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The Turkish Competition Board determines whether members of the guard rails and road safety systems have violated article 4 of the Law No. 4054 on the Protection of Competition through collusive tendering and bid rigging (*Çelik Otokorkuluk*)

ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), BID RIGGING, CONCERTED PRACTICES, EXCHANGE OF INFORMATION, COAL AND STEEL, PRICE FIXING, MANUFACTURING, COOPERATION AGREEMENT, TURKEY, ANTICOMPETITIVE OBJECT / EFFECT, TRANSPORT (RAIL)

Turkish Competition Board, *Çelik Otokorkuluk*, No 18-44/702-344, 22 November 2018 (Turkish)

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This case note analyses the Turkish Competition Board's (**"Board"**) decision of 22 November 2018 numbered 18-44/702-344 in which the Board assessed the allegations that several undertakings–which are all active in the steel guardrail sector in Turkey and members of the Turkish Association of Steel Guard Rails and Road Safety Systems (Çelik Otokorkuluk ve Yol Güvenlik Sistemleri Derneği *or* the **"Association"**)–had engaged in anticompetitive practices, by cooperating in the steel guardrail market which is exclusively operated by tenders and thus violated Article 4 of Law No. 4054 on the Protection of Competition ("**Law No. 4054** ").

Relevant Product Market Definition

In its evaluation on the relevant product market definition, the Board defined the relevant product market as the market for the "production and sale of steel guard rails". The Board defined the relevant geographic market as "Turkey" considering that the investigated undertakings attended meetings within Turkey and there were no significant differences in the competitive structure between the different regions in Turkey.

The Board's Substantive Assessment

In the assessment as to whether the investigated undertakings had violated Article 4 of Law No. 4054, the Board initially addressed the allegations regarding collusive tendering. The Board set out the four most common practices that lead to collusion in tenders namely; cover bidding, bid suppression, bid rotation and market allocation. The

Board then assessed the content of the information exchanged between the investigated undertakings during the tenders between 2014 and 2015 under Law No. 4054 and its Guidelines for Horizontal Cooperation Agreements (**"Guidelines"**). In this regard, the Board reminded that information relating to prices, quantity, customers, costs, revenues, sales and purchase, capacity, product conditions, marketing strategies, risks, investments, technologies and R&D are sensitive within the competitive framework and should be categorised as information exchange which restricts competition. However, the sensitive nature of information exchanged is highly dependent on the structure of the relevant product markets and relies on the density and transparency of the markets involved. In the context of the case at hand, the Board found that the investigated undertakings frequently held meetings with the purpose of creating a joint mutual product, which was initially introduced by the Turkish General Directorate of Highways [*1*]. The Board noted that the meetings were not held exclusively for tenders but rather to discuss the production of a mutual product. Subsequent to its evaluation of the evidence in the case file, the Board found that there had been no evidence establishing exchange of sensitive information that would amount to collusive tendering between the members of the Association.

The Board then scrutinized from a competition law perspective the agreements entered by the investigated undertakings related to the creation of a joint product, namely (i) the 'Commitment Agreement' through which the parties committed to engage in joint production, on the one hand, and (ii) the production licence agreements related to the technical aspects of the joint production on the other.

The Commitment Agreement

On the basis of its thorough analysis of the evidence in the case file, the Board found that the meetings held by the members of the Association–which it considered as a cooperation platform for the creation of a joint mutual product–generally focused on the improvement of safety standards, the reduction of maintenance and repair costs, and ensuring a mutual R&D development process. Accordingly, the Board resolved that the Association's activities did not include any practices that would have adverse effects on competition within the meaning of Article 4 of Law No. 4054.

The Board then examined the Commitment Agreement entered by the members of the Association. To that end, the Board first recalled that to determine whether an agreement has restrictive effects on competition, it is necessary to consider both actual and potential effects on competition. As set forth in the Guidelines, for an impediment to competition to exist, horizontal cooperation agreements, such as the creation of a mutual product, must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition in the market (e.g. prices, output etc.). However, in the case at hand, the Commitment Agreement–which actually had never been implemented since the parties did not create any joint product–did not include any exclusivity clauses, vertical restraints or financial or material obligations that would significantly impede the parties' freedom of decision making. Additionally, the Board emphasized that horizontal cooperation activities which a single undertaking would be unable to carry out independently due to various reasons–such as restricted technical capabilities–will not, in general, lead to restrictive effects on competition pursuant to Law No. 4054, provided that there are objective reasons justifying that the relevant activities cannot be conducted independently. The Board considered that the Commitment Agreement satisfies these criteria as the production of a joint product would result in cost savings for the parties due to their limited technical capabilities in the market. The Board ultimately concluded that there is no evidence that the Commitment Agreement regarding the joint production restrains competition.

The Production Licence Agreements

The Board then examined the three production licence agreements through which the investigated undertakings engaged in the design and production of the mutual product alongside the safety tests, documentation and subsequent activities.

To that end, the Board first recalled that although a horizontal cooperation may lead to significant economic benefits (sharing risks, saving costs, increasing investments, pooling know-how, improving product quality, etc.), it may still lead to various competition problems such as anticompetitive coordination in terms of prices, outputs, product quality or innovation.

In the case at hand, the Board determined that the production licence agreements constitute R&D activities within the meaning of the Block Exemption Communiqué on R&D Agreements. Pursuant to this text, agreements between competitors which include joint use of R&D results can benefit from the protective cloak of the block exemption regime, provided that the total market shares of all the parties involved do not exceed 40%. However, in the case at hand, due to the aggregate market share of the investigated undertakings above the 40% threshold, the Board concluded that the production licence agreements were not eligible for block exemption and thus a separate assessment would need to be conducted to determine whether the individual exemption regime provided under Article 5 of Law No. 4054 would apply to the agreements. To that end, the Board found that the cooperation between the investigated undertakings would enable them to create high quality products which would have higher safety standards, allowing thus consumers a fair share of benefits. Also, this would not result in an impediment to competition within the market or impose competitive pressure more than what is necessary. Consequently, the Board concluded that all the conditions of the individual exemption regime are met and thus the production licence agreements entered between the investigated undertakings may benefit from the individual exemption regime under Article 5 of Law No. 4054.

Based on the foregoing, the Board ultimately concluded, with a majority vote, that there had been no violation of the provisions of Law No. 4054 and decided not to impose an administrative monetary fine to the investigated undertakings. It is worth noting that two members of the Board dissented to the majority opinion on the grounds that the activities carried out by the investigated undertakings could be deemed sufficient to create a strong dominant position in the relevant market and that the purpose of their cooperation goes beyond the creation of a joint mutual product.

The Board's decision is significant prominently as it includes incremental assessments regarding exchange of information and horizontal cooperation agreements generally; and joint production agreements more specifically. The decision is also important as it contains detailed evidential assessment in a market conducted by tenders and behaviours occurring within the scope of a sector-specific association of undertakings.

[*1*] The Directorate is an institution of the ministry of transportation, maritime affairs and communication assigned to design new highways, to construct and repair highways and to improve safety standards of highways etc.