

Unclassified**English - Or. English**

22 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Turkey**

4 December 2019

This document reproduces a written contribution from Turkey submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

Please contact Mr Antonio CAPOBIANCO if you have any questions about this document
[Antonio.CAPOBIANCO@oecd.org]

JT03455180

Turkey

1. Introduction

1. This contribution aims to introduce the approach and experience of the Turkish Competition Authority (TCA) towards Hub-and-Spoke Arrangements through *Aral* decision and *LSID* decision of the Turkish Competition Board (Board). The *Aral* decision is primarily concerned with Hub-and-Spoke Arrangements, vertical price fixing agreements and RPM infringements and is important in terms of scope, because the decision has two related market definition and it discusses three different infringements in these related markets. On the other hand *LSID* decision is mainly concerned with information exchange through retailers, association, research company.

2. First of all we need to say that as in European Commission and most of the European countries, Hub-and-Spoke Arrangements are not regulated under the Turkish competition legislation. The main legislation prohibiting cartel, concerted practice, agreement in Turkey is the Law on Protection of Competition No 4054 (Competition Law).

3. TCA provide guidance to Retail Price Maintenance (RPM) and permissible or prohibited conduct in vertical relationships, via 2002/2 Vertical Communique with a view to preventing horizontal collusive “side-effects” of such conduct but there is no explicit emphasis to horizontal collusion and hub and spoke arrangements in 2002/2 Vertical Communique. Leniency Regulation is applicable to hub and spoke cartels but there is no leniency case regarding hub and spoke arrangements.

4. The Board shed light on the matter depending on European case law through *Replica Kit* and *Tesco* decisions.

5. There are basically two cases that Hub-and-Spoke Arrangements are cited. In *Aral* the hub and spoke suspicion was between retailers (spoke) through suppliers (hub) whereas in *LSID* the suspicion was between suppliers (spoke) through retailers/association/research company (hub). However, in none of these cases the Board decided that the law is breached due to Hub-and-Spoke Arrangements. In *Aral* decision the board concluded that the parties in computer and video game consoles market are in a vertical price fixing agreement and fined both parties (in supplier and retailer level) in this vertical relationship. In other related market in this case (consumer electronics market) there are two kind of violations: vertical price fixing agreement between supplier- LG and its retailers (Teknosa and Mediamarkt) and RPM conducted by Philips Turkey (supplier) and Vestel (supplier) to their retailers. In *LSID* decision which was a result of preliminary investigation, the Board rejected the claims and did not conduct an investigation.

2. The *Aral* Decision¹

6. The *Aral* decision was adopted after an investigation on Aral Game, which is a major video game importer/distributor in Turkey, and its retailers (Teknosa, Kliksa, Bimeks, Vatan, D&R, Gold) in computer and video game consoles market. On the other hand in the same investigation there was another related market described, “the market for

¹ The Board's decision dated 07.11.2016 and numbered 16-37/628-279.

consumer electronics”, investigation was about RPM agreement and anticompetitive agreement between the supplier parties under investigation (LG Electronics Turkey, Türk Philips, Vestel) and their retailers. The case was focused on two related markets: *computer and video game consoles market* and *consumer electronics*².

7. In general for both hub-and-spoke suspicions and the RPM allegations, TCA has executed dawn raids at both suppliers and retailer undertakings and tried to uncover hub-and-spoke arrangements using evidence obtained from suppliers and retailers. The evidence obtained clearly showed a communication regarding price fixing between undertakings.

8. After dawn raids performed at the related parties in the investigation, the obtained communication between suppliers and retailers showed that there were requests coming from the retailers to adjust prices upward and this was an interactive relation.

