Concurrences

ANTITRUST PUBLICATIONS & EVENTS

Information Exchange and Related Risks

A Jurisdictional Guide

Zoltán Marosi, Marcio Soares (eds.)

International Bar Association
Cartels Working Group of the Antitrust Section

Foreword by Anthony M. Collins

Concurrences
Antitrust Publications & Events

the global voice of the legal profession

TURKEY

Gönenç Gürkaynak and İ. Baran Can Yıldırım
ELIG Gürkaynak Attorneys-at-Law

I. Applicable Laws, Regulations and Principles

1. Main Legislation in Turkey

The main legislation applicable for information exchange is Article 4 of Law No. 4054 on the Protection of Competition (Law No. 4054), which is akin to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The relevant provision prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Like Article 101 of the TFEU, Article 4 of Law No. 4054 prohibits all forms of restrictive agreements, which include cartel agreements in any form. Therefore, the prohibition's scope extends beyond cartel activity. It also prohibits any form of agreement that has the "potential" to prevent, restrict or distort competition.

Like Article 101 of the TFEU, Article 4 provides a non-exhaustive list of restrictive conducts. Examples of such prohibited conducts are:

- fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any condition of purchase or sale
- allocation of markets for goods or services, and sharing or controlling all kinds of market resources or elements
- controlling the amount of supply or demand for goods or services, or determining them outside the market
- obstructing and restricting the activities of competing undertakings, or excluding undertakings operating in the market by boycotts or other behavior, or foreclosing the market to potential new entrants
- except for exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts
- contrary to the nature of the agreement or commercial practices, requiring the purchase of other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

2. Secondary Legislation

The Turkish Competition Board (the Board) also published the Guidelines on Horizontal Cooperation Agreements (Guidelines), which contains general principles regarding application of Articles 4 and 5 (regulating exemptions from Article 4) of Law No. 4054, and explains competition concerns on, inter alia, information exchanges.

Section 2 of the Guidelines sets forth the principles for the competitive assessment surrounding information exchanges. Pursuant to the Guidelines, for an information exchange to have restrictive effects on competition, it must be of a nature to have an adverse impact on at least one of the parameters of competition such as price, output, product quality, product variety or innovation.

Furthermore, the Board also takes into account the market characteristics. The Guidelines provides that it is easier for undertakings to achieve a collusive outcome in markets that are sufficiently transparent, concentrated, stable, symmetric and non-complex. Information exchange can facilitate a collusive outcome by increasing transparency in the market, reducing market complexity and asymmetry, and by stabilizing the market. Within this scope, the Board evaluates (i) market transparency, (ii) degree of concentration of the market, (iii) complexity of the market, (iv) stability of the market, (v) similarity of the firms, and (vii) other factors.

3. Case Law

In addition to the legislation mentioned above, the Board has an extensive case law on information exchange which provides guidance for undertakings on enforcement.

II. Types of Information Exchange That May Be Caught under the Competition Rules

The Board categorizes information exchange mainly under three groups: information exchange (i) directly among parties, (ii) via third parties, or (iii) via publicly available platforms.[1]

The exchange of information between competitors is the most common type of conduct in practice (through horizontal relations). However, even if there is no direct exchange of information between competitors, indirect information exchange may also raise competition law concerns. In this respect, information may be directly exchanged among undertakings, or indirectly via associations of undertakings such as trade associations, research companies and other third parties or via the supply or distribution network of undertakings (as set out in para. 40 of the Guidelines).

On the other hand, obtaining commercially sensitive information systematically through distributors/retailers may also artificially raise the transparency of the market and violate competition laws. The principles laid down in the Guidelines would apply, to the extent appropriate, to information exchanges in a vertical relationship (i.e., between entities that are at different levels of the production chain, for example between supplier and distributor/customer).

The main concern of information exchange in a vertical relationship lies in its possible connection with resale price maintenance. In this regard, (i) detailed information of a distributor's and/or customer's resale prices on a product basis or frequent and systematic exchange of information may facilitate maintaining and monitoring the distributor's and/or customer's resale prices, and (ii) exchange of information on actual prices, discounts,

---

[1] E.g. *PETDER II* (22/11/2011, 11-48/1215-428).

increases, reductions or rebates may qualify as strategic information that could ease resale price maintenance.

In its recent *Ro-Ro shipment* decision,[2] the Board explained the criterion for assessing information exchanges between companies that are both customers/suppliers and competitors of one another. The Board held that to the extent the information exchange was necessary for and limited to the purposes of the customer–supplier relationship and the parties took the necessary steps to prevent potential anticompetitive effects, such an exchange may not infringe Article 4 of Law No. 4054. The Board, however, underlined the risk of price-related information exchanges between competitors. In the relevant case, the Board found the price-related information exchange among the parties went beyond the customer–supplier relationship on the basis of the communications between these companies in the evidence.

The nature of the information exchanged is of vital importance for the Authority's analysis on whether the conduct is unlawful. Only exchange of strategically valuable information that may affect the market behaviour of undertakings is caught by competition rules. The question of whether certain information is strategic depends mostly on the characteristics of a given market and the circumstances of a case. However, there are a number of usual suspects that appear often in the Board's decisions, such as information exchange related to prices, sales targets, costs, stocks, prospective business strategies and any other strategically valuable commercial information.

