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From Mergers to Cartels: An Overview of the Rapidly Evolving Turkish Competition Law in Light of the European Model

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This paper provides an overview of the current developments that are observed in Turkish competition law, especially in Turkish merger control, but also outlines some of the primary tenets of abuse of dominance and cartel cases in Turkish competition law practice, while also examining concerted practice and exchange of sensitive competitive information, all in light of European competition law framework and practice.

Key Points

- With its more than a decade-long enforcement practice, Turkish competition law has undergone significant changes that could indicate a move towards converging with the European jurisdiction in many respects.
- In particular, the Turkish merger control regime has been introduced to a new communiqué and a draft guideline to interpret *ex ante* merger review, especially in light of the new only-turnover-based notifiability thresholds.
- Additionally, the guidelines on abuse of dominance, cartel cases, concerted practices and exchange of sensitive competitive information under Turkish competition law bear significant resemblance to their comparable European counterparts, while retaining their Turkey-specific features.

I. Following the ECMR's impressions: the Turkish merger control regime

Change has been afoot in Turkish merger control since July 2008, when the draft legislation envisioning amendments to Law No. 4054 on the Protection of Competition ('Law No. 4054') was submitted to the sub-committee of the Turkish Grand National Assembly. The pace with which new legislation has been introduced to Turkish competition law practice over the past few years could indeed be considered as a welcome signal in the approach of the Turkish Competition Authority (the 'Authority'), whose legislative framework is closely modelled after that of the European Union, which, as a jurisdiction, acts as more than a guidepost to emerging market economies.

In the last quarter of 2010, two substantial developments that merit particular focus were observed in Turkish merger legislation. First, a new communiqué, Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board ('Communiqué No. 2010/4'), was published on October 2010, coming into force as of 1 January 2011. Secondly, a draft guideline on the enforcement of Communiqué No. 2010/4 was released to the public for its opinion on November 2010 (the 'draft Turkish Guidelines'). These developments indeed resemble the enforcement policy that is envisaged in the European Community Merger Regulation[1] (ECMR) as well as other legal texts enforced at the Community level with respect to *ex ante* merger review.

In accordance with Article 7 of Law No. 4054,[2] in which the Turkish merger control regime finds its legislative basis, the Board recently published Communiqué No. 2010/4, bringing a new Turkish merger control regime into the Turkish competition law framework. Communiqué 2010/4 replaced its precedent, Communiqué No. 1997/1 on Mergers and Acquisitions Subject to the Approval of the Competition Board ('Communiqué No. 1997/1'), as of 1 January 2011, becoming a fundamental legal instrument in assessing merger cases in Turkey.

One of the most significant changes observed in Communiqué No. 2010/4 is the ICN-compliant escalated thresholds. The new and only-turnover-based

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1 Reg. 139/2004 [2004] OJ L 24/1.

2 Article 7 of Law No. 4054 governs mergers and acquisitions, and authorizes the Turkish Competition Board (the 'Board') to regulate through communiqués which mergers and acquisitions should be notified in order to gain legal validity.

notifiability thresholds brought by Article 7 of Communiqué No. 2010/4 provide that, except for joint ventures, if the contemplated transaction does not lead to an affected market in Turkey, a transaction will not be notifiable to the Authority. A market, in this respect, is deemed as being affected when the market has 'a possibility to be impacted' by the transaction, and (i) where two or more of the parties have commercial activities in the same product market (horizontal relationship), or (ii) where at least one of the parties is engaged in commercial activities in markets which are upstream or downstream from the product market of the other party (vertical relationship). Consequently, if there is an 'affected market', the transaction will be reviewed for notifiability under the thresholds sought by Article 7 of Communiqué No. 2010/4.

