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Turkey – What to Consider in Sharing Sectoral Reports with Sector Members?

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Introduction

The Turkish Competition Authority (“TCA”) has rendered several decisions in recent years concerning the exchange of competitively sensitive information. A significant number of these decisions have involved negative clearance/exemption applications made to the TCA by undertakings seeking to lawfully exchange information among themselves.

In this regard, the Turkish Construction Equipment Distributors and Manufacturers Association[1] (“MDER”) also submitted a negative clearance application for the reports that were envisaged to be shared with its members in the last year, and if this was not possible, to acquire an exemption. [2]

The main purpose of the application submitted by MDER was to share information about the number of sales and leases of construction machinery with its members in a variety of ways through the platform “mderonline.” Participation in the aforementioned application was optional.

Upon the application of MDER, in the decision dated 07 April 2022 and numbered 22-16/269-121 (“Decision”), the TCA examined three different reports:

- **Monthly Report:** A monthly report compiling information on the number of sales of construction machinery,
- **Annual Report-I:** An annual report on the number of sales of construction machinery, and
- **Annual Report-II:** An annual report on the number of leases of construction machinery.

The scope of the information planned to be shared within the framework of the relevant reports is outlined in the table below:

Reports	Shared Information	Breakdown	Geographical Scope	Undertaking-Specific/Aggregated	Monthly/Annual	Age of Information
Monthly Report	Number of Sales	Size	Turkey	Aggregated	Monthly	At the end of the month
Annual Report-I:	Number of Sales	Size	by Province	Aggregated	Annual	By ageing 3 months

Annual Report-II:	Number of Leases	Short/Long Term	Turkey	Aggregated	Annual	By ageing 3 months
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1 in 3: Negative Clearance Granted for Only the Sharing Data Regarding the Leases

Within the scope of the negative clearance assessment, the TCA first stated that the aggregated data are data that do not reveal undertaking-specific information and that the exchange of historical information (aged two-three months) does not constitute strategic data sharing. On the other hand, it was emphasized that in highly concentrated markets, the restriction of competition effect may occur even in this case, and an examination was conducted regarding the concentration in the market.

The TCA determined that the relevant market does not have a narrow oligopoly structure based on an assessment of the market's undertakings and their market shares. In other words, the TCA concluded that the market is not highly concentrated.

In addition to the degree of market concentration, the TCA also assessed the transparency, complexity, stability, and similarity (symmetry) of the undertakings in the market. In this regard, the TCA made the following findings:

- Transparency is limited in the market as there are no market surveys in which data on construction machinery are shared. There is also no transparency risk arising from the common price change date in the market as the pricing strategies among undertakings differ substantially from each other.
- The market exhibits a very complex structure because (i) construction machinery can be divided into many sub-divisions such as brand, model, and area of use; (ii) there are class, type/tonnage distinctions within each sub-division; (iii) there are undertakings operating at all levels in the market, including manufacturers, distributors, spare parts distributors, and leasing and service companies.
- Considering the fact that the market shares of the undertakings do not follow a stable course, that there are fluctuations in the demand side of the market, and that five undertakings entered the market in the last three years, the market has an unstable structure.
- Since the price change dates and cost structures of the undertakings are quite different from each other, the undertakings are not similar, and the market is not symmetric.
- Since the construction machinery sector is a capital-intensive sector, the threat of entry into the market is low. However, the market is open to new entries as the Turkish construction machinery sector operates in a country with a rapid growth rate and the growth of the market encourages investors. Also, there are no legal barriers to entry in the sector, and although undertakings wishing to operate in the market have to bear certain costs, these costs do not reach the levels that would create barriers to entry.

In light of the foregoing evaluations, the TCA stated that while monthly sales data can be considered relatively riskier from a competitive perspective, annual sales and lease data to be shared on a three-month-aged basis constitute potentially less risky areas.

The TCA also emphasized the low likelihood of anti-competitive agreements due to the highly

heterogeneous structure of the sector and the fact that no cartel structure had previously been detected in the sector, which also reduced the possibility of coordination, despite the fact that annual sales data will be shared on a province basis theoretically poses coordination risks.

In terms of the data in the Monthly Report, although it is known that the data to be shared are aggregated and not undertaking-specific and although it can be said that the construction machinery market is complex, unstable, and not a narrow oligopoly, the TCA emphasized that sharing the number of sales at the end of the month without sufficiently ageing the data would not theoretically cause it to lose its strategic nature. In this context, the TCA concluded that the information to be shared in the Monthly Report was not of a nature that would qualify for a negative clearance certificate on the grounds that it may cause competitive concerns.

