

The Turkish Competition Board submits to public consultation a draft guidelines relating to horizontal cooperation agreements including the exchange of information between competitors

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Ercüment Erdem, e-Competitions | N° 52725, www.concurrences.com

The exchange of information between competitors is not regulated under Turkish law. This subject was recently handled within the Guidelines Project on the Application of Articles 4 and 5 of the Act No. 4054 on the Protection of Competition in Horizontal Cooperation Agreements (“Guidelines”) [1]. However, the Guidelines have not been published yet.

In the absence of a legal framework, Competition Board (“Board”) decisions should be taken into account concerning information exchange, since the Board has given multiple decisions regarding information exchange and has thus opined on the principles of information exchange for more than ten years.

Furthermore, Board decisions should be taken into account within the process of preparation of the Guidelines since the Guidelines should permit a development by determining the negative aspects of the current practice.

Parties to the Information Exchange

It can be observed that the parties to information exchange differ according to the horizontal or vertical relationship between the parties.

Horizontal Relationships. Although the Board does not expressly state that information exchange among competitors should be taken into account, this notion can be easily observed in its decisions; for since its establishment, the Board has taken special care to examine cases where there is an exchange of information between competitors. For instance, the Board, in its decision dated

08.08.2002 and numbered 02-47/586-M regarding the Association of Fertilizer Producers [2], decided that the exchange of statistical information between competitors should cease since such an exchange might negatively influence the competition. In its decision dated 19.12.2005 and numbered 05-85/1182-336 [3], the Board pointed to information exchange between competitors by using the phrase “*between undertakings in the same market*”. In one of its more recent decisions dated 18.04.2011 and numbered 11-24/464-139 [4], the Board did not take into consideration correspondence between the parties, as it was exchanged between Borusan and its retailer (Kosifler) – not competitors.

Board decisions on information exchange among competitors are also examined by the Council of State within the scope of annulment suits issued against Board decisions. The 13th Chamber of the Council of State, in its decision dated 08.05.2012 and numbered E. 2008/9080, K. 2012/965 [5], considered (after analyzing the effects of such information exchange in the market) information exchanged between competitors as against competition since it might negatively influence the competition.

Vertical Relations. Where there is a vertical relationship between the parties, they are in principle not competitors since they are not active in the same market. Nevertheless, even in such a situation, the Board analyses information exchanged between the parties considering that such an exchange may distort competition in the market where the receiving party is active. The Board, in its decision dated 03.05.2012 and numbered 12-24/675-195 [6], analyzed whether information exchanged between the supplier and its retailer would lead to coordination between retailers and decided that the information exchanged did not create a distortion of competition since the information exchanged between the parties (the supplier and the retailer) would not lead to any coordination between retailers. This decision is important with regards to information exchanged between suppliers and retailers.

Form of the Information Exchanged

The information exchange between parties may be direct, indirect and regular.

Direct Information Exchange. Direct information exchange is the easiest form of information exchange that may be detected by the Board. Therefore, there are a limited number of Board decisions on direct information exchange between competitors. For example, the Board, in its decision dated 16.06.2009 and numbered 09-28/600-141 [7], considered the direct exchange of detailed domestic and foreign quantities of sale, monthly import quantities and similar information between Erdemir and Borçelik as anticompetitive.

Indirect Information Exchange. Indirect information exchange is the most common way to exchange information. Indirect information may be exchanged either through statistical or general information or through associations of undertakings.

► The Board prohibits every kind of statistical or general information exchange between competitors that may inform them of each other’s future behavior. The Board first approached this subject in its decision dated 08.08.2002 and numbered 02-47/586-M [8], where it considered anticompetitive any kind of statistical or general information exchange which would prevent undertakings from determining their future behavior “*on the basis of factors other than individual preferences*”. There

are multiple decisions of the Board on this subject [9].

► The Board also examines information exchanged through associations of undertakings and prohibits information exchanges that may influence undertakings' future decisions. Within this scope, the Board, in its decision dated 08.02.2002 and numbered 02-07/57-26 [10], decided that information was exchanged between parties through meetings held in the association of undertakings and through monthly statistical bulletins. The Board also emphasized in its decision dated 25.11.2009 and numbered 09-57/1393-362 [11] that the association of undertakings facilitated the infringement of competition by sharing its work on the calculation of the total production amount of the association members with undertakings.

Regular Information Exchange. It can be observed, in light of Board decisions, that the Board considers regular information exchange as anticompetitive. The Board, in its decision dated 20.09.2012 and numbered 12-44/1350-455 [12], considered skeptical, from the point of view of competition law, the exchange of information consisting of "monthly sales data" (considering that information was exchanged at regular short intervals). There are a lot of decisions where the Board attentively considers monthly information exchanges [13]. Furthermore, the Board also examines whether information exchanges between parties continued for a prolonged period. The Board, in its decision dated 04.07.2007 and numbered 07-56/672-209 [14], considered information exchanged "over a prolonged period" as anticompetitive. Nevertheless, the duration of the information exchange is not stated in the decision, therefore, the Board's interpretation on the duration of "prolonged period" is not clarified.