Accordingly, exchange of competitively sensitive parameters such as price, sales volume or future commercial strategies particularly may raise serious competition law concerns, whereas market shares, production volumes, capacity utilization rates or terms of sales have also the potential to distort competition depending on the market conditions and characteristics of the information (i.e., whether it is historic or forward-looking, aggregated or individualized, etc.).

Especially, if the information exchange leads to collusion on future prices and the amount of supply, it would be considered as a cartel and prohibited under Law No. 4054. In a number of decisions, the Board held that exchanges of commercially sensitive information were part of an existing cartel.[3] Similarly, information exchange that is used to monitor whether competitors comply with the cartel arrangement, in other words those facilitating cartels are assessed as a part of the cartel arrangement. In addition, exchanging information to facilitate, monitor or execute collusion has a greater chance of falling under the Authority's scrutiny compared to mere exchange of information, because in the former case information exchange may lead to a cartel or concerted practice.[4]

---

2 *Ro-Ro shipment* (18/04/2019, 19-16/229-101).

3 *MPS Metal, Bekap Metal* (30/10/2012, 12-52/1479-508), *White Meat Industrialists* (25/11/2009, 09-57/1393-362), *Ceramics II* (03/08/2007, 07-64/794-291), (3/11/2006, 06-80/1034-299), (24/04/2006, 06-29/355-87), (02/02/2006, 06-08/121-30), *Ceramics* (24/02/2006, 06-08/121-30), *Wood Board I* (19/12/2005, 05-85/1181-335) and *Wood Board II* (24/04/2006, 06-29/365-94) and *Fertiliser* (26/07/2007, 07-62/738-266).

4 *Aegean Cement Producers* (14/01/2016, 16-02/44- 14); Gönenç Gürkaynak, Ceren Özkanlı Samlı, "The Turkish Council of State rejects an appeal request made by a cement producer concerning the Regional Administrative Court's decision which imposed a monetary fine for engaging in concerted practices with its competitors,

Direct information exchanges between competitors relating to future pricing and output decisions are usually considered to be risky. For instance, while in principle the competitors may attend meetings organized by associations of undertakings or unions, when competitively sensitive information is shared with competitors at these meetings such information exchange may raise competitive concerns regardless of the initial purpose of the meeting and participants of these meetings may be held liable for a competition law infringement unless they immediately and explicitly take a stand against the exchange of information.[5]

The Board may also consider exchange of competitively sensitive information as an infringement in and of itself.[6] Indeed, in the Board's landmark decision[7] related to automotive distributors, it found that automotive distributors exchanged commercially sensitive information, either through email exchanges or during trade association meetings, related to future prices, targeted sales and stocks, in particular around the time when there was a sector-wide development (such as a remarkable increase in EUR/TRY exchange rate or reduction in taxes applicable to automobiles). The Board also analysed the prices of these distributors following such communications and found significant price increases, which may have not happened but for such communications. In its detailed analysis, the Board distinguished information exchanges on future prices and trade strategies from those related to historic sales information and cumulative sector-wide data that do not allow distributors to identify specific information related to a certain competitor.

Finally, while it could be argued that Board's precedents are not yet sufficiently developed to provide clear guidelines with respect to gun-jumping violations through pre-closing information exchanges, the risk cannot be excluded that the Board might as well review the exchange of competitively sensitive information prior to the Board's mandatory approval in merger control cases from the aspect of Article 4 of Law No. 4054, particularly if the Board were to decide not to approve the transaction due to significant impediment of effective competition in the market.

III. Enforcement Policies and Practice

1. The Authority in Charge of Enforcement

The authority that is entitled to enforce competition law in Turkey is the Turkish Competition Authority (Authority), a legal entity with administrative and financial autonomy. The Authority consists of the Board and case units. The Board is responsible for, inter alia, deciding on whether agreements, concerted practices and decisions restrict competition. The Board has seven members and is seated in Ankara.

---

increasing prices and territorial allocation (Batısöke)", 11 December 2019, e-Competitions December 2019, Art N° 95538.

5 *Adıyaman Auto Gas Distributors* (29/03/2018, 18-09/180-85).

6 E.g., *Corporate Loans* (28/11/2017, 17-39/636-276); *12 Banks* (8/03/2013, 13-13/198-100).

7 *Automotive Entities* (18/04/2011, 11-24/464-139).

The Authority has six case units, each of which focuses on all types of competition cases in certain industries.

2. Assessment of Information Exchange

As mentioned above, the relevance of the effect of information exchange depends on the characteristics of the information and market conditions. In this respect, any information exchange with the objective of restricting competition will be considered as a restriction of competition regardless of its effects. In such cases, the Board considers the information exchange as a restriction of competition by its very nature.

According to the Guidelines, the Board takes into account the following criteria to analyse information exchanges: whether information is (i) strategic, (ii) aggregated or individualized, (iii) historic or related to current or future strategies, (iv) frequent or sporadic, (v) public, and (vi) whether the total share of competitors exchanging information amounts to a majority of the market.

