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COMPETITION POLICY AND THE INFORMAL ECONOMY

Contribution from Turkey

-- Session II --

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INFORMAL ECONOMY AND COMPETITION POLICY: CASES FROM THE TURKISH COMPETITION AUTHORITY

--Turkey--

1. Informal Economy: Conceptual Framework

1. The informal economy¹ may be defined as economic transactions and activities which are hidden from public authorities for several reasons, such as to avoid the payment of taxes and social security contributions. Unreported activities are a prevalent characteristic of economic life, and assume substantial proportions even in the developed countries².

2. The growth of the informal economy is caused by many different factors. The most important ones are the rise of the burden of taxes and social security contributions; increased regulation in the official economy, especially of labor markets; forced reduction of weekly working time; earlier retirement; unemployment³.

3. There are several methods of estimating the size of the shadow economy. They can be classified as direct and indirect approaches. Indirect approaches include “GNP Approach”, “Tax Analysis Approach”, “Employment” and “Monetarian Approach”⁴.

2. Informal Economy and Competition Policy in Turkey

4. According to a study which calculates the level of informality in the economy in Turkey between the years 1971 and 2000, size of informal economy fluctuates in these years but from the 90's, it has started to grow⁵. In 2007, the level of shadow economy was predicted as 30 percent⁶.

5. The causes of the informal economy in Turkey are several, such as financial, economic, political, social and legal. Within this framework, the economic system and structural properties have important role in shaping informal economy. Especially, the informal sector is most widespread in sectors in which small enterprises are active and which are labour intensive. Beside this, high inflation, economy politics, instability, crises and underdeveloped economies can be seen as the factors that affect the informal economy. High tax rates, the high cost of registered activities and over regulation are other elements which encourage shadow economy⁷.

¹ Informal economy can be discussed using various concepts, such as parallel economy, shadow economy, ghost economy, hidden economy or underground economy. In this paper, the term of “informal economy” will be mostly used.

² Globalizing Tax Evasion: How Competition Affects the Size of the Underground Economy, Liliane Karlinge, May 16, 2008.

³ Shadow Economies: Size, Causes, and Consequences, F. SCHNEIDER and D. H. ENSTE, Journal of Economic Literature Vol. XXXVIII (March 2000) s.82.

⁴ <http://www.tbb.org.tr/turkce/dergi/dergi41/Kayitdisi.doc> “Türkiye’de Kayıt Dışı Ekonominin Boyutları, Nedenleri, Etkileri ve Alınması Gereken Tedbirler”, Dr. Mustafa Ali SARILI Bankacılık Dergisi, Sayı 41, 2002.

⁵ Çetintaş H. Ve H. Vergil, “Türkiye’de Kayıtdışı Ekonominin Tahmini”, *Doğuş Üniversitesi Dergisi* 4 (1) 2003, s. 15-30.

⁶ <http://www.atonet.org.tr/yeni/index.php?p=827&l=1>

⁷ <http://www.kayitdisiekonomi.com/files/VUSLAT-US1-KAYITDISI.pdf> (Türkiye Ekonomi Kurumu Tartışma Metni)

6. Informal economy exactly affects the market conditions. The official undertakings obey the rules and regulations while the underground producers do not. So the cost structures of these two groups of undertakings differ from each other. Informal undertakings have lower costs, because that they pay less for labour and input as a result of avoiding payroll taxes. Also, by disregarding safety and health standards underground producers gain a cost advantage. On the contrary, official firms are put at a competitive disadvantage, so that they have to choose between operating as informals or exit from the market. As a result of this problem, official firms may try to solve informality problem with anticompetitive conduct. For instance, they can be organized in the associations in order to avoid informality in the market by using anticompetitive measures. However, it is not the real and permanent solution for the market to use price-fixing agreements for fighting underground sector. In general, there has been a governmental body to prevent informality in the sector and make the market structure more competitive.

7. Another aspect of the informal economy is its importance in the calculation of market shares in the market. As it is mentioned in the definition, the transactions and activities of undertakings in the informal economy are not recorded. So it is hard to calculate the real values of the market size and each firm's share in the market. For example, if the level of informality in the market is 50 percent and the leader firm has a market share of 60 percent in records, then the real market share for the firm is 30 percent. This huge difference affects the competition law assessments, especially in merger control and abuse of dominant position cases. Because market share is essential in these two types of analyses and real market share is closely related with the level of informality in the market, informal economy is crucial in competition law enforcement. Many firms defend themselves claiming that they have relatively lower market shares due to existence of informal economy. For instance, they usually argue that they are not in a dominant position in the market because of the underground economy, if they are investigated for abuse of a dominant position. Additionally, merging firms also use informal economy tools for lowering their market shares in order to get permission from antitrust authorities.