The only-turnover-based thresholds now sought as of 1 January 2011 clearly follow the ECMR's turnover-based thresholds, albeit at different figures. Accordingly, the transaction will be subject to the Board's permission if the total turnover of the parties to a concentration in Turkey exceeds TL100 million[3] and the respective Turkish turnovers of at least two of the parties individually exceed TL30 million,[4] *or* if the worldwide turnover of one of the parties exceeds TL500 million[5] and the Turkish turnover of at least one of the other parties to the concentration exceeds TL5 million[6]. This change from the previously utilized 25 per cent market share threshold or the alternative TL25 million[7] total turnover threshold of the parties in the relevant product market adopted by Communiqué No. 1997/1 could come to signal that the Board is indeed closely following the European legislative framework in terms of merger control.

To that end, the era of notifying transactions with no horizontal overlap and no vertical integration potential has come to an end as of the end of year 2010. Furthermore, it will no longer be necessary to properly define the relevant product market in order to engage in a notifiability analysis in Turkey, since the market share threshold has been abolished, and the alternative turnover threshold will not be sought in the relevant product market. In other words, total Turkish turnovers and total worldwide turnovers will be the determining factor for the Board when conducting an *ex ante* review.

Communiqué 2010/4 also brings about a new regime in terms of calculating turnover for successive transactions. Article 8 of Communiqué 2010/4 outlines the general framework for calculating the turnover of each party to the transaction as well as how a turnover calculation will be made when there are successive transactions. Accordingly, multiple transactions that take place between the same undertakings and that are realised over a period of two years are deemed to be a single transaction in terms of turnover calculation stipulated under Article 7 of Communiqué 2010/4.

With respect to the concept of 'control' in Turkish competition law, Communiqué 2010/4 provides a definition of 'control',[8] which does not fall far from the definition of this term as found in Article 3 of the Council Regulation No. 139/2004. Accordingly, 'control' is understood to be the right to exercise decisive influence over the day-to-day management or over long-term strategic business decisions, and it can be exercised *de jure* or *de facto*. In this respect, much like the EC regime, mergers and acquisitions resulting in a change of control may be subject to the approval of the Board in the Turkish merger control system. Several of the Board's precedents accept that acquiring *de facto* majority at general assembly meetings confer the acquirer *de facto* control over the target and lead to a change of control within the meaning of the communiqué.[9] Additionally, the Turkish merger control regime also accepts that a transfer of minority interests or other interests that do not lead to a change of control does not trigger the filing requirement before the Board.

Communiqué No. 2010/4 further provides that a transaction is deemed 'realised' (ie closed), on the date when the change in control occurs (pursuant to Article 10). It remains to be seen if this provision will be interpreted by the Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold separate agreement. This has been consistently rejected by the Board thus far,

3 Approximately €50.277 million, according to the average free market exchange rates of 2010.

4 Approximately €15.083 million, according to the average free market exchange rates of 2010.

5 Approximately €251.382 million, according to the average free market exchange rates of 2010.

6 Approximately €2.514 million, according to the average free market exchange rates of 2010.

7 Approximately €12.569 million, according to the average free market exchange rates of 2010.

8 Article 5/2 of Communiqué No. 2010/4 defines 'control' as '*constitute[ing] rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.*'

9 *Bouygues/Alstom*, 15 June 2006, 06–44/551–149; *Total/Cepsa*, 20 December 2006, 06–92/1186–355; *Jacobs/Adecco*, 14 April 2006, 06–27/319–74.

arguing that a closing is sufficient in order for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

In terms of the prescribed format in which the notification must be submitted to the Board, Communiqué No. 2010/4 has also introduced a new and a much more complex notification form, similar to the Form CO of the European Commission. In line with the new notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified in any case, there is an increase in the information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies and the like. However, the new notification form no longer insists on 'signed copies of the agreement leading to the notified concentration'. This is a very welcome change allowing the parties to file before the transaction document is signed. While this is expected to save much valuable time, and is certainly an improvement over the currently applicable regime, there remains a risk that the Board might still refuse to act on memoranda of undertaking or letters of intent, since the new provision refers to the 'current version of the agreement'.