Pursuant to the case law, exchange of current information or future plans risks changing the competitive landscape of the market and such exchange is harmful from a competition law perspective. On the other hand, the Board finds that historic data that are no longer relevant to current or future commercial strategies may be exchanged in certain circumstances without invoking competition law repercussions. Similarly, parties may argue that the information exchange is not problematic if it is aggregated, sporadic, publicly available or publicly exchanged, and not related to strategic competition parameters such as prices and amount of supply. For example, in the *Diye Danışmanlık* decision,[8] the Board considered, inter alia, the date, nature and frequency of the exchanged information through the Media Barometer System in terms of its assessment on the anticompetitive nature of the information. A similar assessment is found in the *Keşan Cement* decision.[9]

Similarly, factors such as the degree of concentration, transparency and stability of the market and the similarity of competitors are taken into account in the assessment of whether such information exchange may easily enable the competitors to collude (para. 43 of the Guidelines). Certain markets may facilitate coordination among undertakings due to their characteristics and market structure. Exchanges of information in such markets may lead to more restrictive effects compared to markets that do not have such characteristics.

On the other side of the coin, certain information exchanges may be exempted from Article 4 in some sectors, whereas these exchanges are prohibited in some others. Code-sharing agreements in air transport are allowed to a certain extent due to the characteristic of the market. Banks are capable of exchanging customer credit risk information as long as they adhere to the specifications in Article 73 of the Banking Law No. 5411. The insurance sector was assigned specific competition rules based on the nature of the service offered and the structuring of the sector. The Block Exemption Communiqué Sector No. 2008/3 Concerning Insurance sets the prerequisite conditions for the exemption of certain agreements in the insurance sector, such as pooling insurance-related

---

8 *Diye Danışmanlık* (12/12/2014, 14-51/900-410).

9 *Keşan Cement* (19/12/2019, 19-45/758-327).

risk information into databases or exchanging the same information between different players in the insurance market.

In any case, for an information exchange to fall under Article 4 of Law No. 4054, such information exchange should involve strategically valuable information that is likely to affect the market behavior of the parties. Although what strategically valuable information entails, varies depending on the facts and market structure surrounding the case as explained above; prices, future business strategies and promotional campaigns are usually categorized as strategically valuable. Future pricing related information is particularly considered strategic, which may facilitate, monitor or execute collusion. On the other hand, the precedent of the Board suggests that the exchange of competitively sensitive information may be an infringement in and of itself, without being necessarily categorized as cartel.[10]

3. Procedural Steps: Pre-investigation, Investigation, Authority's Inspection Powers, Commitment and Settlement Procedures, and Appeal Process

The Board is entitled to launch an investigation into an alleged illegal information exchange *ex officio* or in response to a complaint. In the event of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds a notice or complaint to be serious.

According to Article 15 of Law No. 4054, the Authority's case handlers are authorized to conduct on-site inspections (dawn raids) during which they can investigate any type of electronic and hard copy documents owned by the investigated company. The recent amendment to Law No. 4054 (Amendment Law) (on 24 June 2020) includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in companies' physical records, as well as those held electronically and on IT systems, which the Authority already does in practice. In other words, the Authority is able to access not only employees' computers, but also company's servers for inspection. There are also information exchange cases in practice in which the Board took WhatsApp correspondences into account in its assessment.[11]

At the preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under pre-investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process.

At the preliminary investigation stage, case handlers of the Authority are trying to put together a set of material facts to decide whether they should recommend

---

[10] *Automotive Entities* (18/4/2011, 11-24/464-139).

[11] E.g. *Burdur Province Stations* (09/01/2020, 20-03/28-12).

the Board launch a fully fledged investigation. The assigned case handlers will deliver to the Board their written report, including their conclusion on the case file and the whole set of information collected during the preliminary investigation process.

After the delivery of the case handlers' report, the Board will assess the case file and the case handlers' report and decide whether to launch a full-fledged investigation. If the Board finds that there is sufficient indication for a potential infringement, it may launch a fully fledged investigation.

Upon receipt of the case handlers report, if the Board does not find the evidence available sufficient to justify a more detailed analysis, it can decide not to launch a fully fledged investigation. The Board's "no-go" decision might be brought to a judicial review file before the Administrative Courts in Ankara by the potential complainant or an individual/undertaking having an interest in the. If this were to be the case, the undertaking subject to preliminary investigation can join the proceedings as an intervening party to side with the Authority.

If the Board decides to launch a fully fledged investigation, it takes about six months. If deemed necessary, the investigation period may be extended only once for an additional period of up to six months by the Board.

Although exceptional in practice, the Board may also initiate an in-depth investigation directly without a preliminary investigation. The Board opened a direct investigation in only a few instances such as the investigation against Türk Telekomünikasyon[12] and the investigations initiated in 2019 against (i) food retailers[13] and wholesalers of fresh fruits and vegetables.[14]

The recent Amendment Law introduced two new mechanisms that are modelled after the EU competition law: commitment and settlement. The purpose of these new mechanisms is to enable the Authority to end investigations without going through the entire pre-investigation and investigation procedures.

The commitment procedure allows undertakings or associations of undertakings to voluntarily offer commitments during a preliminary investigation or fully fledged investigation to eliminate the Authority's competitive concerns under Articles 4 and 6 of Law No. 4054, prohibiting restrictive agreements (including information exchange) and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Authority can decide against launching a fully fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. However, if the information exchange leads to naked and hardcore infringements such as price fixing between competitors, or territory or customer sharing, then commitments are not accepted.

As for the settlement procedure, it can be initiated by the Authority *ex officio* or upon the parties' request. Unlike the commitment procedure, settlement could be offered only

---

12 *Türk Telekomünikasyon* (2/10/2002, 02-60/755-305).