3. Informal Sector In the Decisions Of Turkish Competition Authority (TCA)

8. There are many cases that TCA faced the informal sector. Relevant cases are cited below where informal sector was discussed.

3.1. Waste Accumulator Case:

9. In the Competition Board decision dated 20.5.2008 and numbered 08-34/456-161, it has been detected that at the stage of the collection of waste accumulators, some accumulator-producing and waste accumulator-collecting firms were engaged in competition-limiting behaviour. In the pleas of the undertakings, which took place in the decision in question;

the claims that

*“...Even if it is thought for a moment that competition rules are broken, those injured by it are a few number of scrap dealers working in extremely unsound conditions in an **informal** way, or small firms or personal enterprises working with those scrap dealers, it is not possible to agree with speaking that here the rights of people working in an informal way have been infringed.”*

took place. However, the statements that

“Primarily it should be emphasized that the purpose of the Act No. 4054 is to ensure the “protection of competition”. Therefore, it is unnecessary to explain that in order for the Competition Board to make a detection that there is an infringement of competition in a market and to be able to establish a decision, a requirement such that large firms working in that market are injured does not exist. Moreover, consequences that decisions and acts detected to be an

infringement give rise to in terms of many actors in the sector have been put forward above in detail.”

were included in the assessment of this plea, and it was put forward that competing undertakings' concluding agreements between themselves with a view to pushing out of the market those who commit informal activity did not rule out an infringement of competition. Furthermore, that competition-limiting agreements concluded can exceed their purpose in respect of their effect also takes place among the detections made. Because, it is understood that not only those firms working informally but also the other firms can be affected by an anti-competitive agreement. But, the decision in question does not render legal the activities of those working informally. All detections and assessments have been made in terms of “competition law”. As a matter of fact, while assessing the pleas made by the undertakings that

“Licensed or unlicensed scrap dealers collected waste accumulators in an informal way, they were engaged in free-riding, they, by means of not filling the quotas of themselves and the other members of AKÜDER, caused them to be considered guilty vis-à-vis the Ministry of Environment and Forestry.”;

the statements that

“the addressee of the plea that scrap dealers working unlicensedly collected waste accumulators in an informal way, they were engaged in free-riding, consequently they, by means of not filling the quotas of themselves and the other members of AKÜDER, caused them to be considered guilty vis-à-vis the Ministry of Environment and Forestry is not the Competition Board certainly. Public bodies to supervise and administratively penalize the sector in this regard are the Ministry of Finance and the Ministry of Environment and Forestry.”

were included, and emphasis was put on the fact that the other assessments outside competition law were required to be done by the relevant public agencies. In the result part of the decision given by the Board, the plea of the “prevention of informality” has not been assessed as a mitigating factor when establishing penalty about the undertakings concerned after having reached the conclusion that they infringed competition. In other words, in the decision in question, the “prevention of informality” has not been evaluated both at the stage of detecting infringement and when assessing penalty.

3.2. Denizli Precious Metal Dealers and Jewellers Chamber Case

10. In another Competition Board decision dated 19.9.2007 and numbered 07-73/892-336, it has been detected that Denizli Precious Metal Dealers and Jewellers Chamber infringed article 4 of the Act on the Protection of Competition No. 4054 by means of determining the selling and purchase price of gold outside the market. In the investigation referred to, the plea that

*“ * there was no commercial logic for sales below the cost,*

** informality would be inevitable,*

** it would give rise to products with a low degree of fineness and weight in gram, or to fake products,*

** a consumer who preferred this product due to its cheapness would suffer, and*

** this situation would contradict with the purpose of protecting the consumer, which was mentioned in the reasoning for the Act No. 4054.”*

has been made by the association of undertakings. In the assessment of this plea;

the statements that

“In its plea, the Chamber referred to article 11 of the Act No. 5362 and mentioned that it was commissioned for controlling the quality of goods and whether they are produced according to the standard. Primarily it should be mentioned that an assessment as to the quality control of the Chamber has not been made. There is no relationship between controlling the quality of goods, and price determination and controlling whether the price list is complied with. The control of the quality of goods should not be through price determination, but in the manner of having their degree of fineness controlled in houses for degree of fineness by means of getting specimens from jewellers. Furthermore, it is required that the provision of article 11 be assessed together with article 62 of the same Act. In article 62, it has been mentioned that price tariffs show maximum limits. Control to be made by chambers should be whether tradesmen and craftsmen sell above the price tariffs determined. But in the existing incident, sales made by a low price create discomfort and they are tried to be prevented.”

