:

“... It is clear that uncertainty as to the future, which is expected to exist in normal market conditions and is in a sense the source of competitive pressure on undertakings, will be substantially lessened if the undertakings meet together and exchange views on prices to be implemented. Also in a market where this kind of communication and information exchange takes place, it is impossible that undertakings’ commercial strategies are not affected by these contacts and the information exchanged. It is emphasized in the reference EU competition case law that in order to apply the presumption of concerted practice it is enough to demonstrate the anticompetitive object while there is no need to prove the anticompetitive effect. Moreover, unless competitors disprove, exchange of [this kind of] commercially sensitive information is presumed to give rise to a concerted practice. [...] In this context, meetings within the Association of Turkish Private Schools and Association of Ankara Private Schools and sharing information about prices to be implemented between competitors at these meetings are considered to be a breach of Article 4 of the Turkish Competition Act.”

5. Similar to ECJ case law, the Turkish Competition Board also confirms that private disclosure of intended future conduct, that is unilateral disclosure of future prices, quantities or strategies only to competitors should be considered as restrictions of competition by object. In order to apply the presumption that the relevant undertakings are engaged in a concerted practice within the meaning of Article 4 of Turkish Competition Act, it is sufficient for the TCA to prove that the relevant undertaking(s) either attended a meeting where this kind of commercially sensitive information is exchanged, or received or sent that information through other means (via phone calls, fax, e-mail etc).

6. The logic behind the object-based approach on this issue is that, it is very unlikely for customers to benefit from an information exchange which they are not aware of. For this reason it is difficult to find a way that the society benefits from private information exchanges on future prices and quantities between the companies<sup>6</sup>. In this context, as is stated in the literature<sup>7</sup>, the best possible explanation of this kind of unilateral communications of the firms should be efforts to coordinate future market behavior of rivals.

## 2.2. **Public Announcements**

7. The assessment under second possible scenario where a concerted practice may be found regarding unilateral communications, namely public announcements, is more complicated. Although there is no case law on this issue in Turkey, in terms of public announcements, it can be said that the TCA shares

<sup>4</sup> *Automobile Manufacturers and Distributors* decision (dated 18.04.2011 and numbered 11-24/464-139). In this remarkable case 16 automobile manufacturers or distributors were imposed a total fine of 277 million Turkish Liras (approximately 110 million Euros) for infringing Article 4 of the Turkish Competition Act through sharing information on future price strategies, targets and stocks.

<sup>5</sup> *Private Schools II* decision (dated 03.03.2011 and numbered 11-12/226-76).

<sup>6</sup> For a different view see DOYLE, M. P. and C. M. SNYDER (1999), “Information Sharing and Competition in the Motor Vehicle Industry”, *Journal of Political Economy*, Vol:107, No:6, pp.1326-1364.

<sup>7</sup> See CAFFARRA, C. and K. U. KÜHN (2006), “The Cost of Simplistic Rules for Assessing Information Exchange: The Italian Jet Fuel Decision”, in *The Pros and Cons of Information Sharing*, Swedish Competition Authority (Edt.), pp. 139,140; KÜHN, K. U. and VIVES, X. (1995), *Information Exchanges Among Firms and their Impact on Competition*, Office for Official Publications of the European Communities, Luxembourg, p. 55; WHISH, R. (2006), “Information Sharing Agreements”, in *The Pros and Cons of Information Sharing*, Swedish Competition Authority (Edt.), p. 37.

the view in the European Commission's new Guidelines on Horizontal Cooperation Agreements<sup>8</sup>. According to the Guidelines, “ ... depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.”

8. However, unlike private announcements, in such a situation, several considerations need to be taken into account. For instance, careful attention should be paid whether these public announcements, e.g. public price announcements, constitute industry tradition with a historical background, whether buyers demand these announcements, whether or not these announcements are binding for companies before buyers, whether undertakings usually stick to and implement the prices announced before or, in contrast, they readjust their prices mutually following price announcements of rivals.

