

# Assessment of Information Exchange Fines Under Turkish Competition Law Regime: Sector Specific Justifications May Not Be Enough to Prevent the Violations!

Kluwer Competition Law Blog  
October 31, 2019

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*Please refer to this post as: Evren Sesli, Arman Canbeyli, 'Assessment of Information Exchange Fines Under Turkish Competition Law Regime: Sector Specific Justifications May Not Be Enough to Prevent the Violations!', Kluwer Competition Law Blog, October 31, 2019, <http://competitionlawblog.kluwercompetitionlaw.com/2019/10/31/assessment-of-information-exchange-fines-under-turkish-competition-law-regime-sector-specific-justifications-may-not-be-enough-to-prevent-the-violations/>*

Competition law, at its core, is a case law based practice. The natural habitat of enforcement for competition rules is the consolidation of bilateral and multilateral commercial relationships that we came to know as the system of economy. In an effort to maximize the consumer welfare (and eventually the total welfare via innovation and creative destruction), antitrust enforcers impose a certain regulatory framework onto economic relationships, which have a self-defined point of balance. Accordingly, right at this sharp interception of law and economics, antitrust rules are expected to protect the consumer welfare whilst refraining from distorting the natural economic order.

In an effort to meet with the challenges of this multi-dimensional task, the competition law practice needed to embark a certain degree of flexibility, which is predominantly provided by having a case law based system. In other words, antitrust enforcement needs to fully understand the legal and economic circumstances surrounding each case and establish a bespoke case law that adapts to the specific needs of the given case.

Therefore, the most important asset of a competition law practitioner in this ever-changing and tailored-to-adapt kind of practice is the corresponding case law established by the authorities. Considering that the competition enforcement shall (ideally) steer away from formalistic approaches and mostly rely on the rule of reason approach, practitioners of this field are often seen making referrals to landmark decisions that established the core principles and picking up a sense of the current enforcement trends via the latest decisions.

Against this backdrop, the Turkish Competition Authority (“TCA”) has recently published its reasoned decision in its landmark investigation of the poultry sector involving all major players and an association of undertakings. Tackling with a number of complex allegations in a peculiar market structure, the jurisprudence of the TCA provides a sample of its latest approach on some of the key antitrust issues, namely the exchange of commercially sensitive information. Below we share our analysis on this significant precedent along with our remarks and takeaways from the jurisprudential rationale of the TCA therein.

## **The TCA's Investigation**

Upon a complaint to the TCA, the authority initiated a full-fledged investigation on the Turkish poultry sector. The sector-wide investigation included within its scope 19 of the largest undertakings along with the White Meat Industry Association – BESDBIR (“**Association**”).

Accordingly, the TCA's probe had predominantly focused on horizontal violations that are embodied in the allegations concerning an anti-competitive agreement or a concerted practice among the poultry producers. Increasing the amount of exports, even when it was not justifiably profitable, with the intention of decreasing the domestic output to increase the prices was also among the allegations pointed at the competing poultry firms. In addition, sharing strategic and firm-based production data among producers was also listed among the allegations against the poultry firms. Lastly, a series of e-mail correspondences and Association meetings were alleged to have supported the claims against the investigated parties.

Following a broad review of the Turkish poultry market, the Competition Board dropped the allegations in relation to information exchange concerning the production details and increasing the level of export in order to restrict the supply in domestic market. On the other hand, after a detailed examination of the poultry market, TCA's findings indicated that there was a certain degree of parallelism between the pricing behaviours of the scrutinized undertakings. Moreover, the TCA's findings also suggested that the white meat producers consistently possessed the future-dated pricing list of their competitors, even before the announcement of the relevant lists, at their disposal.

