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## **Global Forum on Competition**

### **SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION**

#### **Contribution from Turkey**

-- Session IV --

*This contribution is submitted by Turkey under Session IV of the Global Forum on Competition to be held on 29-30 October 2015.*

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## **SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION**

### **-- Turkey --**

1. In Turkey, cement and bread industries seem to stand out as serial offenders in anti-competitive practices, more so than any other industry. Below, we will briefly address the questions that are suggested on the “call for country contributions” document for cement and bread sectors, respectively.

#### ***Answers for the cement sector***

i) Sectors prone to repeated collusion

*If you have investigated any cartels in the above-mentioned sectors / products, please describe the anti-competitive practice (e.g. market allocation, price-fixing) and the level in the sector at which this practice was observed (e.g. manufacture, wholesale, retail level). What was the outcome of the investigation?*

2. We have investigated numerous cartels and other anti-competitive agreements in the cement sector, mostly involving price fixing. There has also been cases of market allocation and occasional boycotts. Most of these practices have been in the production (wholesale) level. Often, complainants regarding these practices have been ready-mixed concrete producers and construction companies. Some of the investigations were resulted in fines, while some cases were closed as the claimed anti-competitive practices could not be proven. Since there has been a vast number of cases regarding anti-competitive agreements in this sector, it has become hard to find evidence showing coordination between the alleged parties which made it hard to prove a concerted practice and/or an agreement. Due to the amount of the ongoing complaints, Turkish Competition Authority (TCA) has started a sector inquiry in order to better address the competition issues in this industry.

*Did your investigation in any way take account of investigations of a similar matter in other jurisdictions – whether just for informational purposes or through international cooperation?*

3. There used to be one or two global companies operating in the Turkish cement sector which do not exist anymore, apart from few companies with foreign shareholders. Since there are only local players, investigations of a similar matter in other jurisdictions have not been taken into account and there has not been an international cooperation on that matter. Nevertheless, we have taken into consideration international cases, as usual, from a general competition law point of view, regardless of the parties of a specific case.

*Have you observed more than one case in the same sector / market over the years?*

4. We have observed several cases in the cement sector over the years. Actually, the complaints have been as often as once or twice in a single month, although not every complaint have resulted in an investigation.

*Have you observed more than one case involving the same firms (i.e. serial offenders)? Were these cases in the same product or in a different one?*

5. Usually, the complaints have been about the same firms. There have been roughly 15-20 cases on some firms which can be defined as the “core group” (i.e. serial offenders), and there are smaller firms which have been investigated less frequently. All of these cases have been about the same product.

*Have you observed if serial offenders adopt the same collusive practices or do they adopt different practices in subsequent cartels?*

6. Usually, serial offenders have been adopting the same collusive practice, namely price fixing. The collusive practices tend not to differentiate in subsequent cartels, except for occasional market sharing agreements.

*Have you noticed whether repeated collusion in the same sectors or by the same companies has become more or less frequent over time? What are the reasons in your view for any increase or decrease?*

7. Complaints regarding repeated collusion in this sector by the same firms have not become less frequent over time. There is a regular increase in the number of complaints starting from April-May of each year, in line with the boost in construction business, and a decrease during the winter months. Apart from these seasonal fluctuations, the number of complaints remain constantly high. There may be only a slight decrease in the number of complaints, which can be related with the difficulty in finding evidence and addressing anti-competitive behaviour after investigating the same firms over and over again.

ii) Factors likely to lead to repeated collusion

*Did you start your investigations because of the existence of certain factors or characteristics in a market? What were these factors?*

8. Almost all investigations in this sector have been initiated with the complaints of ready-mixed cement producers, constructors or construction material suppliers who complain about the high prices in the market. During the investigations, price movements are usually found to be suspicious, but often it is hard to prove any coordination between the parties to demonstrate that the fixed prices are a result of collusion. A sector inquiry is being conducted in order to better understand the market characteristics, to possibly explain the pricing behaviours. In some rare instances, complaints have been made by insiders regarding meetings with the competitors, which makes it easier for case handlers to prove an infringement.