13 *Food Retailers* (7/2/2019, 19-06/75-M).

14 *Wholesalers of fresh fruits and vegetables* (21/2/2019, 19-08/108-M).

in fully fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure up until the official service of the investigation report. The Authority will set a deadline for the submission of the settlement letter and, if settled, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the Authority can reduce the administrative monetary fine by up to 25%. Settlement procedure can be applied to all infringement cases, unlike in the EU, where it is only applicable to cartels.

Final decisions of the Board, including decisions on interim measures and fines, can be submitted to judicial review before the administrative courts by filing a lawsuit within 60 days of receipt by the concerned parties of the Board's reasoned decision unless the investigation is closed upon settlement which does prejudice the parties' right to appeal (Article 43/8 of Law No. 4054).

Filing an administrative action does not automatically stay the execution of the Board's decision (Article 27, Administrative Procedural Law). The Administrative Courts render a separate decision on that front.

Administrative litigation cases (and private litigation cases) are subject to judicial review before the regional courts (appellate courts), creating a three-level appellate court system consisting of Administrative Courts, regional courts and the Council of State (the court of appeals for private cases). The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. A decision of a regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In these cases, a decision of a regional court will not be considered as a final decision, and the Council of State may decide to uphold or reverse the regional court's decision.

If a decision is reversed by the Council of State, it will be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State's decision.

Third parties can also challenge a Board decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

IV. Applicable Sanctions

The sanctions that could be imposed under Law No. 4054 are administrative in nature. The Board imposes administrative fines for anticompetitive information exchanges. However, certain types of competition law violation such as bid-rigging may also fall under criminal law and trigger criminal sanctions in addition to administrative monetary fines and subsequent civil liability. Indeed, there have been cases where the matter had to be referred to a public prosecutor following the competition law investigation has been completed. Bid-rigging activity may be criminally prosecutable under sections 235 et seq.

of the Turkish Criminal Code. Illegal price manipulation (i.e., manipulation through misinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

For companies and association of undertakings that were involved in anticompetitive information exchange, the Board may impose a fine up to 10% of the Turkish turnover generated in the financial year preceding the date of the Board's decision. Employees or executives of undertakings or association of undertakings that had a determining effect on the violation would also be fined up to 5% of the fine imposed on the relevant undertaking or association of undertaking. The base fine for anticompetitive information exchange ranges from 2% to 4% of the turnover for cartels, and from 0.5% to 3% for other types of collusion. The minimum fine is currently 31,903 Turkish liras.

For instance, in *White Meat Industrialists*,[15] the Board decided that the concerned undertakings violated Article 4 of Law No. 4054 by fixing horizontal prices and it applied an administrative monetary fine which was calculated on the basis of 0.8% of the undertakings' turnovers for 2008 financial year. The Board held that White Meat Association chairman, who was also chairman of the board of directors of one of the investigated undertakings, had a decisive influence in the infringement and applied an administrative monetary fine, which was calculated on the basis of 3% of the administrative monetary fine applied to undertaking. Similarly, in *Sodium Sulphate Producers*,[16] the Board concluded that the investigated undertakings made an agreement in order to determine the prices and to allocate the customers within the meaning of Article 4 of Law No. 4054. Therefore, the Board imposed monetary fines, which were calculated on the basis of 6% and 3% of the undertakings' turnovers for 2011 financial year respectively. In addition, the Board applied monetary fines, which were calculated on the basis of 3% and 1.5% of the administrative monetary fines applied to undertakings respectively, on the directors of the investigated undertaking since they had a determining effect on the violation.

In addition to the monetary sanction, 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 taken unlawfully and to take all other necessary measures in order to restore the level of competition as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Similarly, the Board may take interim measures until the final resolution on the matter if there is a possibility of serious and irreparable damages.

V. Safe Harbours and Exemptions

Article 5 of Law No. 4054 provides certain conditions that, if met, may exempt agreements, decisions by associations of undertakings and concerted practices from the

---

15 *White Meat Industrialists* (n 3).

16 *Sodium Sulphate Producers* (03/05/2012, 12-24/711-199).

prohibitions enumerated under Article 4 of Law No. 4054. If an agreement does not meet the requirements and cannot benefit from the protective cloak of the block exemption, the relevant parties are entitled to make a self-assessment to check whether their agreement fulfils the conditions of the individual exemption, as set out under Article 5 of Law No. 4054 as explicitly confirmed through the recent Amendment Law.

The conditions for an individual exemption set forth by Article 5 of Law No. 4054 are similar to the conditions put forth under the relevant EU law, namely:

- the agreement must contribute to improving the production or distribution of goods, or to promoting technical or economic progress;
- it must allow consumers a fair share of the resulting benefit;
- it should not eliminate competition in a significant part of the relevant market;
- it should not limit competition more than what is absolutely necessary for achieving the goals set out in sub-paragraphs (i) and (ii) above.

It is important to note that the foregoing conditions are not alternative, but cumulative; in other words, all conditions must be met cumulatively in order to benefit from the individual exemption.