Regarding the data to be shared in the Annual Report-I, the TCA stated that the fact that the report will be prepared on an annual basis and aged for three months, without including undertaking-specific data, reduces the strategic nature of the data, considering the structure of the market. However, the TCA stated that (i) the requirement in the Monthly Report that at least five undertakings participate in the report and that none of the participants has a weight of more than 25% is not applicable for the Annual Report-I, and (ii) since the undertakings that are members of ?MDER account for approximately 95% of the market, the sharing of province-based sales volume data could theoretically lead to province-based coordination of undertakings. Accordingly, it was concluded that the information sharing within the scope of the Annual Report-I could not benefit from a negative clearance certificate.

Regarding the Annual Report-II in which the number of leases to be shared is discussed, the TCA emphasized the following points:

- The previous year's data will be aged by three months.
- Unlike the Annual Report-I, the data will be aggregated across Turkey, rather than by province, and an additional sub-division will be made into long-term and short-term leases.
- There are also financial leasing companies operating in the leasing of construction machinery in the market and the data in the Annual Report-II will not include the number of leases of financial leasing companies. This will further reduce the risk of cooperative results in the market.

In this context, considering the unstable, complex, and non-oligopoly structure of the market, the absence of a previous investigation into the sector and the fact that the data will be collected through an independent third-party firm, the TCA stated that the data that will be aged for three months and shared across Turkey would lose its strategic nature. Based on these assessments, the TCA concluded that a negative clearance certificate could be granted for the Annual Report-II.

What to Consider in Sharing Number of Sales: The TCA Answers

In the application made by ?MDER, it was stated that:

- The information to be shared in the Monthly Report and Annual Report-I will enable undertakings to have information about the market and thus to make more rational decisions;
- Undertakings will have information on the level of supply and demand in the market, which will enable them to improve their production, sales, and distribution planning and, thus, achieve efficiency gains;

- The information to be shared would also provide forecasts regarding the demand for spare parts and serve for product availability in after-sales services, thus benefiting the end-user;
- Due to the structure of the market, the aforementioned activities can only be achieved if the changes in the market are monitored at least on a monthly basis with the Monthly Report; and
- Province-specific actions could be taken to meet the demand and increase the quality of service thanks to the province-based information contained in the Annual Report-I.

In its assessment, the TCA pointed out that the factors mentioned above are among the areas where the information exchange would lead to efficiency gains. In this context, it was stated that since there is currently no market research in the construction machinery market, the reports to be prepared by ?MDER may prevent a significant waste of resources for the undertakings in the market and provide a cost advantage by accessing market research. In this regard, the TCA concluded that sharing the information on the number of sales of construction machinery planned to be included in the Monthly Report and Annual Report-I fulfils the first condition of the exemption.

Regarding the condition of consumer benefits, ?MDER emphasized in its application that the market conditions can be determined more accurately, and more competitive strategies can be determined by undertakings based on this information. In this context, it was stated that the increased competition, combined with the ability of undertakings to make more rational decisions, would provide consumers with benefits such as price reductions, increased service quality and product diversity.

In ?MDER's application, it also was stated that as a result of the ability to share the number of sales on a monthly basis in the Monthly Report, production-distribution-sales planning and effective stock management can be carried out by estimating the trend in demand at short intervals, so that the customer groups of construction machinery will not experience problems in product availability due to the inability to increase the supply of machinery in a short period of time, thus preventing disruptions and irrecoverable investment losses. Furthermore, it was emphasized that province-based needs will be identified more accurately, and consumer demands can be answered quickly and accurately, through the Annual Report-I.

In this framework, the TCA concluded that consumers would benefit from the more accurate positioning of undertakings and the elimination of the lack of data in the market within the scope of the information exchange, and therefore, the information to be included in the Monthly Report and Annual Report-I can provide consumer benefit in general.

With regard to the condition that competition in a significant part of the relevant market is not eliminated, the TCA stated that the ?MDER reports subject to the exemption assessment only contain information on the number of sales of the member undertakings and that although this information can be said to be competitively sensitive, it is less likely to adversely affect competition in the relevant market compared to information such as prices, costs, and future strategies.