Importance of the Information Exchanged

As has been frequently stated in Board decisions [15], information exchange does not constitute *per se* a competition violation since information exchange does not always influence competition in a negative way; it may even have positive effects on competition. Indeed, it is accepted that information exchange has positive effects on competition if it permits the parties to better organize their future investments.

However, information exchange may be anticompetitive from the point of view of the market structure and the nature of the information exchanged.

Influence of the Market Structure. It may be observed from Board decisions that market structure can have a significant influence on information exchange. The Board takes a flexible approach to information exchange where the market is transparent, since in such a case exchanged information may also be obtained from the market. For instance, the Board, in its decision dated 15.04.2004 and numbered 04-26/287-65, specified that there was low probability that the information exchanged between the parties caused coordination since the products are uniform and there are a lot of actors in the market [16].

Contrary to the aforementioned, the Board has an inflexible approach to information exchange where the market is not transparent, which means that the information exchanged between parties may not be obtained from the market. For instance, the Board, in its decision dated 16.06.2009 and numbered 09-28/600-141, considered the information exchange between parties anticompetitive since there were a limited number of actors in the market, the concentration level was high in the

market and there were entry barriers to the market [17].

However, it should be stated that there is no uniformity in Board decisions regarding market structure:

- ▶ The decisions of the Board concerning market structure are inconsistent. The Board, in its decision dated 28.12.2006 and numbered 06-95/1202-365, decided that information exchange between parties did not constitute a violation of competition by reason of the nature of the aviation fuel market [18]. On the other hand, the Board, in its decision dated 04.07.2007 and numbered 07-56/672-209, stated that *“it may be concluded to be a violation of competition if the coordination and communication between the parties is proved without analyzing the structure of the market”* [19].
- ▶ The Board has also given contradictory decisions concerning the same market (the same sector). For instance, the Board, in its decision dated 09.09.2009 and numbered 09-41/998-255, decided that the exchange of updated information between the parties did not result in coordination, considering the easy entry to the automotive market [20]. On the other hand, the Board, in another of its decisions related to the same sector, emphasized that the exchange of prospective information between the parties restricted competition, without taking into account the nature of the market [21].

Nature of the Information Exchanged. According to Board decisions, information exchanges conducted by undertakings to help them make decisions *“on the basis of factors other than individual preferences [22] or which prevent undertakings “from taking individual economic decisions” [23] (strategic information exchange) are prohibited. Additionally, in some of its decisions the Board did not consider the exchange of strategic information between the parties a violation of competition [24].*

When determining the existence of a strategic information exchange, the Board considers both the content of the information and the time period to which the information is related.

Content of the Exchanged Information. Even though the Board does not define strategic information, it gives some indication as to what can be deemed strategic information. The following information is accepted as strategic information:

- ▶ Information related to prices, capacity utilizations, production quantities and customer based sales quantities [25];
- ▶ Information related to detailed sales prices and quantities of brands as per provinces, regions and sub-segments as well as information related to market shares [26];
- ▶ Information related to monthly production numbers, payments made for raw materials and sub-industries as well as information related to paid taxes and wages on the basis of each sub-model [27];
- ▶ Stock data and sales data [28];

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- ▶ Information related to any kind of parameter related to price conditions and supply control [29];
 - ▶ Consolidated or statistical information are not considered strategic information when the following conditions are fulfilled [30]:

Tables showing data related to quantities (capacity, production, sales, exports, imports) and capacity utilization should be prepared in a manner that prevents their disclosure on the basis of an undertaking or group of undertakings which form an economic unit, and only total countrywide information should be shared;

In addition to the distributed statistics, no comments, analyses or advice which may affect the competitive behavior of an undertaking should be disclosed;

Estimations related to future prices, productions and capacity utilization should not be shared;

It should be ensured that officials responsible in associations of undertakings for the collection and tabling of data conceal sensitive information from members of the association and third parties; and

Tables showing monthly data should not be published before at least two months following the month to which they are related.

Time Period to which Information Exchange is related. The Board, in order to determine whether an information exchange is anticompetitive, also examines the time period to which this information is related. Nevertheless, Board decisions on that subject are not yet uniform. Although in some of its decisions the Board holds that prospective information exchange is prohibited [31], it states in other decisions that retroactive information exchange may also create future coordination between competitor undertakings within a dynamic process [32].

Unilateral Information Exchange

The Board, in its recent decisions, to determine whether there is a unilateral exchange of information, examines the behavior of the undertaking receiving the information and decides that competition is violated where the undertaking receiving the information does not to the information. Further, the Board, where the information exchanged is in written form, such as an electronic mail, looks for an immediate answer from the objecting counterpart. The same principle is also applied to verbal information exchanges such as in meetings. In such cases, the Board examines whether the participants have directly objected to the information exchanged (and recorded their opposition in the minutes of the meeting) [33].