The Guidelines recognizes that some information exchanges may generate efficiency gains. For instance, information exchange may eliminate information asymmetries between parties. Certain information exchanges between market players may offer them reliable benchmarks against which they can compare their effectiveness. Sharing information may also help undertakings to better micromanage their inventories, ensure quicker delivery of products to consumers or lower their perception of market volatility. This may result in direct benefits for the consumers who would in turn benefit from reduced search costs, increased choice and better overall quality of service. These potential efficiencies depend on the nature of the information and market conditions.[17] For instance, aggregated and historic data are more likely to be considered pro-competitive relative to individualized and future data, in particular those related to prices and trade strategies.[18] Furthermore, the Board has consistently distinguished current information from historic information.[19] Likewise, the Guidelines also confirm that historic data is less likely to restrict competition compared to current or future data and the older the data gets, the less likely it is to detect deviations and retaliate. That said, there is no predetermined threshold for how old the data must be not to create any risk of distorting competition.

On the other hand, exchanges of public information are generally not expected to constitute an infringement under Article 4 of Law No. 4054. Exchange of information readily available to the public may decrease the likelihood of distortion of competition in the

---

17 For example, the Block Exemption Communiqué No. 2008/3 Concerning the Insurance Sector also allows insurance-related databases to pool risk information from multiple insurers. These databases are exempt from the general rule even though they may contain strategic and valuable information, because they contribute to the public welfare.

18 *EBS Otomotiv OSD* (20/09/2012, 12-44/1350-455), *ODD* (15/04/2004, 04-26/287-65).

19 *Philips/Group SEB* (13/02/2020, 20-10/109-65), *The Automotive Distributors Association* (15/04/2004, 04-26/287-65), *Turkey Construction Industrialists Employers Union* (18/01/2018, 18-03/31-18), *EBS Otomotiv* (n 18).

market, to the extent that cooperative effects of the exchange of information can be constrained by other undertakings, potential competitors and customers.[20]

Public information is defined in the Guidelines as information that is equally accessible to all competitors and customers in terms of the cost of access. That said, the possibility of obtaining the necessary information from the market does not necessarily mean that such information constitutes market data readily accessible to competitors: the data cannot be considered public if the cost of collecting the relevant data that is frequently exchanged among competitors is deterring new players from entering the market (para. 72 of the Guidelines).

Furthermore, the fact that information is publicly exchanged would also not mean that the possibility of a collusive outcome in the market is completely eliminated (para. 74 of the Guidelines). For instance, circulating price lists on a monthly basis among industry members could increase the price transparency in the market.[21]

Finally, the Amendment Law recently introduced the *de minimis* principle. With this amendment, the Board will be able to decide not to launch a fully fledged investigation for agreements, concerted practices and/or decisions of association of undertakings that do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. However, this principle will not be applicable to hardcore violations such as price fixing, territory or customer sharing and restriction of supply. Thus, the *de minimis* principle might be applied to information exchange unless it is a facilitator of hardcore restriction by increasing transparency in the market, reducing market complexity and asymmetry, and by stabilizing the market.

VI. Information Sharing Best Practices

Depending on specific circumstances surrounding each particular case, exchange of information between competitors or via third parties (such as customers, distributors or market research companies, etc.) may not raise competition law concerns. Exchange of (i) competition sensitive (strategic), (ii) comprehensive (comprising the whole market), (iii) company-specific, (iv) current, (v) detailed (broken-down), and (vi) not publicly available information may raise questions for the Authority.

To minimize misunderstandings in practice, it is also useful to clearly indicate the source of information within documents and correspondences when information is gathered by company employees from the market. Similarly, training employees to avoid exchanging commercially sensitive information with third parties would further decrease the risk of illegal information exchanges in practice.

Also, it is imperative for parties to expressly object to exchange of information (i.e., to publicly distance themselves from the problematic conduct) if such situation arises during

---

20 *EBS Otomotiv* (n 18).

21 *Petroleum Industry Association* (21/11/2013, 13-64/904-384).

gatherings with competitors, for example, during meetings organized by associations of undertakings or unions, regardless of the nature or the number of exchanges between the undertakings as the Board does not analyse nor does it take into account the effects of such conduct on competition while finding a violation (para. 56 of the Guidelines).

The following precedents shed further light into the Board's approach to information exchanges in practice.

In the *Sanitary Ware Producers* decision,[22] the Board reviewed the market and determined that there was a noticeable competition among undertakings. The Board also found that there were no documents showing direct communication between the competitors and the competitors were gathering information from published price lists, resellers or customers. Thus, the Board decided not to initiate a fully fledged investigation since there was no indication of an actual information exchange among competitors.

In the *Philips/Group SEB* decision,[23] the Board indicated that: (i) the file alleged to be evidence of information exchange contained retrospective information which does not reflect continuously collected data that is spread over a long time period, (ii) competitors following each other's actions and accordingly taking a position is an ordinary event, (iii) collecting information from the market through their own means is not deemed as competition restricting conduct, (iv) no information, documentation and communication indication information exchange was found at the investigated undertakings. Therefore, the Board decided not to initiate a fully fledged investigation since it concluded that the undertakings did not breach competition law via exchange of competition sensitive information.

In the *Burdur Province Stations* decision,[24] the Board evaluated whether 10 stations operating at Burdur Province has violated Article 4 of Law No. 4054 by concluding agreements for the purpose of increasing the prices of the auto gas LPG and fuel products. The Board concluded that there was an exchange of competition-sensitive data including future sales strategies, determined price collusion and decided that Article 4 of Law No. 4054 was breached and imposed administrative monetary fines of 0.2% of the relevant undertakings' turnover generated in 2018.