9. Hence an object-based approach may not be proper in all circumstances where undertakings publicly announce their future price and quantities as in some industries public announcements may involve commitments to customers. For instance, in markets where long term relationships exist between buyers and sellers, future price announcements may guarantee customers a maximum price to be implemented. In such a situation customers may have chance to adjust their production/purchase plans more efficiently. In addition, bargaining power of customers may increase, that is to say customers can request discounts on announced prices<sup>9</sup>.

10. In this sense, as far as it is observed that companies usually stick to the prices they announced, that is, if they usually do not revise or readjust their own earlier announcements before these announcement take effect in response to announcements made by competitors, potential efficiency gains of such announcements may be considered to be stronger than the collusive effects of the announcements<sup>10</sup>.

### **3. Cheap Talk and Invitation to Collude**

#### **3.1. Cheap Talk**

11. *Cheap talk* can have a critical role on collusion, enabling a meeting of the minds among rivals on how to play the game. Because in a game where multiple equilibria exist, reaching a common understanding is only possible by overcoming or at least limiting strategic uncertainties. As the literature shows<sup>11</sup>, *cheap talk* can deal with it. This way firms may arrive at a commonly agreed price without inquiring the risk of losing market shares or triggering price wars during the period of adjustment on new

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<sup>8</sup> “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, OJ (2011) C/11, para. 63.

<sup>9</sup> See MØLLGAARD, H. P. and P. B. OVERGAARD (2007), *Information Exchange, Market Transparency, and Dynamic Oligopoly*, Economics Working Paper 2007-3, University Of Aarhus, Denmark, p. 14.

<sup>10</sup> See KÜHN, K.U. (2001), “Fighting Collusion by Regulating Communication Between Firms”, *Economic Policy*, Vol. 16, No: 32, p.196; MOTTA, M. (2004), *Competition Policy Theory and Practice*, Cambridge University Press, New York, U.S. p.156.

<sup>11</sup> See for instance FARREL, J. (1987), “Cheap Talk Co-ordination and Entry”, *RAND Journal of Economics*, Vol: 18, No: 1, s. 34-39.; FARRELL, J. and RABIN, M. (1996): “Cheap Talk”, *Journal of Economic Perspectives*, Vol. 10, No: 3, s. 103–118.; GILLESPIE, W. (1995), *Cheap Talk, Price Announcements, and Collusive Coordination*, U.S. Department of Justice Antitrust Division, Economic Analysis Group Discussion Paper, EAG 95-3;

prices<sup>12</sup>. In this regard, increasing communication about future plans of rivals may reduce strategic uncertainties which normally exist on markets and facilitate coordinated behavior<sup>13</sup>.

### 3.2. Invitation to Collude

12. There are no specific rules directly prohibiting invitation to collude in Turkish Competition Act. During investigations, when there is evidence found on this kind of activities of a firm, the Turkish Competition Board inquires if the other parties changed their market behavior towards a way proposed by the firm that invites others to collude. Unless there is further evidence revealing that the parties had reached a common understanding and/or the invited parties changed their market behavior towards a collusive outcome, the Competition Board just warns the parties not to engage in anticompetitive practices.

13. For example, in one of the recent decisions of the Turkish Competition Board, namely *Hidrogen Peroxide*<sup>14</sup>, although there was evidence revealing that one of the undertakings was seeking grounds for an agreement with the other, the Turkish Competition Board did not decide that the relevant undertakings were parties to an anti-competitive agreement as there was no further evidence that the other undertaking had responded affirmative to the one seeking an agreement or there was a mutual understanding between the two undertakings on market parameters. Likewise, in *Medical Gas*<sup>15</sup> case, the Turkish Competition Board held that a document referring to an anticompetitive agreement between three rivals which was signed by one of the undertakings and mailed to the others to be signed would not meet alone the required standard of proof.