The Presumption of Information Exchange

As mentioned above, the 13th Chamber of the Council of State, in its recent decision dated 08.05.2012 and numbered E. 2008/9080, K. 2012/965, decided that as long as it is not established that the exchange of information between parties will not influence their future decisions, it will be assumed that said exchange will result in coordination between them. As per this decision, it may be stated that the Council of State has established a rule of presumption, which foresees that

information exchanges will influence parties' future behavior [34]. Nevertheless, as also mentioned above, in cases where the market is transparent, and that information may be easily obtained, and where the information exchanged is related to general and statistical information, the decision of the Council of State should be made with caution. Likewise, there should be a flexible approach on the exchange of information in export transactions, which do not affect any market in Turkey [35].

Conclusion

The principle criterion considered by the Board is whether an information exchange will limit undertakings' capability "to take individual economic decisions". However, the Board has not established uniform and objective conditions which facilitate the determination as to whether this criterion is met. The Board, in some of its decisions:

- ▶ Has prohibited the retroactive exchange of information;
- ▶ Has not taken into account the market structure; and
- ▶ Has brought a rule of presumption on information exchange (Council of State).

Within the scope of the aforementioned Board decisions, it can be observed that information exchanged is *de facto* restricted. However, as also mentioned above, information exchanged may sometimes have positive effects on competition. With this in mind, uniform and objective conditions should be established which facilitate a determination as to whether the criterion established by the Board is met. Hence, it is anticipated that the Guidelines, which have not yet been published, will shed some light on these subjects and be a proper guide for undertakings.

[1] The Guidelines was submitted to public opinion at the end of 2012. For further information, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[2] For information about the decision, see **PISMAF, Samil**, İktisadî ve Hukukî Açından Teşebbüsler Arası Bilgi Paylaşımı, Rekabet Kurumu Uzmanlık Tezleri Serisi, No. 280, Ankara 2012, p. 79.

[3] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[4] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[5] To reach de decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[6] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[7] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[8] For detailed information on the decision, see endnote 2.

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- [9] For instance, see the Board decision dated 04.07.2012 and numbered 12-36/1040-328, <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [10] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [11] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [12] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [13] For instance, see Board decision dated 04.07.2012 and numbered 12-36/10040-328. For information about the decision, see endnote 10.
- [14] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [15] For instance, see the Board decision dated 19.12.2005 and numbered 05-85/1182-336, <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [16] For information about the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [17] For information about the decision, see endnote 7.
- [18] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [19] For information about the decision, see endnote 15.
- [20] To reach the decision, see the following link: <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).
- [21] To reach the decision, see **PISMAF**, p. 83, fn. 246.
- [22] Letter of the Competition Authority to the Turkish Cement Manufacturer's' Association dated 15.05.1998. For information about the letter, see endnote 9.
- [23] Board decision dated 09.09.2009 and numbered 09-41/998-255. For information about the decision, see endnote 18.
- [24] For detailed information, see Board decision dated 24.06.2009 and numbered 09-30/637-150. The existence of exchange of strategic information is stated in the dissenting opinion, <http://www.rekabet.gov.tr/default.a...> (access on: 21.03.2013).
- [25] Board decision dated 04.07.2007 and numbered 07-56/672-209. For information about the decision, see endnote 15.

[26] Board decision dated 15.04.2004 and numbered 04-26/287-65. For information about the decision, see endnote 17.

[27] Board decision dated 20.09.2012 and numbered 12-44/1350-455. For information about the decision, see endnote 13.

[28] Board decision dated 18.04.2011 and numbered 11-24/464-139. For information about the decision, see endnote 4.

[29] Board decision dated 20.12.2006 and numbered 06-92/1172-350, <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[30] Board decision dated 08.08.2002 and numbered 02-47/586-M. For information about the decision, see endnote 2.

[31] For instance, Board decision dated 08.08.2002 and numbered 02-47/586-M and Board decision numbered 09-41/998-M. For information about the decision, see **PISMAF**, p. 79 and 83. Additionally, see decision of the 13th Chamber of the Council of State dated 08.05.2012 and numbered E. 2008/9080, K. 2012/965. For information about the decision, see endnote 5.

[32] For instance, see Board decision dated 20.09.2007 and numbered 07-76/907-345, <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[33] For instance, see Board decision dated 11.04.2007 and numbered 07-31/325-120, <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013) or Board decision dated 18.04.2011 and numbered 11-24/464-139, <http://www.rekabet.gov.tr/default.a...> (accessed on: 21.03.2013).

[34] For information about the decision, see endnote 5.

[35] See Board decision dated 06.10.2005 and numbered 05-65/928-250, <http://www.rekabet.gov.tr/default.a...> (accessed on: 27.03.2013).

Ercüment Erdem | Erdem & Erdem (Istanbul) | ercument@erdem-erdem.com