9. In *Aral* decision Board has referred to European case law based on *Replica Kit* decision. According to United Kingdom Supreme Court the analyses is made using the three criteria test: (i) retailer A should give future sale prices to supplier B with the anticipation/foresight that supplier B may use these info to affect market conditions (ii) supplier B should give these info to retailer C – retailer C may /should know that these info is given to supplier B by retailer A (iii) retailer C should determine its future sale price using these information³. In this relationship it is said that to hold C liable for the violation, C should be in a position to know that the source of the request/information coming from B is A. In *Aral* Case there was horizontal effect but based on these criteria, the Board said that it is not certain that the retailers could know that the price adjustment requests actually comes from competing retailers and said causality between retailers’ requests and other retailers’ price adjustment is not clear. Since hub-and-spoke arrangements is composed of vertical and horizontal elements, the causality between horizontal effect and vertical price fixing agreements should be reached to conclude that a hub-and-spoke infringement exists. For this reason, the Board said that the communication in the market cannot be called as a horizontal agreement and abandoned claims regarding hub and spoke arrangement. Hence, Board fined *Aral* and only the retailers who requested from suppliers to warn other retailers to adjust resale prices, taking in to consideration even if the other retailers were adjusting their prices they were not in a position to know the source of the requests.

10. As a result the Board decided that the *Aral* and its retailers violated the Article 4 of the Competition Law by vertical price fixing agreements in computer and video game consoles market and imposed monetary fine against *Aral* and its retailers (*Teknosa*, *Kliksa*, *Bimeks*, *Vatan*, *D&R*, *Gold*). In addition, in the market for consumer electronics Board found that *LG* and its retailers (*Teknosa* and *Mediamarkt*) breached Article 4 of the Competition Law via vertical price fixing agreements; whereas the other suppliers *Vestel* and *Philips* breached Article 4 of the Competition Law via resale price maintenance (RPM) infringement and thus the Board imposed monetary fine against *LG* and its retailers (*Teknosa* and *Mediamarkt*) and against other suppliers *Philips Turkey* and *Vestel*.

² In *Aral* decision, the investigation has first started with the allegations regarding RPM and hub and spoke arrangements, in computer and video game consoles and then the scope of the investigation has widened from computer and video game consoles to consumer electronics market since the parties are in general common and the allegations are similar.

³ Case Nos 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318, para. 141

11. *Aral* decision is important as both sides of the computer and video game consoles market were more or less equally engaged in the price fixing agreement (This is also valid for LG and its retailers in the market of consumer electronics). Since both suppliers and retailers in computer and video game consoles market and partially in market for consumer electronics (LG And its retailers) are fined, the result is somehow same as Hub and Spoke arrangements in terms of fined parties. On the other hand infringement way of the law has had also consequence regarding the fine amount in TL because if they were fined due to breaching Act 4054 (Competition Law) via hub and spoke cartels they would be fined at a higher percentage of their annual income realized at previous year since it is a cartel violation.

3. The *LSID* Decision⁴

12. The *LSID* decision was adopted after a preliminary investigation on LSİD (Tire Industrialists and Importers Association) and major tire suppliers (Brisa- Bridgestone, Good Year, Pirelli). This preliminary investigation was about the information exchange⁵ between competitors through retailers, association (LSID), a research company (an independent auditor-BDO Denet) about the sales volume and the price increases.

13. As in the other cases for information exchange suspicion, TCA has executed dawn raids at both association and competitor undertakings and tried to uncover information exchange using dawn raid evidence. While the evidence showed that there is an exchange of information regarding competitors' future prices between undertakings through retailers, the Board took a step further and made an effect based analysis to see how the suppliers used this information.

14. In *LSID* decision Board has referred to European case law based on *Tesco* decision. According to Board's *LSID* decision; United Kingdom Competition Appeal Tribunal's conditions that was considered as lessening of competition by object in hub and spoke arrangement are listed as follows: (i) supplier A should give future sale prices to retailer X with the intention of affecting its competitor supplier B's market attitudes (ii) retailer X should give these pricing information to supplier B (iii) supplier B which should absolutely know that this information belongs to A will settle its own pricing policy using this information obtained from retailer X.