Another important change in the Turkish merger control regime is brought about with Article 13 of Communiqué No. 2010/4. The Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (eg non-compete, non-solicitation, confidentiality, etc.). This will consequently allow the parties to engage in self-assessment, and the Board will no longer have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. Additionally, Article 13 is significant in the sense that efficiencies are openly recognised and discussed. The wording of the provision allows the inference that efficiencies will be taken into consideration in favour of approving the transaction only to the extent they demonstrably serve consumer welfare maximisation objectives, and that the total welfare maximisation benefits will not lead to a dramatic impact unless it trickles down specifically to consumers.

As one last remark, Article 14 of Communiqué No. 2010/4 provides a regulation for the possibility that the parties might provide commitments to remedy substantive competition law issues of a concentration under Article 7 of Law No. 4054. Strategic thinking at the time of filing is somewhat discouraged through explicit language confirming that the review periods would start only after the filing is made. This way, the current situation in practice is now regulated by explicitly giving the Board the right to secure certain conditions and obligations to ensure the proper performance of commitments.

II. Complementing the Communiqué: the new Turkish Merger Guidelines

The newly enacted merger communiqué has also brought with it the draft guidelines, which were brought before the public's opinion in early December 2010, prior to the official entry into force of Communiqué No. 2010/4. The Guidelines on the Undertaking Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (the draft 'Turkish Guidelines') bear similarities to their counterpart at the Community level, the EUMR Jurisdictional Notice.[10] Although they follow the Commission's model closely, the draft Turkish Guidelines are very brief and focus on three main issues: the concepts of the undertaking concerned, turnover calculation and ancillary restraints in mergers and acquisitions. The EU notices, in comparison, cover these issues in two separate legislative documents in a much more detailed way, emphasising the undertaking concerned and turnover calculation in the EUMR Jurisdictional Notice and ancillary restraints in the Commission Notice on restrictions directly related and necessary to concentrations.[11] In relation to the topics addressed in the draft Turkish Guidelines and the EUMR Jurisdictional Notice, the draft Turkish Guidelines are not as extensive as their EU counterparts and only cover the more common merger situations. Nonetheless, the draft Turkish Guidelines provide useful road map to Communiqué No. 2010/4 in being a practical guide to undertakings and their counsels to make *ex ante* assessments.

The rapid changes that have been taking place in Turkey's competition law with respect to *ex ante* review indicate that there is indeed a development in terms of merger enforcement in light of the newly established principles and thresholds. However, it remains to be seen just how effectively these changes will be adopted by the Board given the time it will take for it to establish new precedents in light of a relatively new approach to merger control.

10 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95/2, 16 April 2008 (the 'EUMR Jurisdictional Notice').

11 Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56/24, 05 March 2005.

III. The dual obligation to preserve effective competition: abuse of dominant position under Turkish competition law

As the primary legal basis for regulating the behaviour of dominant firms under Turkish competition law Article 6[12] of Law No. 4054 brings a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to Article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 82 of the EC Treaty). Among this list are four types of abuse; in particular, (i) directly or indirectly preventing entries to the market or hindering competitor activity in the market; (ii) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties; (iii) distorting competition in other markets by taking advantage of financial, technological, and commercial superiorities in the dominated market; and, (iv) restricting production, marketing, or technical development to the prejudice of the consumers.

The prohibition brought by Article 6 of Law No. 4054 applies only to dominant undertakings; this prohibition is brought for the abuse of dominance, and not dominance itself, in a similar way as that provided in Article 102 of the TFEU. The dual obligation imposed on dominant firms to avoid acts that harm competition and to modify their practices if they are likely to harm competition can be observed in many of the cases establishing this obligation within the EC competition law framework.[13] From a Turkish law perspective, the definition of dominance[14] substantiates the Board's enforcement trends,[15] which show that the Board is increasingly inclined to somewhat broadening the scope of application of the prohibition found in Article 6 by diluting the 'independence-from-competitors-and-customer' element of the definition to infer dominance even in cases of dependence or inter-dependence.