In the *Chemotherapy Pharmaceutics* decision,[25] Board concluded that certain undertakings active in the chemotherapy pharmaceutical business violated Article 4 of Law No. 4054 during various phases of bidding. It was decided that the undertakings subject to the investigation manipulated the bidding process by sharing the bids among themselves. The Board ultimately decided that this conduct infringed Article 4 of Law No. 4054 and imposed administrative monetary fines of 0.25% of the relevant undertakings' turnover generated in 2018.

In *White Meat Producers* decision,[26] the Board held that nine poultry producers violated Article 4 by exchanging information on future prices and by supply restrictions. The

---

22 *Sanitary Ware Producers* (13/02/2020, 20-10/100-58).
23 *Philips/Group SEB* (n 19).
24 *Burdur Province Stations* (n 11).
25 *Chemotherapy Pharmaceutics* (28/5/2020, 20-01/14-06).
26 *White Meat Producers* (13/03/2019, 19-12/155-70).

Board held that the fact that competitors could calculate each other's production amounts and unit costs of by means of the commercially sensitive information they exchanged, such as broiler chicken production and slaughtering numbers, and the fact that they had access to current and future price lists, there was no remaining information that could create competitive uncertainty among the relevant companies. The Board ultimately decided that this conduct infringed Article 4 and imposed monetary fines of 0.75% of four undertakings' and 1.125% of six undertakings' turnover generated in 2018.

In the *Keşan Cement* decision,[27] the Board analysed whether information exchange through a subcontracting agreement was illegal. The agreement was between two competitors (Akçansa and Saros) in a specific region, where one of the competitors (Akçansa) recently terminated its production. This agreement also allowed Akçansa to access the production records of Saros. The Board decided that the relevant information was not strategic for competition in this market as the product was homogenous. The Board also found that provision aimed to protect the brand image of Akçansa, as it would be selling the concrete purchased from Saros under the Akçansa brand. The Board therefore decided not to initiate a fully fledged investigation since the relevant agreement did not breach Article 4 of Law No. 4054.

In the *Turkey Port Managers Association* decision,[28] the Board (i) analysed whether the information had anticompetitive purpose; (ii) granted negative clearance for exchanging of the said information, which were to be shared between the members of the Turkey Port Managers Association and will be publicly available on the internet at the same time.; and (iii) determined that individualized sales amounts (handling quantities per load) were strategic and would create coordination risks among competitors and potentially make it possible to control deviations from a possible agreement on quantity or customer sharing. However, by taking into consideration, among other things, the efficiencies including eliminating idle capacity, decreasing costs, contribution to incentives for service quality improvement; the increase of consumers' bargaining power; the fact that the data will be published quarterly and yearly, etc., the Board granted individual exemption for the publication of the relevant data by the port managers association for five years.

In the *Leasing, Factoring and Financing Companies Union* decision,[29] the Board assessed an individual exemption application which concerned the Union's initiative to collect financial data from its members related to leasing, factoring and financing services market and share them as retrospective data with all of its members. The Board conducted a rule of reason analysis and held that (i) exchange of retrospective data such as the data on the turnover reports or account receivables reports for the past financial periods would not infringe Article 4 of Law No. 4054; however, (ii) exchange of current data such as the data on the turnover reports or account receivables reports for recent financial periods, the data on the number of the existing customers or the number of the contracts would infringe Law No. 4054 and did not benefit from an individual exemption under Article 5 of Law No. 4054; and (iii) exchange of current data on the financing amount or currently

---

27 *Keşan Cement* (n 9).

28 *Turkey Port Managers Association* (14/11/2019, 19-40/655-280).

29 *Leasing, Factoring and Financing Companies Union* (15/03/2018, 18-05/79-43).

issued financing credits would benefit from a conditional individual exemption under Article 5 of Law No. 4054.

In the *Migros, Boyner and BNR Teknoloji* decision,[30] the Board granted individual exemption to a cooperation agreement executed between Migros, Boyner and BNR. HOPİ is a mobile application developed by BNR that provides its users with personalized campaigns and the opportunity to gain money points from their transactions. Accordingly, HOPİ users would gain money points by shopping at the retailers that are members of the HOPİ system and be able to spend those money points at Migros. Also, HOPİ and Migros would organize promotions and campaigns together and to do this they would exchange information on the customers' personal data to the extent permitted by applicable law. In its assessment, the Board decided that a certain level information exchange (e.g., the information on the consumers' names, mobile phone numbers, etc.) is indispensable for the implementation of the cooperation agreement. By way of the information exchange, discounts, gift cards, free products and services would be available to the consumers to be used when shopping at HOPİ's members. In addition, the exchange of information provided by the agreement would decrease the operational costs, increase the quality of the services and lead to more comprehensive understanding of the consumer needs, thereby making better consumer campaigns possible, which would ultimately result in consumer benefit.

In the *Başkent Gaz* decision,[31] the Board granted negative clearance to Başkent Gaz's initiative to announce its list of Performance/Success Evaluation of Certified Firms on its website. Başkent Gaz is an institution authorized to certify real and legal persons who carry out construction and service activities of natural gas interior installation and service lines, based on their performance, on behalf of the Energy Market Regulation. The Board stated that as the concerned list contains information related to the service quality of the undertakings active in the natural gas sector, it would eliminate the problem of information asymmetry between customers and undertakings active in the sector and thereby lead to pro-competitive effects on the market. The Board also held that since the information contained in the list reflects only the objective criteria about the firms rather than subjective evaluations about them and it does not contain data about the firms' prices or costs, the initiative would not lead to any breach of competition law.