were included, and it was expressly mentioned that combating informality was not regarded in detecting an infringement of competition. Because, it was tried to be emphasized that controlling whether standards determined within the market are complied with was possible for behaviour other than those restricting competition and that a competitive market structure did not lead to informality.

3.3. Ceramic Coating Case:

11. In the Competition Board decision dated 24.2.2004 and numbered 04-16/123-26 given as a result of an investigation conducted against undertakings operating in the markets for ceramic coating materials and/or ceramic health appliances, there are also statements as to informality. Among the evidence obtained from the undertakings in the process of investigation, statements that

“expressed that...

- * ceramic health appliances was a sector in the world where there was excess capacity,*
- * crises in the Far East and Russia created narrowing of demand,*
- * the European Union countries were saturated markets,*
- * in Turkey, investments continued despite these conditions,*
- * since export prices were low and dates of maturity were very high in internal markets, net prices amounted to export prices,*
- * increased capacities constantly pulled prices down due to narrowing of market,*
- * intense combat was required to be continued with those organizations which created unfair competition by working informally in order to be able to cope with these conditions,*
- * investment decisions were required to be taken by behaving with further common sense.”*

“closed the meeting by expressing that...

- * there was a significant segment in the sector which grew by exploiting informal economy,*

** this put in a difficult situation those organizations which survived in conformity to laws and according to the rules of economy,*

** therefore, combating unfair competition was the most important subject of the Association,*

** methods to protect members but to prevent unfair competition could be determined by ensuring the required reconciliation,*

** a research that would put forward the consumption in Turkey overall and capacities of small producers would be very beneficial.”*

took place. However, convening, in the name of combating informality, of undertakings which committed anti-competitive acts has not been found sufficient at the stage of decision in detecting infringement or assessing penalty. Because, as is also expressed in the previous decisions, in combating informality, tolerating anti-competitive behaviour or exempting such acts from the practices of competition law is not in question. Just as there exists other public agencies that combat informality, it is possible to tell that the market would also push informal firms out of the market within the dynamics of itself.

3.4. TESK Case:

12. Likewise, in the Competition Board decision numbered 7.1.2005 and dated 05-02/18-9, the investigation conducted in respect of the bread and pita market in Gaziantep has been concluded. In the decision in question, TESK which fixed a base price as to breads and pitas has made a plea that

“...the demand in question has been examined by the Executive Board of the Confederation, and it is understood that offering for sale below cost those goods and services produced by our tradesmen and craftsmen arises out of reasons such as working and having work informally, and forming goods and services that are of low quality and that do not conform to conditions of health. It has been held to be appropriate that in price tariffs as to bread, prepared by our Chambers and approved by our Associations, the cost (base) price of bread as well as its maximum price be fixed and this price be also included in price tariffs since it would not only prevent suffering of the tradesmen and craftsmen concerned but also protect them from unfair competition. Therefore, provided that it is only limited to bread tariffs, also fixing the cost (base) price of bread besides the maximum selling price of bread and this fixed price’s taking place in bread price tariffs have been found to be appropriate by our Confederation.”

13. As is seen, the confederation made up by tradesmen and craftsmen has detected a base price in the name of preventing informality in markets. It has been thought that thus it would be revealed that bakeries selling below the base price would produce and sell illegally or in a manner not conforming to standards. However, the plea in question has been replied by the statements that

“it is not possible to agree with the thought that the declaration of cost-base price is at least beneficial for drawing the attention of consumers, as TESK argues, even if it shall be calculated by taking into consideration the fulfilment of all legal obligations. It is defended in theory that, differently from the ceiling price, base price practices are far from ensuring a benefit in economic terms, such practices merely serve the aim of preventing predatory price war and of undertakings’ gaining from it. Also indeed, particularly hypermarkets’ selling at quite low prices the bread they produce at bakeries within them for purposes of drawing consumers to the point has become a typical quality of the market. Also in the letter of the Federation, dated 10.4.2002, emphasis has been put on this issue exactly. However, from both the Circular No. 29 and its correspondences with the Associations, it is understood that TESK is aware that cost-base price fixing cannot be applied to undertakings having the nature of merchant. Moreover, low-price

sales of large stores do not remain limited to only bread and similar products, they create effect on markets of the other consumption goods as well to the degree of the ending of small-scale producers' activities. However, to what extent the determination of cost-base price would be an efficient solution is also controversial against the reality that capacities, costs and profit-related expectations of undertakings would present difference.