Another key finding of the TCA was the issues surrounding the meetings of the Association. Accordingly, among the findings of the TCA there were certain internal e-mail correspondences of one of the investigated undertakings, where the relevant representative reported to the upper management that they managed to convince the other companies to increase the prices. Based on the reasoned decision, other undertakings strongly disclaimed having any participation in such an agreement. Additionally, several market players explained in detail that the sender of the said e-mails was only trying to impress the upper management by making ordinary price increases look like the product of a successful initiation to coordinate the prices among the competitors.

The conquering opinions issued by a member of the TCA's decisional board also credited the parties' defensive explanations and expressly stated that the relevant e-mail correspondences have become suspicious and untrustworthy.

Nonetheless, despite the objections of some of the board members, the TCA decided to impose a total of roughly 150 million Turkish Liras (23 million Euros) of administrative fine on nine undertakings and the Association due to anti-competitive exchange of information practices. Considering that the starting point of the allegations mentioned some hard-core horizontal violations including cartels or concerted practices, the TCA tacitly reasoned that such practices were not taking place in the relevant market. However, the TCA still considered the findings at hand sufficient to impose an administrative fine on information exchange practices.

## **The peculiarities of the relevant market**

After outlining the key findings of the TCA and before delving into the conclusive assessment of these findings, we think it would be prudent to assess the market-specific circumstances surrounding the case at hand to make a cross-reference with the findings.

Accordingly, the market under investigation was the Turkish poultry market, which covered all essential aspects of the white meat production substantially including chicken and turkey meat.

The poultry market has an extensive production process that starts with the procurement of the breeding eggs. Following this stage, the producers start growing the livestock, pass through a series of technical processes until they reach to the slaughterhouse. Accordingly, the whole production process may take between six months and one year until the breeding eggs become ready to be processed as white meat products.

After this stage, the producers are obliged to fulfil certain packaging and labelling requirements to meet with the food codex before they distribute the products to the dealerships.

However, despite the long and extensive production process, the poultry products have a highly perishable nature and the producers have only one week to package, label, distribute, deliver and sell their products before they expire and start rotting.

At the distribution level of this market structure, there are white meat dealerships who serve as the primary sales point of the said products. They procure the output of the poultry producers and sell those to their clients on a retail or wholesale basis. However, considering that the restaurants, hotels or other commercial customers need an uninterrupted supply chain, they tend to issue their orders several days before the delivery, which subsequently require the dealers to negotiate the future prices with the producers.

Lastly, the general arrangement of sales in the poultry market seem to be based on bargaining, which is applied by the dealerships, who sell the product to the final customers, to the producers. Accordingly, the dealers try to negotiate and lower their purchase costs based on increasing volumes of their purchase and/or the benchmark of the competitors' market prices for similar orders.

## **Assessment of the findings in light of the market structure**

In light of the foregoing, we may boil the fine imposed on the poultry sector into two key findings; (i) participation to the Association meetings, which allegedly facilitated the fined conduct and (ii) circulating the future-dated price lists with the dealers. However, the reasoned decision fails to provide a sufficient level of guidance on how the fined undertakings may prevent another fine. In other words, although the reasoned decision makes detailed assessments on the TCA's findings over the course of the investigation, the core reasons behind the administrative monetary fine do not fully satisfy the market players' need for guidance on future behaviour.

Accordingly, when we take the first prong of the root behavioural cause for the levied fine, we can see that there is a certain degree of reasonable doubt raised over the content of discussions in the Association meetings. Accordingly, in the absence of any primary evidences, the authority is expected to delve into economic assessments and look for secondary evidences.

When we assess the reasoned decision from this perspective, we see that the investigated undertakings have similar cost schemes, which are substantially dependent on imports and foreign currency fluctuations. Moreover, the sales pattern in the market seems to be highly seasonal and the driving factors in determining the process emerge as the demand of final consumers and active bargaining by the dealerships. When we add the perishable nature of goods in question along with the cost of production into this assessment, the pricing behaviours and sales patterns of companies with similar operation levels seems to be inevitably parallel due to the market structure.