In the *IQVIA Health* decision,[32] the Board conducted a preliminary investigation against IQVIA Health upon a complaint from Aymed that IQVIA Health had violated Articles 4 and 6 of Law No. 4054 by sharing competitively sensitive information related to the market for drugs with Aymed's competitors. The Board decided not to launch a fully fledged investigation against IQVIA Health on the ground that exchanging information regarding the drug prices is not strategic given that IQVIA Health calculates the prices in accordance with the profit margins determined by the Council of Ministers. In other words, IQVIA Health was using the information that is publicly available.

---

30 *Migros, Boyner and BNR Teknoloji* (03/05/ 2018, 18-13/238-111).
31 Başkent Gaz (5/07/2018, 18-22/374-182).
32 *IQVIA Health* (12/06/2018, 18-19/330-164).

In the *Corporate Loans* decision,[33] the Board launched an investigation against 13 financial institutions active in corporate and commercial banking in Turkey. The investigation started with BTMU's leniency application on an alleged cartel on loan conditions. The Board ultimately found that some of the parties violated Article 4 of Law No. 4054 by way of exchanging competitively sensitive information such as price, amount and maturity of loans; however, the Board made a significant analysis in terms of the corporate loans market, since the relevant market allows exchange of information to a certain extent by its very nature. In order to determine the "certain extent", the Board indicated that during the pre-mandate period (before the determination of the coordinator bank), exchange of information on the banks' intention to bid to become the coordinator bank and also on the conditions of an offer, such as price, maturity and agreement terms without the customer's knowledge, between the banks will constitute violation of competition law. On the other hand, the Board stated that during the post-mandate period, the coordinator bank is usually authorized by the customer to negotiate with other banks as to which conditions they want to participate in the syndicated loan. As a general rule, provided that they are within the scope of the authorization provided by the customer, the exchanges between the coordinator bank and the potential banks will not result in a competition law violation. In conclusion, the Board emphasized that in order to determine whether the exchanges between the banks will constitute competition law violation (i) time of the correspondences, (ii) scope of the correspondences, and (iii) whether the customer has information on the relevant exchanges are important. However, in general, it can be said that exchange of information on future prices, interest rates and payment terms violates Article 4 of Law No. 4054. Although, the Board did not declare the violation to be a cartel, it imposed an administrative monetary fine on ING Bank AŞ and the Royal Bank of Scotland Plc in the amount of 21.1 million liras and 66.4,000 liras respectively. Contrary to its decisional practice and the explicit rule in the Leniency Regulation that the leniency regime only applies to cartel cases, the Board granted BTMU full immunity.

In the *Travel Agencies* decision,[34] the Board investigated whether travel agencies violated Article 4 of Law No. 4054 by restricting activities of a competitor, Biblio Globus. The Board held that travel agencies exchanged information on Biblio Globus' activities as well as contractual relations with hotels and agencies, and used such information against hotels and other undertakings that work with Biblio Globus to pressure them into terminating their agreements with this company. The Board found that travel agencies also exchanged information to collude on boycotting hotels that work with Biblio Globus. The Board decided that the hotels' choice of refraining from working with Biblio Globus could not have been an independent commercial decision and fined the relevant travel agencies. In this regard, the Board ultimately decided to impose monetary fines of 0.35% on two infringing undertakings' 2015 turnovers and 0.3% on one infringing undertaking's 2015 turnover.

In the *Forex* decision,[35] the Board launched a preliminary investigation against several banks in order to determine whether traders of competing banks who are responsible for

---

33 *Corporate Loans* (28/11/2017, 17-39/636-276).
34 *Travel Agencies* (21/12/2016, 16-40/662-296).
35 *Forex* (24/12/2016, 16-41/667-300).

buying and selling different currencies exchanged commercially sensitive information in Bloomberg and Reuters chat rooms between 2009 and 2013. Owing to the nature of the market, traders could be competitors and customers of each other at the same time, and thus constantly exchanged information. Although most of the exchanges could be considered as common business practice, the Board identified 24 documents including confidential information related to customers' purchase and sales amounts as well as traders' positions on certain currencies. The Board decided not to initiate a fully fledged investigation on the grounds that, despite being commercially sensitive, the information exchange was isolated, sporadic and could not restrict competition. The Board further held that the purpose of the information exchange was essentially to increase the profit from a specific customer, and thus it was more of a manipulation than a competition infringement.

In the *Aral Oyun* decision,[36] the Board held that nine undertakings active in the markets for computer and console games and consumer electronics violated Article 4 of Law No. 4054. The Board found that Aral, a supplier of computer and console games, and some of its retailers, exchanged commercially sensitive information, such as future pricing strategies, with regards to competing retailers. The Board did not find a "hub-and-spoke" agreement. However, the Board held that complaints received by Aral from its retailers with regard to the prices of competing retailers may lead to an indirect horizontal information exchange amounting to a horizontal agreement between retailers. That said, the Board concluded that all bar one of the retailers communicating with Aral were aware that Aral's intervention resulted from information provided by competing retailers. As a result, the Board held that there was no indirect communication between retailers through a common supplier, amounting to a horizontal cooperation. The Board concluded that Aral was involved in separate anticompetitive agreements with five of its retailers, which had the object to determine the prices of computer and console games and thus it imposed a monetary fine in the amount of TL 863,538 on Aral and monetary fines in amounts ranging between TL 1.1 million and TL 10 million on the relevant infringing retailers.