Needless to say, the dominance provisions found in Turkish competition law apply to all companies and individuals, to the extent these individuals act as 'undertakings' within the meaning of Law No. 4054.[16] Law No. 4054, therefore, applies to individuals and corporations alike if they act as an undertaking. While the Board has placed much emphasis on the 'capable-of-acting-independently' aspect of this definition to exclude state-owned entities from the application of Law No. 4054 at the very early stages of Turkish competition law enforcement,[17] more recent enforcement trends[18] show that the Board now uses a much broader and accurate view of the definition, in a manner which now extends to state-owned entities. Consequently, state-owned entities are also subject to the Authority's enforcement.

When making an assessment of dominance, it would also be valuable to note that the Board's use of the test for market definition does not differ much from the concept used for merger control purposes. When doing this, the Board makes use of a set of guidelines on the definition of the relevant market,[19] closely modelled after the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law.[20] These guidelines apply to both merger control and dominance cases, considering demand-side substitution as the primary standpoint of market definition.[21]

The economic rationale behind abuse cases in Turkish enforcement policy is more frequently quoted by the Turkish competition circle as having 'the ultimate object of maximising total welfare by targeting economic efficiency'. Nevertheless, since the legislative history behind Law No. 4054 and the legislative reasoning for it include clear references to non-economical interests as well (such as the protection of small and medium-sized businesses), some of these policy interests are still pursued in Turkey, particularly in abuse of dominance cases, while also taking note of the economic objective. It would only be fair to observe that the Board has been successful in blending the economic and non-economic

12 Article 6 of Law No. 4054 provides that '*any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited.*'

13 Cf. Case T-5/02 *Tetra Laval v Comission* [2002] ECR II-4381, para. 157: '*where an undertaking is in a dominant position it is in consequence obliged, where appropriate, to modify its conduct so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect.*'; Case 322/81 *Nederlandse Banden-Industrie Michelin v Commission* [1983] ECR 3461, para. 57; Cases T-125/97 and T-127/97 *The Coca Cola Company and Coca-Cola Enterprises Inc. v Commission* [2000] ECR II-1733, paras 80–5.

14 Article 3 of Law No. 4054 defines dominance as '*the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers.*'

15 See *Anadolu Cam* decision, 01 December 2004, 04–76/1086–271; *Warner Bros* decision, 24 March 2005, 05–18/224–66.

16 Pursuant to Article 3 of Law No. 4054, an 'undertaking' is defined as '*a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services.*'

17 Cf. *Sugar Factories* decsion, 13 August 1998, 78/603–113.

18 See *Turkish Coal Enterprise* decision, 19 October 2004, 04–66/949–227.

19 Guidelines on the Definition of Relevant Market, 10 January 2008, 08–04/56-M.

20 OJ C 372, 09 December 1997.

21 Section 1.3 'Basic Principles of Market Definition', sub-section 1.3.1. 'Demand Substitution'.

interests, and preventing one from overriding the other in its precedent concerning abuse cases.

Closely modelled after Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. That said, the indications in practice show that the Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4 of Law No. 4054, which governs restrictive agreements. With a novel interpretation of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows the enforcement of Article 4 against a 'discriminatory practice of even a non-dominant undertaking' or a 'refusal to deal with even a non-dominant undertaking' under Article 4, the Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since the respective unilateral conduct is not engaged by a dominant firm. Owing to this new and peculiar concept (ie the enforcement of Article 4 becoming a fallback to the enforcement of Article 6 if the entity engaging in unilateral conduct is not dominant), certain instances of unilateral conduct that can only be subject to the enforcement of Article 6 have been reviewed and enforced against Article 4.