The TCA also pointed out that construction machinery are differentiated products far from homogeneous in nature, and that competition in the market is based on parameters such as quality, effective marketing, brand perception, rapid response to changing demand, ability to develop new models, product diversity, and the prevalence of an after-sales service network in addition to the price. Considering the competitive, complex, and unstable nature of the market, the TCA stated

that the aforementioned considerations may prevent the possible adverse effects of the information exchange subject to the notification of competition in the relevant market. Therefore, the TCA concluded that the condition of not eliminating competition in a significant part of the relevant market within the scope of the information exchange to be included in the Monthly Report and Annual Report-I also was met.

With respect to the condition that competition is not restricted more than necessary, the TCA stated that the fact that the fee for obtaining the reports is equal to the annual dues of ?MDER members and that the reports are made available to anyone who requests them indicates that the sharing will not be discriminatory. In this context, the TCA considered that the cooperative effects that may arise as a result of the information exchange may be limited by undertakings that are not involved in the information exchange and by potential competitors, thus reducing the possibility of distortion of competition in the market. Moreover, it was underlined that the voluntary nature of information sharing would serve to ensure that competition is not restricted more than necessary.

The TCA also assessed the aggregated nature of the data and the age of the data. In this context, the TCA considered that the number of sales within the scope of the Monthly Report would be shared without being sufficiently aged but would be structured in such a way that at least five participants would participate and that no participant's weight in the consolidated data would exceed 25%. As a result, the TCA concluded that competition in the market would not be restricted more than necessary.

As regards the Annual Report-I, the TCA concluded that, given the absence of undertaking-specific information, the unstable and complex nature of the market and the ageing of historical data, sharing such information would not go beyond what is necessary in terms of the restriction of competition.

In this context, it was decided that the Monthly Report and the Annual Report-I also met the condition that competition should not be restricted more than necessary and that both reports should be granted an exemption for five years in the light of the fulfilment of all conditions.

Conclusion

With the Decision, the TCA concluded its evaluations regarding the application of ?MDER, the outcome of which has been eagerly awaited by the association members, with granting a negative clearance certificate to one of the reports and five years individual exemption to the other two reports.

In this regard, the TCA emphasized that:

- Sharing the number of sales at the end of the month without sufficiently ageing the data would theoretically not cause it to lose its strategic nature;
- As the undertakings that are members of ?MDER constitute approximately 95% of the market, the sharing of a province-based number of sales could theoretically lead to province-based coordination of undertakings;
- The data, which will be aged for three months and shared across Turkey, as in Annual Report-II, would lose its strategic nature;
- Consumers would benefit from the more accurate positioning of undertakings and the elimination

of the lack of data in the market within the scope of the relevant information exchange to be included in the Monthly Report and Annual Report-I;

- Information regarding the number of sales can be said to be competitively sensitive, but it is less likely to affect competition in the relevant market adversely compared to information such as prices, costs, and future strategies; and
- The competitive, complex, and unstable nature of the market may prevent the possible adverse effects of information exchange in the relevant market.

We consider that the Decision is important in terms of expressing the limits foreseen by the TCA towards the exchange of competitively sensitive information. Taking into account the number of decisions taken by the TCA regarding information exchange, we anticipate this issue is likely to remain on the TCA's radar.

[1] ?MDER is an association of manufacturers and distributors of all kinds of construction machinery and their spare parts operating in Turkey.

[2] It should be noted that ?MDER's previous application dated 24 January 2020 requesting a negative clearance or an exemption for the reports shared and/or intended to be shared with its members was rejected by the TCA's decision dated 09 November 2020 and numbered 20-50/688-302. In the said decision, it was concluded that competition had been restricted more than necessary because the reports envisaged sharing information undertaking-specific and the frequency of data sharing, the limits of the data to be shared, and the purpose for which it had been collected were not clear. Furthermore, the data to be shared could not be considered genuinely public information, and the data would be compiled by the employees of the association and not by an independent third party.

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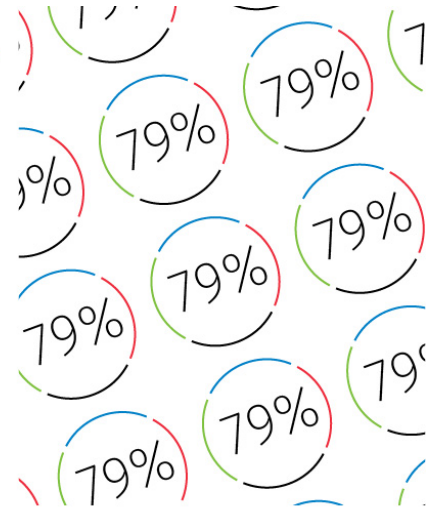
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