Relieving deficiencies in a market via determining a base price expressly sets contrariness to law in the context of article 4 of the Act No. 4054. Therefore, the opinion reached was that TESK infringed article 4 of the Act through its decisions directed at fixing and declaring the base price as well together with the ceiling price in bread price tariffs."

14. In other words, emphasis was put on the fact that the determination of a base price is not necessary in preventing informality in a market, and benefits that may be obtained by a consumer are prevented in this manner. On the other hand, in assessing penalty, the purpose of the association of undertakings to prevent informality has been considered as a mitigating factor as it would be understood from the statements that

"Also in the assessment of the fine to be imposed, market-related conditions explained above and associations of undertakings' acting with a view to correcting these conditions, and...

...are required to be accepted as mitigating factors."

3.5. **Karboğaz Case:**

15. In the Competition Board decision dated 23.08.2002 and numbered 02-49/634-257, it has been mentioned that Karboğaz Inc. which was identified to be in dominant position in the relevant product market detected as the "market for liquid carbondioxide" included in its plea the statements that

"It is asserted that the market share of Karboğaz Inc. is below the detected rates and is around 50 %. And particularly with the citation that informal economy is an important problem in our country, it is defended that this difference stems from the fact that sales of competing companies, which are realized without invoice are not reflected in the actual figures and therefore, the market share of competitors appears to be at lower levels than it is. It is mentioned that within this framework, the market position of Karboğaz Inc. appears stronger than it is, and it is implied that Karboğaz Inc. is not in dominant position in the market for liquid carbondioxide which is the relevant product market."

When assessing this plea, the statements that

"When making an assessment as to the fact that Karboğaz Inc. is in dominant position, there was not a limitation merely to the market share, the other factors outside the market share have also been considerably taken into consideration. On the other hand, not only today's but also 1996 and later-periods market share of Karboğaz Inc. have also been regarded. In determining the latest 5-year market share and the market position of Karboğaz Inc. within this framework, total sale figures have been asked from all companies (including Karboğaz Inc.) operating in the market, and also import figures obtained from the Undersecretariat of Foreign Trade have been regarded. Furthermore, sale figures based on customers have been asked from all producing undertakings (Güney Natural Gas Inc., Barit Inc. and Habaş Inc.) including Karboğaz Inc. These sale figures obtained from the companies in question are also based on invoices charged by the companies."

have been used.

16. As is seen, it is stressed that only the market share was not regarded when identifying dominant position. However, it is understood that the figures employed in the identification of market share are based on invoices. Because, it is not possible to use sales without invoice in the calculation of market share. For this reason, besides the fact that in markets where there is much informality, reaching actual market share information gets difficult, values to be used in calculation are required to exist within entries. However much it presents importance in identifying “dominant position” which is an important issue in respect of competition law, informality cannot be used in calculations of market share and market power since it is not possible to put forward its level definitely.

4. Conclusions and Recommendations

17. In summary, as it would be understood from the decisions mentioned in this contribution, informality can be encountered in various ways in competition law practices. In general, when explaining a competition-restricting behaviour, it is likely that the “purpose of preventing informality” be used. Particularly, associations of undertakings’ committing behaviour such as price fixing in the name of having a specific standard established and combating informality in their relevant market becomes the subject of investigations in our country. In these examinations, the “purpose of preventing informality” is not considered as a valid plea, it is likely for it to be deemed a mitigating factor in some files in terms of aim. Also, when identifying dominant position, it is likely that there are pleas as to the calculation of the market share of informal production. However, the inability to calculate informality due to its nature, and the utilization of invoices that are “registered” in identifying market share do not justify the plea of “informality” of those undertakings which are identified to be in “dominant position”. Finally, competition authorities can be more beneficial in the deregulation process by their opinions as a means of competition advocacy, because that one of the major reason for informality is excessive regulations, especially in the market entry. In other words, if over regulations are removed as a result of competition advocacy, informality level in the market may decline and market may be more competitive.