Law No. 4054 does not recognise any industry-specific abuses or defences. However, certain sector-specific regulators have concurrent powers to diagnose and control dominance in several sectors. The secondary legislation issued by the Telecommunications Authority prohibits 'firms with significant market power' from engaging in discriminatory behaviour between companies seeking access to their network, and unless justified, rejects requests for access, interconnection, or facility-sharing. These firms are also required to make an 'account separation' for pricing the access to their networks on a cost basis.

It would not be an overstatement to note that some of the most important cases[22] in the history of Turkish competition law enforcement involved Article 6 violations, resulting in substantial monetary fines to be imposed on incumbent firms.

IV. The central tenets of cartels in Turkish competition law

The applicable provision for cartel-specific cases under Turkish competition law is Article 4 of Law No. 4054, which lays down the basic principles for cartel regulation. The provision is akin to and closely modelled after Article 101(1) of the TFEU (former Article 81(1) of the EC Treaty).[23]

Similar to Article 101 (1) of the TFEU, Article 4 of Law No. 4054 does not provide a definition of what must be understood by 'cartel'. The provision rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity. Unlike the TFEU, however, Article 4 does not refer to an 'appreciable effect' or a 'substantial part of a market' and thereby excludes any *de minimis* exception as of yet. Therefore, for an infringement to exist, the restrictive effect need not be 'appreciable' or 'affecting a substantial part of a market'. The practice of the Board to date, therefore, has not recognised any *de minimis* exceptions to Article 4 enforcement either, though the enforcement trends and proposed changes to the legislation are increasingly focusing on *de minimis* defences and exceptions.

The prohibition brought by Article 4 is also applicable to the form of agreement which has the '*potential*' to prevent, restrict, or distort competition, which would be considered as a unique element found only in the Turkish cartel regulation system, recognising the broad discretionary power of the Board.

As is the case with Article 101 (1) of the TFEU, Article 4 brings a non-exhaustive list of restrictive agreements, which is intended to generate further examples of restrictive agreements. Among these prohibitions are, in particular, directly or indirectly fixing purchase or selling prices or any other trading conditions; sharing markets or sources of supply; or, limiting or controlling production, output or demand in the market. Unlike the EC, where the undisputed acceptance is that tacit collusion does not constitute a violation of competition, Law No. 4054 does not give weight to the doctrine known as 'conscious parallelism and plus factors'. In practice, the Board does not go to the trouble of seeking 'plus factors' along with conscious parallelism if naked parallel behaviour is established.

22 *Turkcell* decision, 20 July 2001, 01–35/347–95; *Türk Telekom* decision, 02 October 2002, 02–60/755–305; Türk *Telekom/TTNet* decision, 19 November 2008, 08–65/1055–411.

23 Article 4 of Law No. 4054 '*prohibit[s] all agreements between undertakings, decisions by associations of undertakings and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition within the Turkish product market or services market or a part thereof.*'

On a separate note, the prohibition on restrictive agreements and practices does not apply to agreements which benefit from a block exemption and/or an individual exemption issued by the Board. To the extent not covered by the protective cloaks brought by the respective block exemption rules or individual exemptions, vertical agreements are also caught by the prohibition laid down in Article 4.

In this respect, a brief overview of the block exemption rules currently applicable in Turkish competition law would merit attention. Notwithstanding the anticompetitive implications of agreements which fall within the scope of the prohibitions stipulated under Article 101 (1) of the TFEU and Article 4 of Law No. 4054, both EC and Turkish competition law, be it in practice or in theory, envisage that certain agreements be economically deemed to be more beneficial were they to be left outside these scopes. Exemptions, in both systems, are two-fold, as individual and block exemption; while the latter is said to be competition law's 'off-the-peg clothing', the former, on the other hand, is made to measure.[24] The five block exemptions in Turkish competition law, which frame agreements so as to exclude them from the prohibition that would normally restrain them for having negative implications for competition are (i) the Block Exemption Communiqué No. 2002/2 on Vertical Agreements; (ii) the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) the Block Exemption Communiqué No. 2003/2 on R&D Agreements; (iv) the Block Exemption Communiqué No. 2008/3 for the Insurance Sector; and (v) the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements, which are all modelled on their respective counterparts at the Community level. Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition of Article 4.

