Building a better working world

Kuzey YMM ve Bağımsız Denetim A.Ş.
Eski Büyükdere Cad.
Orjin Maslak No:27
Maslak, Sarıyer 34398
İstanbul - Turkey

Tel: +90 212 315 3000
Fax: +90 212 234 1067
ey.com
Ticaret Sicil No : 479919
Mersis No: 0-6010-2772-0400010

European Union horizontal cooperation regulation have been amended

What is introduced in terms of exchange of information?

European Commission (Commission) has updated its legislation and guidelines regarding horizontal cooperation agreements on 01.06.2023. New titles such as sustainability agreements as well as new interpretations regarding production among competitors, R&D commercialization agreements and exchange of information, which have been already included, are included in the Guideline, entered into force as of beginning of July. Legislation (Guideline) in Türkiye included highly parallel provisions to previous Commission regulations regarding cooperation agreements between competitors. The abovementioned amendments may cause amendments in our domestic practices as well in the following period.

Exchange of information and cartel: Restriction of competition in terms of purpose

It is emphasized again in the Guideline that exchange of information between competitors can be a part of a horizontal agreements as well as being main subject of an agreement. Elimination of uncertainties regarding whether the analysis in terms of exchange of information cases would be made in perspective of “breach in terms of purpose” or “breach in terms of impact” is of high significance for the enterprises. Yet, exchange of information made “in terms of purpose” has the risk of being considered as cartel and independent from impact and therefore imposing heavy fines.

It continues to define commercially sensitive data as the nature of information whose exchange may violate competition; accordingly, information such as price, cost, production, quantity, market strategies, market shares and customers are considered as information that can significantly reduce the uncertainty among competitors. If such information is shared prospectively and in detail, it increases the possibility of being considered a violation in terms of purpose. This issue is also clearly stated in our Guideline. In addition, it is clearly stated in the new guideline that the fact that the information shared among competitors is false or misleading will not, by itself, eliminate the risk of affecting the behavior of competitors.

Unilateral sharing and announcements

The following statement is mentioned in our Guidelines *“When a competitor sends information that is sensitive to competition to an undertaking in any way, if the undertaking does not give a clear response that it does not want to receive such information, it will be assumed that the undertaking accepts this information and changes its behavior in the market accordingly.”* The above approach is also adopted in the new Guideline.

Information made publicly available for legitimate reasons - and therefore [...] available to all competitors and customers is generally accepted as non-sensitive in terms of commerce by the Guideline, however, it also underlines that risks may arise in the disclosure of information that does not seem to provide any benefit for consumers (for example, information on future pricing behaviors, R&D costs, costs of compliance with

environmental requirements, etc.) within the framework of the specific characteristics of the relevant sector.

Indirect exchange of information (hub & spoke violations)

It is noteworthy that the Guideline refers to exchange of information made through third parties (distributor, algorithm, customer, etc.) under a separate heading. It can be stated that the Guidelines for hub & spoke (collect-distribute) violations[1], which is one of the most popular competition issues in our country in the last three years, clarifies to some extent the issue of when the action will constitute a violation and how it will be evaluated.

Guideline mentions that such violations would arise in case: *"the undertaking sharing commercially sensitive information expressly or implicitly agrees with the third party that the third party may share such information with the rivals of the undertaking, or the undertaking intends to disclose commercially sensitive information to its competitors through the third party".* Such case may arise in case the undertaking disclosing the information *"can reasonably foresee that third party would share the information with competitors of undertaking and ready to accept the risk required by such condition"*

It is not unexpected in business life for a buyer to disclose the price of one supplier to another in order to negotiate better terms. The Guideline clearly states that *"Competition law does not prevent one supplier from independently disclosing a quote to another supplier in order to obtain better trading conditions for customers, such as lower prices.".* However, it is also stated that such situations should be distinguished from situations where the buyer has knowledge of an anti-competitive agreement between suppliers and exchanges information to implement such agreement. Therefore, information of buyer has a key role in evaluation process.

[1] For example, Retail decisions numbered 21-53/747-360 and 22-55/863-357, Sunny decision numbered 22-23/371-156