14. On the other hand, in *Adiyaman LPG*<sup>16</sup>, *Peugeot Dealers*<sup>17</sup> and *Automobile Manufacturers and Distributors*<sup>18</sup> decisions, the Turkish Competition Board adopted an approach in parallel with *T-Mobile* decision of the ECJ. Pursuant to the three aforementioned cases, unless an undertaking, which participated in an anti-competitive meeting or received a communication in the same context, has publicly distanced itself from collusion as such, it will face the risk of being held liable for infringement of Article 4 of the Turkish Competition Act.

## 4. Policy guidance

15. Presently there is an ongoing study to issue a policy guideline on assessment of horizontal cooperation agreements which is mainly based on the European Commission's new guidelines<sup>19</sup> within the TCA. It is planned to be published within a few months. Nevertheless, as it is mentioned above, in a number of cases the Turkish Competition Board implicitly evaluated the standard of proof regarding anti-competitive horizontal agreements. With respect to judicial review of the decisions of the Turkish Competition Board, the Council of State, which is the high administrative court against the decisions of the former, has not clarified the evidential threshold to be met in a precise manner. On the other hand, under

<sup>12</sup> Motta, supra note 10,154.

<sup>13</sup> Møllgaard and Overgaard, supra note 9, p. 8; VIVES, X. (2006), "Information Sharing: Economics and Antitrust", in *The Pros and Cons of Information Sharing*, Swedish Competition Authority (Edt.), p. 89.

<sup>14</sup> *Hidrogen Peroxide* decision (dated 25.01.2011 and numbered 11-05/88-31).

<sup>15</sup> *Medical Gas* decision (dated 11.11.2010 and numbered 10-72/1503-572).

<sup>16</sup> *Adiyaman LPG* decision (dated 25.10.2005 and numbered 05-73/986-273).

<sup>17</sup> *Peugeot Dealers* decision (dated 06.08.2010 and numbered 10-53/1057-391).

<sup>18</sup> See supra note 4.

<sup>19</sup> EU Commission's guidelines on horizontal agreements (see supra note 6).

the light of a few exceptional rulings by the Council of State such as *SGK*<sup>20</sup>, it is possible to conclude that the decisions of the Turkish Competition Board regarding alleged infringements of Article 4 of the Turkish Competition Act should be based on clear, convincing and consistent evidence which eliminates uncertainty as to the unlawfulness of an act when considered holistically.

16. In practice there are no clear safeguards developed regarding unilateral disclosure of information in Turkish competition case law. However, the Turkish Competition Board laid down some general principles on the evaluation of information exchanges in its case law. In a number of decisions,<sup>21</sup> the Turkish Competition Board remarked that, taken into account the particular characteristics of the market concerned, the type of information exchanged and the way information is exchanged, and in case certain measures taken, exchange of past and current data may be allowed<sup>22</sup>. On the other hand, the Turkish Competition Board clearly stated in its decisions that, private exchange of future prices, quantities or market strategies shall not be tolerated and shall be considered as an infringement of Article 4 of Turkish Competition Act.<sup>23</sup>

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<sup>20</sup> *SGK* decision (13th Chamber, dated 16.02.2010 and numbered E.2007/9330, K.2010/1325).

<sup>21</sup> See for instance, the opinion by Competition Board given to Fertilizer Producers Association (which can be found in its decision dated 08.08.2002 and numbered 02-47/586-M), *ODD Exemption* decision (dated 14.07.2011 and numbered 11-43/916-285).

<sup>22</sup> For instance, in *ODD Exemption* decision (supra note 21), with reference to the Guidelines on Horizontal Cooperation Agreements of the European Commission, the Turkish Competition Board stipulated that structure of the market and characteristics of the information exchanged are taken into account when an alleged infringement of Article 4 is considered.

<sup>23</sup> 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. See also recent *Automobile Manufacturers and Distributors* case (supra note 4).