15. Based on the e-mail communication between suppliers and retailers in this case, upon request of the retailers to have discount on the prices, the suppliers were obtaining each others' sales prices through retailers that were functioning as a hub. So the Board found that the second and the third condition is fulfilled but emphasized the fact that the retailers use this information to bargain on the prices so it cannot be said that retailers restricted the competition by object. Additionally, the Board said that the supplier parties' intention is not clear while providing their

⁴ The Board's decision dated 16.12.2015 and numbered 15-44/731-266.

⁵ Information exchange issue is regulated under the Turkish competition legislation with the Guideline on Horizontal Co-operation Agreements. But in this guideline just the general scope of the information exchanged detrimental to competition (competitively sensitive information) is outlined but indirect information exchange issue is not covered.

own sales prices and requesting other suppliers' prices because suppliers may also settle new competitive prices for their retailers using competitors pricing information.

16. In this case it was found that information exchanged through association and research company was basically past information and information was obtained from the retailer level not the supplier level under preliminary investigation. For this reason the exchanged information through association and research company was not considered as competitively sensitive information.

17. Lastly the Board found that the competition is not restricted through information exchange by effect, depending on the effect based analysis which was comparing major tire sellers' prices by different types of mostly preferred tires.

18. In the light of the dawn raid evidence and effect based analysis the board concluded that Brisa-Bridgestone, Good Year, Pirelli and association (LSID) did not violate by aim and by object the Article 4 of the Competition Law via information exchange.

4. Other Issues

19. TCA has not experienced any e-commerce case including hub and spoke arrangements yet. For this reason it is not possible to say that e-commerce increases the risk for hub-and-spoke types of collusion based on TCA experience for now. Nevertheless, we know that as the number of players in the market decrease it is easy to organize hub and spoke arrangements⁶ taking the market structures in the cases analyzed into consideration. On the other hand independent from the number of players in the market, price comparison tools and algorithms can do price monitoring and facilitate direct interventions against deviating suppliers or retailers.

20. Although TCA has not encountered any e-commerce case including hub and spoke arrangements, it is thought that biggest challenge will come from the analyze and comprehension of price comparison tools and algorithms. Last year TCA imposed fine against Sony due to breaching Competition Law via RPM on online sales.

21. Nowadays, TCA is investigating an e-commerce retailer company called Hepsiburada and a supplier Anka Mobil (Turkey distributor of Spigen branded mobile phone case) regarding the supplier interfering in resale prices for its products to be sold by its retailers (other than Hepsiburada) and dictating a price margin plus retailer Hepsiburada's sale price causing a price advantage to Hepsiburada But whether Hepsiburada is an intervening party in RPM on this relationship will be clear at the end of the investigation.

5. Conclusion

22. Since there are limited number of cases related to hub and spoke arrangements it is hard to say that enforcement practice in Turkey can identify markets that are prone to this type of indirect horizontal collusion. On the other hand there are challenges in determining

⁶ YILDIZ, U (2017), Rekabet Hukukunda ABC Bilgi Değişimi, Hub and Spoke Conspiracy

the indirect horizontal collusion especially when potentially high numbers of players involved.

23. If the connection between vertical relationship and horizontal effect is obvious and provable than it is easy to say that there are hub and spoke cartels but according to TCA's experience it is hard to establish causality between vertical and horizontal components of hub and spoke cartels. For this reason some hub and spoke cases in reality may be interpreted as RPM case or other price fixing agreements since causality between vertical and horizontal components of hub and spoke cartels cannot be found out due to lack of necessary proof.

24. Based on the TCA experience and Turkish jurisdiction's point of view it is hard to decide that and it is hard to prove the intention of the parties in hub and spoke cartels with limited findings (i.e. communication finding / proof between supplier and retailer). On the other hand hard core cartels are more clear if a communication finding/proof between competitors are obtained.