Presumption of concerted practice in Turkey: Going back to the old days?

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Enforcement trends for the presumption of concerted practice in Turkish competition law have developed over the last decade to integrate the presumption of innocence. However, a recent decision by the Turkish Competition Board ('the Board') suggests the trend may have shifted back towards the older enforcement approach. A recent decision suggests the Board may have begun to treat any communication among competitors as evidence of concerted practice, even if this communication does not contain a clear link to anti-competitive outcomes.

As with its European counterpart, Turkish competition law has three pillars. One of these is anti-competitive agreements, decision of undertakings and concerted practices. Accordingly, all agreements are prohibited between undertakings, decisions made by associations of undertakings and concerted practices if such arrangement has the object or effect of preventing, restricting or distorting competition. Article 4 of Law No 4054 on the Protection of Competition addresses this pillar, akin to Article 101 of the Treaty on the functioning of the European Union (TFEU).

Although the basic infrastructure is the same, the Turkish competition law regime distinguishes itself from the European Union competition law regime with the presumption of concerted practice. In Turkey, enterprises can be presumed to have engaged in concerted practices even if no agreement is shown to exist. The presumption is triggered where price changes, supply-demand equilibrium, or fields of an enterprise's activity bear a resemblance to those in markets where competition is obstructed, disrupted or restricted. Once the presumption is triggered, parties bear the onus of showing that no concerted practice exists, based on economic and rational facts.

Turkish Competition Board's past approach to enforcement

Enforcing the presumption of concerted practice in Turkey has been a battle, with many ups and downs. About a decade ago, the Board would generally hold that parallel behaviour among competitors within certain time periods was sufficient to trigger the presumption of concerted practices. The Board would request each undertaking prove it had not engaged in concerted practices, using economic and rational grounds.

The Board's approach exposed undertakings in oligopolistic markets to serious competition law risks. The primary risk was the inherent difficulty of differentiating between anti-competitive conduct and normal market behaviour. Undertakings were required to demonstrate that any parallelism was not based on concerted practice, but is rather based on economic and rational reasons. The enforcement trend lacked the universally accepted presumption of innocence.

Evolving interpretations over the past decade

The Board's presumption of concerted practice has evolved over the last decade, injecting the presumption of innocence into its assessment of concerted practice.

The latest in a series of decisions on the presumption of concerted practice is the Board's 2014 White Cement decision.1 The Board held that competitors failed to plausibly explain parallel conduct by economic and rational

reasons, thus failing to dispel the Board's presumption of anti-competitive conduct. However, despite this, the Board ruled that the investigated undertakings must be acquitted due to the lack of clear and consistent evidence proving anti-competitive communication among the competitors.

The Board held that individual interfirm parallel behaviour (specifically, parallel price increases) was not sufficient to prove concerted practice. Evidence of parallel conduct alone was deemed insufficient in these circumstances for the Board to conclude that a violation existed.

Thus, the Board has clearly integrated the universally accepted presumption of innocence into its ‘presumption of concerted practice' enforcement. In the summer of 2015, vacant seats on the Board were filled with new members. Since this time, Turkish competition law circles have been wondering whether the new Board composition would continue with its predecessor's jurisprudence trend.

Enforcement trends changing again?

A recently published Board decision might indicate a return to the old days for enforcing the presumption of concerted practice In Turkey.

In the Board's decision in Aegean Region Cement Manufacturers,2 it concluded that all six of the investigated cement manufacturers had engaged in price-fixing, imposing administrative monetary fines on all undertakings.

Aegean Region Cement Manufacturers decision 14 January 20163

Six cement manufacturers in ?zmir, Denizli and Mu?la (cities in the Aegean region of Turkey) are alleged to have agreed to:

- significantly increase cement prices;
- share customers and territories based on the location of the cement manufacturing facilities; and
- prevent their distributors from selling cement from competing manufacturers.

The Board groups evidence into three different time periods.

January - March 2013 (pre-violation period)

According to the Board, evidence obtained for this period suggests a competitive market structure. The Board's conclusion is based mainly on internal correspondence by cement manufacturers which indicates that competitors are stealing customers from each other via price competition.

January - March 2013 until October - December 2014 (anti-competitive period)

The Board heavily relies on evidence from this period. Among eight documents relating to this period, the Board considers email correspondence between competitors regarding two meetings at the Cement, Glass, Ceramic and Soil Products Exporters Union to be particularly important.

The decision indicates that two meetings (in December 2013 and February 2014) were held, ostensibly to share 2013 cement export statistics. However, the critical email exchange (quoted in the decision) reveals that discussions at the meetings extended to include:

- clinker stocks;
- volume and price details for a particular clinker shipment to Azerbaijan;
- cement export destinations and volumes;
- variable costs for clinker; and
- future export plans for clinker.