Additionally, it goes without saying that Turkey is one of the 'effect theory' jurisdictions where the main concern is (i) whether the cartel activity has produced effects on Turkish markets, irrespective of the nationality of the cartel members, (ii) whether the cartel activity took place, or (iii) whether the members have a subsidiary in Turkey. The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, so long as there is an 'effect' on the Turkish markets.[25] It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as the difficulties of formal service to foreign entities).

As a subsidiary note to monetary sanctions, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been unlawfully taken and to take all other necessary measures in order to restore the level of competition and status quo before the infringement. Furthermore, such restrictive agreements shall be deemed as legally invalid and unenforceable, together with all of its legal consequences.

It is also important to note that the very low proof standards adopted by the Board are among the material issues that are specific to Turkey. The participation of an undertaking in cartel activity requires proof that (i) there was such a cartel activity, or (ii) in the case of multilateral discussions or cooperation, the particular undertaking was a participant. With a broadening interpretation of Law No. 4054, and especially the 'object-or-effect-of-which' expression, the Board has established a considerably low standard of proof concerning cartel activity.

While cartel enforcement has been enriched by secondary regulations, particularly concerning leniency and sentencing regulations, the Authority has clearly appeared anxious to utilise the mechanisms that have empowered it to take an increasingly serious stance in its battle against cartels. Undoubtedly, the most noteworthy development was the enactment of regulations with respect to the leniency and sentencing guidelines: the Regulation on Active Cooperation for Discovery of Cartels and the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance.

Back-to-back investigations initiated by the Authority in 2009 and fining decisions in the telecommunications market and flat steel market, are among the distinctive headlines that provide useful indicators for the ongoing determination of the Authority in Turkey in this respect. The Flat Steel decision[26] stands out as having led to the heaviest fine in recent years. With this decision, the Board very clearly demonstrated that

24 PJ Slot and A Johnston, *An Introduction to Competition Law*, Oxford and Portland, Oregon (Hart Publishing, 2006), 69.

25 *Sisecam/Yioula*, 28 February 2007, 07–17/155–50; *Gas Insulated Switchgear*, 24 June 2004, 04–43/538–133.

26 *Flat Steel* decision, 16 June 2009, 09–28/600–141.

it will not tolerate actions hindering or obstructing competition in Turkey. After conducting the necessary investigations in the market for flat steel, the Board imposed a fine of over TL20 million[27] on Ereğli Demir Çelik Fabrikaları TAŞ, which is one of the largest steel manufacturers in Turkey, and a total fine of over TL 23.5 million[28] on three undertakings, making this the highest fine imposed on one company and the highest fine imposed on multiple companies on the basis of Article 4 of Law No. 4054.

V. Exchange of sensitive competitive information

In a similar manner to the legislative framework found at the Community level, Law No. 4054 does not include an explicit provision governing the exchange of sensitive competitive information between competitors. However, such exchange of information is considered to be falling under Article 4 of Law No. 4054 provided that certain conditions are met since the Board, on numerous occasions, has considered that an exchange could indeed result in collusion between independent undertakings and restrict competition in oligopolistic markets.[29] In these decisions, the Board decided that exchange of information, detailed surveys and statistical work have the potential to restrict competition by increasing collusive behaviour.