In the *EBS Automotive* decision,[37] the Board granted negative clearance to EBS Automotive's initiative to share new and second-hand vehicle sales data with the market and third parties through its website. The Board emphasized in its decision that the data to be shared is already public and easily accessible on public records and evaluated the information exchange aspect of the case under Article 4 of Law No. 4054.

In the *Aegean Cement Producers* decision,[38] the Board concluded that six cement producers active in the Aegean region of Turkey violated Article 4 of Law No. 4054 by allocating regions and increasing resale prices. The fines ranged between 3% and 4.5% of each company's 2014 annual income, which are above the average of the Board's fines in similar cases. Exchange of information was an important part of the case. The Board found that these companies exchanged information on stock, cost, future business strategies, and accordingly facilitated collusion in the relevant market, which is an

---

36 *Aral Oyun* (07/11/2016, 16-37/628-279).

37 *EBS Automotive* (n 18).

38 *Aegean Cement Producers* (14/01/2016, 16-02/44-14).

oligopolistic and exceedingly stable market. In this regard, the Board ultimately decided to impose monetary fines of 0.3% on four infringing undertakings' 2014 turnovers and 4.5% on two infringing undertakings' 2014 turnovers.

In the *Adıyaman Auto Gas Distributors* decision,[39] the Board decided that a number of auto gas distributors violated Article 4 by way of information exchange on future prices in a meeting held in Adıyaman Chamber of Commerce and Industry. In this decision, the Board stated that, in principle, competitors may attend meetings organized by associations of undertakings or unions. However, when competitively sensitive information is shared with competitors at these meetings, such information exchange may raise competitive concerns regardless of the initial purpose of the meeting. Furthermore, participants of these meetings may be held liable for a competition law infringement unless they immediately and explicitly take a stand against the exchange of information. The Board ultimately imposed administrative fines in the amount ranging between TL 4,554 and TL 289,817 on 14 auto gas distributors.

In the *12 Banks* decision,[40] the Board investigated whether 12 banks violated Article 4 of Law No. 4054 by colluding on their trade terms for cash deposit interest, credit, and credit card fees. The Board found that sharing information with competitors on pricing strategy reduces the uncertainty regarding competitors' future behaviour and provides a basis for future cooperation. In other words, sharing such strategic information, which affects pricing decisions of the banks, would restrict competition. The Board assessed the information exchanges as a facilitator of the cartel by emphasizing the continuity of the exchange. The Board ultimately imposed administrative fines on 12 banks ranging between 0.3% and 1.5%.

---

39 *Adıyaman Auto Gas Distributors* (29/03/2018, 18-09/180-85).

40 *12 Banks* (08/03/2013, 13-13/198-100).

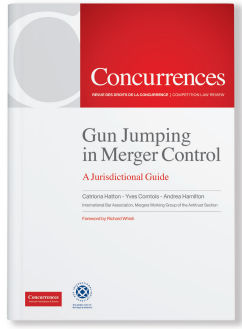
Information Exchange and Related Risks

A Jurisdictional Guide

Zoltán Marosi, Marcio Soares (eds.)

Foreword by Anthony M. Collins

ALSO IN THIS SERIES:



The prohibition on exchanging commercially sensitive information among competitors is one of the most fundamental antitrust rules. Companies and individuals may face potential exposure for anticompetitive information exchange, not only in their day-to-day business due to the applicable conduct and behavioral rules, but also in the context of M&A deals due to applicable gun jumping regulations. The Cartels Working Group of Antitrust Section of the International Bar Association has formulated a comparative guide across 28 jurisdictions, encompassing all global regions, to provide a compendium of best practices and key insights about leading cases, laws and regulations, as well as enforcement trends. Contributed by distinguished practitioners, each chapter provides an overview of the national competition rules and principles that guide information sharing in that jurisdiction, followed by the types of information sharing that may be caught, the enforcement policies and practices of the competition authority and applicable sanctions for parties that are found guilty of an illegal exchange of information. The book also provides a high level overview by the editors outlining trends observed across jurisdictions, to provide insight to the international business community, their advisors as well as to competition authorities.

The jurisdictions covered include Argentina, Australia, Brazil, Canada, Chile, China, Colombia, European Union, Finland, France, Germany, India, Israel, Italy, Japan, Mexico, Russia, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, The Netherlands, Turkey, Ukraine, United Kingdom, United States.

Zoltán Marosi *is Co-Head of competition at DLA Piper Budapest. Zoltán acts as the newsletter officer of the Antitrust Section of the International Bar Association (IBA) and is a member of its Unilateral Conduct Working Group.*

Marcio Soares *is a Partner within the antitrust practice at Mattos Filho in Brazil. He acts as co-chair of the Cartels Working Group of the Antitrust Section of the International Bar Association (IBA), and is a member of the Board of the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade (IBRAC).*

Concurrences
Antitrust Publications & Events

the global voice of the legal profession

ISBN 979-10-94201-27-5

€235 - £200 - $230