*In the cases mentioned above, did your decision refer to the economic characteristics of this industry? What were these characteristics?*

9. In some of the cases mentioned above, price movements were explained by seasonality, demand fluctuations, prices of the raw materials, locality, logistics or other economic characteristics of the industry. Economic characteristics were examined especially in cases which were lacking concrete evidence. In some of these cases, alleged behaviours were as a result of such economic characteristics and not because of collusive behaviour.

*In your view, what are the reasons for repeated collusion in these sectors? Do you think that it is due to specific market characteristics?*

10. We think that the characteristics of this market, such as oligopoly, homogenous product, interdependence, locality, transparency, etc. makes it very convenient for repeated collusive behaviour.

11. Seasonality of demand also stands as a drive for collusion. Other reasons are the lack of efficient and effective tools (digital and mobile forensic, etc.) for the detection of collusion, and accordingly, the difficulty of imposing effective fines.

iii) Implications for enforcement

*In your cases, have you faced situations in which you considered that fines were not sufficient and additional remedies (e.g. divestiture, information disclosure) would have been more effective? In your jurisdiction, can the competition authority impose these remedies in cartel cases? Do you think there are other enforcement tools that could be used more effectively in these sectors, in addition to cartel law?*

12. Because of the difficulty in detecting and proving anti-competitive conduct and imposing effective fines, there have been cases in which additional remedies were imposed. In such cases, the parties to the anti-competitive agreement were asked to submit their prices to the TCA every month, but this method has not been a consistent and effective way to prevent or detect anti-competitive behaviour.

13. The relevant association of undertakings in this sector is suspected to have a facilitating role, since the member firms are submitting to this association their prices and their amount of production and sales. The association is known to keep a database of the commercial information of member firms, but the way it distributes this information is unknown. Therefore, there have been proposals on regulating the details of this information sharing, or abolishing the association altogether. In any case, a remedy as such is expected to be potentially more effective. Additional remedies might be suggested as a possible outcome of the on-going sector inquiry, which may well be taken into account in future Board decisions.

*In your jurisdiction, are serial offenders treated in a stricter way? If yes, do you think that this discourages repeated collusion?*

14. In our jurisdiction, recidivism is considered as an aggravating factor for the amount of fines to be imposed on the infringing firms. According to our secondary legislation on fines, the fine to be imposed on a recidivist is to be raised by 50-100% on the basic amount of fine for every repeat offence, but in practice, this provision is not consistently applied. Recidivism has been considered as an aggravating factor in a single case so far in the cement sector (Competition Board Decision No: 13-54/756-316, Date: 17.09.2013).

*Based on your findings on repeated collusion in these sectors, have you drawn any implications for your enforcement planning and priorities? Have you drawn any implications for your leniency programme or your fining guidelines?*

15. We have given priority for tackling the anti-competitive practices in this sector and recently had sequential investigations in each geographical region, in the end covering the whole country. Subsequently, we have initiated a sector inquiry in order to address the structural problems of the industry.

16. There has not been significant implications for our leniency programme, since the firms that operate in this industry do not prefer leniency applications, and they have not made any applications so far. These firms have become confident that it got quite hard for the TCA to find evidence showing an anti-competitive practice, due to the learning effect of the several previous investigations.

17. Regarding the fining guidelines, we think that fines should be imposed using the higher end of the range with a determined and continuous application of the current regulations, unless any adjustment is made in the current provisions.

*Do you think that the legal framework in your jurisdiction is suitable to address repeated collusion or are there any changes that could improve it?*

18. As explained above, we think that there is suitable legal framework in our jurisdiction to address recidivism, yet there is room for these provisions to be used more effectively.

*Is there scope for better international co-operation to combat cartels in these sectors?*

19. Since the firms operating in this sector are mostly local, except for some firms with foreign shareholders, we do not think that right now there is scope for international cooperation, but this may change over time according to possible changes in the status quo.

### **Answers for the bread sector**

- i) Sectors prone to repeated collusion

*If you have investigated any cartels in the above-mentioned sectors / products, please describe the anti-competitive practice (e.g. market allocation, price-fixing) and the level in the sector at which this practice was observed (e.g. manufacture, wholesale, retail level). What was the outcome of the investigation?*

20. We have investigated several cartels in the bread sector, most cases involving price fixing and market allocation. Bakeries that bake and sell bread to final consumers make horizontal anti-competitive agreements at the production and retail level. The geographical market is very small and local, usually made up of villages and provinces. Bakeries are members of their local chambers of craftsmen, and these chambers want to protect their members from bakeries operating outside their areas. The most frequently used tool is to get in touch with the chamber of the bakery that is selling bread to their village/ province in order to let them know about this conduct and them to take necessary actions to stop that bakery's conduct.