Similarly from the Commission's point of view, an exchange of sensitive information could be deemed as amounting to serious infringements of Article 101 (1) of the TFEU[30] as well. Particularly in *Wirtschaftsvereinigung Stahl*, [31] a case concerned with detailed exchanges of data between the members of the German steel industry trade association, the Commission drew a distinction between exchanges of sensitive, recent, and individualised information on a concentrated market in homogenous products, and exchanges of such information on less concentrated or more diverse markets. The Commission's reasoning is based on the idea that excessive market transparency on an oligopolistic market for homogenous products acts as a significant deterrent to competitive conduct on that market, because of the rapid detection of such conduct by competitors.[32] However, this decision was annulled by the Court of First Instance, which stated that the data exchanged did not enable the participants to do more than estimate their relative market shares. In other similar cases[33] the Commission emphasised that the principles applicable and specific to concentrated sectors 'should serve as guidelines for any similar exchanges of information in other highly concentrated sectors'.

VI. Parallel behaviours and presumptions: concerted practice issues

In addition to the restrictions observed above, Turkish competition law also prohibits concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations with the 'presumption of concerted practice'.[34] The standard of proof is therefore lower in terms of concerted practices than it is in cartel cases. In practice, if parallel behaviour is established, a concerted practice will readily be inferred and the undertakings concerned will be required to prove that the parallelism is not the result of a concerted practice. The respective 'presumption of concerted practice' is therefore used by the Competition Board in order to engage itself with the enforcement of Article 4 in cases where price changes in the market, supply–demand equilibrium, or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted, or restricted. Therefore, the burden of proof is very easily switched and it becomes incumbent upon the enterprises to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

As for the meaning of concerted practice in Turkish competition law, although there is no explicit definition found in either Law No. 4054 or the TFEU, it can be

27 Approximately €10.055 million, according to the average free market exchange rates of 2010.

28 Approximately €11.855 million, according to the average free market exchange rates of 2010.

29 *Cement* decisions, 05 December 2005, 05-81/1118-320 and 24 April 2006, 06-29/354-86; *Fertiliser* decision, 08 February 2002, 02–07/57–26; *Imported coal* decision, 11 September 2003, 03–60/733–343; *Ceramics* decision, 24 February 2004, 04–16/123–26; *PETDER* decision, 20 September 2007, 07–76/907–345.

30 *Steel beams* decision, OJ 1994 L116/1 [1994] 5 CMLR 353.

31 OJ 1998 L1/10, [1998] 4 CMLR 450.

32 *Ibid.* para. 39.

33 *CEPI-Cartonboard* OJ 1994 L243/1, [1994] 5 CMLR 547.

34 Article 4(2) of Law No. 4054 provides the following in relation to the presumption of concerted practice: '*In cases where an agreement cannot be proven to exist, if price changes in the market, supply-demand equilibrium, or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted, such similarity shall constitute a presumption that the relevant enterprises are engaged in concerted practice. Any party may absolve itself of responsibility by proving no engagement in concerted practice, provided such proof depends on economic and rational facts.*'

understood within the context provided in Article 4 of Law No. 4054 as being a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The ECJ's *Dyestuff*'s ruling[35] also supports this understanding. Due to this presumption, oligopolistic markets for the supply of homogenous products (eg cement, bread yeast, etc.) have constantly been under investigation by the Board for concerted practice. Nevertheless, whether this track record (over 15 investigations in the cement and ready mixed concrete markets in the Authority's more than a decade long enforcement history) leads to an industry specific offence would be debatable.

VII. Concluding remarks

The various areas of Turkish competition policy that have been outlined above in comparison with the Commission's legislative framework and practice show that Turkey's competition policy may well be gaining new momentum after more than a decade of its competition enforcement that primarily stemmed from the route EC competition policy has taken over the years. While following the imprints left by the European legal framework, Turkish competition law is yet to grow and develop its own voice, not just in enhancing its legislative framework, but also in enriching its approach towards a more effective enforcement.

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35 Cases 48/69 etc., *ICI v Commission (Dyestuffs)* [1972] ECR 619, [1972] CMLR 557, para. 64, where it has been ruled that concerted practice is '*a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.*'