In other words, the assessment here all comes down to the essential question of; whether the prices would keep moving seemingly parallel in the absence of any anti-competitive conduct. The market structure and secondary findings (especially in the absence of any primary evidence) suggest that the overall overview under scrutiny is predominantly shaped by the natural conditions of the market and the pricing behaviours would keep appearing similar regardless of any anti-competitive conduct.

When we take put second prong of the root cause under the magnifying glass, we see that circulating future-dated pricelists was considered as an anti-competitive element over the course to the fine imposed by the TCA. From a prima facie perspective, future-dated price lists seems to be significantly alarming indeed. However, even for findings that look as bad as this one, the competition authorities are still obliged to conduct an overall assessment and try to find out whether are there and market specific explanation or justification to the conduct at hand. When we delve into the reasoned decision with this notion in mind, we see that the market at hand moves at a very fast pace in terms of pricing.

Indeed, firms publish price list updates two or three times in a single month, which indicates that the undertakings need to update their prices and adapt themselves to the market conditions to keep themselves in the game due to the high volatility of market structure. In other words, taking the highly perishable nature of poultry products into consideration, the undertakings are under a considerable pressure to move fast in their sales activities and adopt a certain degree of flexibility to react the seasonal changes in the demand structure.

By the same virtue, the purchasing behaviours of the dealerships and the customers are also shaped by this perishable nature and the associated degree of timing pressure. Accordingly, as indicated above, the customers and the dealerships need to see and negotiate their future pricings beforehand. Once the poultry product is processed, the producers and the dealers have only one week to comply with all the packaging, labelling and distribution requirements, solicit customers and finalize the sales.

Similarly, as of the production date, the customers also have only one week to procure their poultry needs and keep their business running. Therefore, as a characteristic of the market, all undertakings are required to determine and quote their future prices a few days in advance to comply with the natural market demands. On that basis, the otherwise alarming practice of circulating future-dated price lists seems to be rationally justifiable by the market conditions and the nature of the goods in question.

#### **Conclusion**

As explained above, competition enforcement is shaped by its corresponding case law. Accordingly, this feature of the competition law imposes certain responsibilities on the decisional practice. In other words, as the interpretation and the enforcement trends of antitrust rules are to be determined by the jurisprudential rationale, the authorities are under the obligation to provide sufficient level of reasoning and guidance in their decisions.

Therefore, on a case-by-case basis, the competition authorities are not only tasked with rendering an accurate decision, but also providing useful insights and guidance to the fined undertakings on what precautions they need to take in order to avoid any future fines. Not only the investigated undertakings but also all of the market players and players from other markets have a lot to learn from the reasoned decisions and adapt their behaviours to comply with antitrust rules.

Accordingly, the TCA's successful track record sets a very good example of high profile reasoned decision that benefits all of the market players. However, in the poultry case, although the TCA provides a thorough and detailed reasoning, undertakings do not seem to be well guided on how to avoid a follow up fine due to same practices.

The reason for this lack of guidance seems to be the nature and essentiality of the fined behaviours. In other words, the root causes of the fine in question is an essential part of the poultry market's ordinary and natural functioning. Accordingly, undertakings may have to inevitably resume these behaviours, due to the natural order of the market and the perishable nature of the poultry products.

When we combine this with the conquering opinions of the objecting board members along with the application of reasonable doubt and well-funded market specific explanations/justifications, the necessity of the levied fine may come under question.

However, considering that the TCA has already imposed the fine, the reasoned decision still sets an important precedent on how to handle the pricing lists and exchange of competitively sensitive information. Accordingly, the key takeaways of the reasoned decision provide that undertakings acting with fast moving pricing schemes in fragmented markets need to be extra careful while exposing their prices to their peers and dealerships. Moreover, the reasoned decision also indicates that market players must keep a red flag on any future looking commercial information, while keeping in mind that sector specific justifications might not be enough to prevent an exchange of information fine.