21. There has been over 60 investigations, 7 of which have been in-depth investigations, while the rest has been closed in the preliminary phase. Out of the 7 in-depth investigations, 5 of them have resulted in fines while 1 of them is on-going, and 1 have been closed without any fines. Among the 5 in-depth investigations that have resulted fines, 3 have resulted in fines for individual bakeries, 1 for chambers and 1 for the bread federation which is the upper body of the chambers. Almost all the remaining investigations which have been closed in the preliminary phase have resulted in letters of warning for the parties to stop their alleged anti-competitive behaviour.

*Did your investigation in any way take account of investigations of a similar matter in other jurisdictions – whether just for informational purposes or through international cooperation?*

22. Since bakeries in Turkey have different characteristics than bakeries operating in other parts of the world, there has not been an examination of other jurisdictions in this regard. The main characteristics of Turkish bakeries that set them apart from their counterparts are basically that:

- Most of them are family-owned businesses,
- Most of them operate locally,
- Most of them do not mass produce,
- Most of them do not know anything about the Competition Law,
- Consumers do not like differentiated products, and

- Excess capacity.

*Have you observed more than one case in the same sector / market over the years?*

23. There has been over 60 investigations, 7 of which have been in-depth investigations in this sector in the last 10 years.

*Have you observed more than one case involving the same firms (i.e. serial offenders)? Were these cases in the same product or in a different one?*

24. We have only had one case in which the same chamber was the subject of a pre-investigation and an investigation (Case no: 13-33/445-196, Date: 04.06.2013 and Case No: 16-03/59-20, Date: 21.01.2016). Other than this case we have not seen more than one case involving the same firms/chambers, due to the fact that the geographical market for bread is highly local (limited to villages and provinces) and there are about 22.500 small bakeries countrywide.

*Have you observed if serial offenders adopt the same collusive practices or do they adopt different practices in subsequent cartels?*

25. Bakeries around the country tend to adopt the same collusive practice, namely price fixing and customer (retail shops) allocation.

*Have you noticed whether repeated collusion in the same sectors or by the same companies has become more or less frequent over time? What are the reasons in your view for any increase or decrease?*

26. We have noticed that in the last 1-2 years, the frequency of complaints and investigations regarding anti-competitive practices in this sector has decreased. We believe that, in addition to the amount of fines that have been imposed on the infringing firms, the rise in the competition awareness of relevant firms has also helped greatly to this decrease. As mentioned above, some cases have resulted without fines but letters of warning for the alleged firms and chambers to refrain from anti-competitive practices, which have beneficial. Moreover, there have been competition advocacy efforts in way of letters by the President of the TCA, addressed to all the firms operating in this industry to let them know how to avoid competition infringements. We believe that such efforts have helped the companies to learn about competition rules and how to act in accordance with them.

- ii) Factors likely to lead to repeated collusion

*Did you start your investigations because of the existence of certain factors or characteristics in a market? What were these factors?*

27. We started our investigations usually as a result of complaints or news articles about chambers of craftsmen declaring that the bakeries have met and/or have agreed to fix the prices. In recent years we have had cases where some bakeries complained to us and accused other bakeries for selling bread below the maximum price.

*In the cases mentioned above, did your decision refer to the economic characteristics of this industry? What were these characteristics?*

28. Very often, in bread industry, anti-competitive practices are out in the open and there is an abundance of evidence showing anticompetitive object. We are usually able to find a written anti-competitive agreement signed by the parties who usually confess that they have indeed agreed on price fixing.

29. In this sector, there are many independent small bakeries operating with excess capacity. They are not able to compete with one another and they prefer to have a fixed price and sell to the same retail shops. Nevertheless, they seem not to be able to sustain this anti-competitive agreement for more than a few months due to cheating. Occasionally, the anti-competitive agreement is already terminated before we detect it. There seems to be no apparent punishment for the cheaters, other than that the members of the cartel start selling bread from below-cost prices after detecting the cheating, and the cheaters risk having to exit the market.