The Board concluded that the topics extended beyond merely sharing export statistics. Rather, the participants inappropriately shared competitively sensitive information.

Post-October - December 2014 (post-violation period)

According to the Board, evidence from this period suggests separate market entries (by Limak Group and Oyak Group) triggered competitive processes in the market again and a downward price trend was observed.

The Board's assessment

The Board identified an extraordinary parallel price increase based on the evidence mentioned above, as well as analysing price trends for January 2013 to October 2014. The Board analysed price increases against the costs and level of demand in this period, concluding that no variable existed to explain the price increases.

The Board is convinced that the market displays a competitive structure during the pre-violation period. The Board observed a shift to a different market structure between the January - March 2013 and October - December 2014 period. It accepted the critical email exchange as evidence of contact among competitors regarding their future strategies. In particular, the Board held that competitors may potentially have discussed competitively sensitive issues during the export meetings. However, the Board concluded that the market entries by Limak Group and Oyak Group terminated the violation in October - December 2014.

The Board accepted that concerted practices, intended to share the market and increase prices, existed among the cement manufacturers between January - March 2013 and October - December 2014. It stated that:

‘… such information exchange … forms a basis for cooperation between undertakings and allows them to continue especially in homogenous concentrated markets that are characterised with stable demand and supply conditions and high investment costs. It has been concluded that in the case at hand, behaviours of undertakings and market performance could not be explained with reasonable and rational explanations other than the information exchange.'4

Dissenting opinion

A dissenting opinion clearly portrays the weakness behind the Board's reasoning. Highlights include:

- the only communication evidence shows communication only about clinker exports. The Board's jurisdiction is limited to Turkey's national borders. Therefore, any communication about exports clearly falls outside the Board's jurisdiction.
- To be deemed anti-competitive, an information exchange must eliminate market uncertainty and make the market prone to parties gaining a competitive advantage. In these circumstances, it is not proven exactly how the information in the critical email exchange (mainly information on exports) eliminates market uncertainty regarding competitors' pricing behaviour.
- Considering the information shared in the meetings was historic information, it is not clear how this would affect competitors' future market behaviour.
- The position taken in this decision contradicts prior positions taken about standards of proof for concerted practices (Mediterranean Region Cement Producers decision of 31 March 20115 and also for parallel conduct (see White Cement decision, of 25 June 2014).
- The casual nexus has not been established between the communication's content and the anti-competitive outcome (parallel price increases).
- The violation decision is based only on analysis on demand and costs, made by the case handlers. A more thorough economic analysis by the Department of Economic Analysis and Research should have been made to conclusively determine whether other reasons could potentially explain the parallel conduct.
- The decision lacks analysis on capacity utilisation rates in the relevant markets.
- The Board's reasoning for termination of the violation (market entries by Limak Group and Oyak Group) lacks concrete reasoning.

Conclusion: declining evidentiary standards?

In a sense, this latest decision indicates a decline in the standard of proof required in concerted practice cases.

The Board bases its conclusion about inappropriate conduct exclusively on the critical email evidence. The aspects of this e-mail which are reproduced in the Board's decision show communication between competitors about relatively benign topics. However, the email contains no clear smoking gun. Therefore, the primary evidence fails to establish a clear nexus between the meeting discussions and the alleged anti-competitive conduct. Rather, the email simply shows that competitors have communicated about matters which are not directly relevant to the issues under investigation.

Despite this weak causal link, the Board has accepted the fact that competitors have been in contact about arguably immaterial topics as evidence of what could have been discussed at the two meetings. Thus, email communication is treated as conclusive proof of inappropriate discussions having occurred elsewhere which led to anti-competitive outcomes.

Risks arise if the Board consistently adopts this (arguably) lower evidential standard. Treating any communication among competitors as evidence of concerted practice and not requiring a clear nexus between the communication and anti-competitive outcomes is a slippery slope, contrary to natural justice principles (such as the presumption of innocence) and undermines the Board's gains made over the last decade in this respect. If this happens, the uphill battle must start over from scratch.

Notes

1. See: www.rekabet.gov.tr/en-US/News/Investigation-concerning-Cimsa-Cimento-Sanayi-ve-Ticaret-AS-ve-Adana-Cimento-San-TAS-concluded.
2. www.rekabet.gov.tr/en-US/News/Investigation-initiated-concerning-6-cement-producers-operating-in-the-Aegean-Region.
3. Ibid
4. Ibid
5. case No 11-20/378-117

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