*In your view, what are the reasons for repeated collusion in these sectors? Do you think that it is due to specific market characteristics?*

30. We think that the repeated collusion in this sector has mostly been due to specific market characteristics, and partly because of the lack of competition awareness.

31. As mentioned above, there are over 22.500 small bakeries and only 250 large bakeries according to data from the year 2013. Almost all bakeries use wet yeast as the main ingredient and the production costs of all bakeries are completely the same. They operate with excess capacity and the final product is homogenous. Communication between bakeries is very easy since they are conveniently located close to each other and has to become a member of the same chamber in that province. Since most Turkish consumers prefer to consume bread right after it is produced (when it is still fresh), this justifies the small scales and local production. Moreover, bread is an indispensable product with a very low demand elasticity. We believe that all of these factors make it very suitable to collude.

32. Even though in the last 10 years, new bakeries with larger scale production capacities have entered the market, the demand of the Turkish customers to consume bread when it is fresh has put a limit to this trend. Therefore, we can say that the market characteristics do not seem to change in time and it results in repeated collusion. We have the opinion that a consolidation could drive down the urge to collude in this sector.

33. Another factor that facilitates repeated collusion appears to be the maximum price regulations which we will explain more below.

iii) Implications for enforcement

*In your cases, have you faced situations in which you considered that fines were not sufficient and additional remedies (e.g. divestiture, information disclosure) would have been more effective? In your jurisdiction, can the competition authority impose these remedies in cartel cases? Do you think there are other enforcement tools that could be used more effectively in these sectors, in addition to cartel law?*

34. As mentioned above, we think that a consolidation could drive down the urge to collude, but in cartel cases, we are not able to impose a structural remedy as such. Therefore, the TCA has tried different approaches to decrease the probability of collusion in this sector.

35. Maximum price regulations also appear to ease the repeated collusion in this sector. In line with the legislations, in every city, chambers of craftsmen set a maximum price for bread which can be perceived as a mandatory price to be applied by the bakeries, making it easier for the bakeries to agree on not to sell lower than this price level. It has been debated on whether there should be a change in this regulation, but since bread is known to be an indispensable product for all consumers, such price regulation has a social ground.

36. The overriding opinion at the TCA at the moment is that the repeated collusion in this sector should be tackled with competition advocacy in addition to the cartel rules.

*In your jurisdiction, are serial offenders treated in a stricter way? If yes, do you think that this discourages repeated collusion?*

37. Recidivism as an aggravating factor in the amount of fines does not come in handy regarding this sector, since, as mentioned before, the infringing firms are very often not the same. In this regard, we do not think that repeated collusion in this industry can be discouraged in such a way.

*Based on your findings on repeated collusion in these sectors, have you drawn any implications for your enforcement planning and priorities? Have you drawn any implications for your leniency programme or your fining guidelines?*

38. As explained before, there have been efforts to make the bakeries end their anti-competitive behaviour and refrain from such activities in the future, as an outcome of investigations and competition advocacy activities. Letters of warning and informatory notifications have been sent to the relevant chambers and the federation, as well as individual bakeries.

39. There has not been significant implications for our leniency programme or our fining guideline. There has been two leniency cases (Competition Board Decision No: 14-04/80-33, Date: 22.01.2014; Decision No: 14-04/80-33, Date: 22.01.2014), since the competition awareness of most bakeries have been almost non-existent. About fining, due to the very low turnovers of bakeries, the percentage of the fines imposed on these firms has been kept on the lower end of the range, not to mention the ones that have not been imposed a fine.

*Do you think that the legal framework in your jurisdiction is suitable to address repeated collusion or are there any changes that could improve it?*

40. We think that the repeated collusion in bread industry is due to the specific characteristics and problems of the sector, including the price caps imposed by chambers.

*Is there scope for better international co-operation to combat cartels in these sectors?*

41. As explained in detail above, since the bread sector is very local, made up of local players who are the members of the same chamber, there seems to be no scope for international cooperation to combat the cartels in this industry.