

PURCHASING CARTELS AND THE FIRST PURCHASING CARTEL CASE

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In consideration of Competition Board decisions on purchasing cartels involving different sectors such as food, agriculture and labor, these cartels clearly fall within the Authority's field of examination in all aspects.

There are various views on the emergence of competition law: it is well-known that there were some laws to regulate competition in Greece and in India at around 50 BCE, that the first modern anti-monopoly act was the Statute of Monopoly which came into force in the UK in 1624, and the first and most important legal regulation was the Sherman Act, which was adopted in the United States in 1890.

In Türkiye, Act no. 4054 on the Protection of Competition was adopted in 1994 for the purposes of protecting the consumer and ensuring a free competitive environment in particular, with the aims of creating healthy markets, encouraging entrepreneurs as well as ensuring the effective distribution and most productive use of the nation's limited resources. At the focus of all of these legal regulations is national authorities' desire to protect consumers from the negative consequences of cartels and monopolies, taking action with a social state approach. This is because while the cartel may lead to an increase in the welfare of the cartel members, it causes a decrease in consumer welfare, and therefore, social welfare.

In competition law, cartel price fixing can be defined as the allocation of customers, suppliers, regions or trade channels, restriction of the amount of supply or setting quotas, and agreements and/or concerted practices between competitors related to collusive action tenders, which restrict competition. In fact, the main motivation (purpose) of this type of agreement is to create joint market power, to use this power while operating in the market to obtain common benefits, and to essentially avoid the risks and uncertainties caused by the competitive process.

According to Article 4 of the Act no 4054 on the Protection of Competition, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. In this context, cartels are also prohibited by the Act, because they are created to prevent the process that ensures economic efficiency (i.e., competition).

Purchasing cartels

Purchasing cartels can be defined as agreements made between two or more buyers without negotiating with the supplier/seller. Generally, when talking about cartels, the first thing that comes to mind is the case related to the selling side of the market, which involves high prices for final consumers. Purchasing cartels, on the other hand, focus on the input side of the market rather than the output side, and the purpose of such cartels is to eliminate competition among buyers in order to lower input prices or control supplier behavior without allowing the supplier to impose certain conditions. Practices that can be considered examples of cartel behavior by the buyers are: (i) purchase price fixing, (ii) supplier allocation, (iii) determination of purchasing quantities of inputs or products, and (iv) exchange of competitively sensitive information. Therefore, the main issue regarding purchasing cartels is the restriction of competition related to input prices and terms of purchase, and controlling the behaviors of the producers and suppliers.

When decisions by competition authorities are taken into consideration, it is observed that all cartels without any distinction as to their position on the selling or the purchasing side of the market are directly seen as violations of the relevant competition laws and are imposed sanctions. But, it is claimed that purchasing cartels can lead to efficiencies in some cases. The main argument for efficiency gains is that purchasing cartels provide buyers with bargaining power against powerful sellers. Small buyers operating in markets with a single seller or a limited number of sellers are individually in a weaker position when negotiating for lower prices and are therefore forced to accept the prices offered by the seller. These small buyers will only be able to successfully purchase at lower prices if they come together to create a credible threat that they will stop buying unless they get lower prices. This way, there will be a higher possibility that the lower purchase prices obtained from sellers will be passed on to the final consumers. Of course, the opposite of this situation is also possible. If the purchasing cartel also spreads to the selling market, there is a high probability that the buyers will become parties to a cartel in the selling market. There is an opportunity to sell products purchased at lower prices to consumers in the lower market at higher prices, in violation of competition laws. In this respect, the argument that the purchasing cartel provides efficiencies is disregarded by competition authorities.

The main argument is that purchasing cartels provide buyers with bargaining power against powerful sellers.

On the subject of purchasing cartels, perhaps the biggest difficulty for competition authorities is distinguishing a purchasing cartel from a joint purchasing agreement. Just like a purchasing cartels, joint purchasing agreements are also the result of a number of competing buyers

combining their purchases. In most general terms, joint purchasing agreements are agreements made by a group of potentially competing buyers to negotiate for the inputs they need as a single buyer, either jointly or through a representative. In this respect, joint purchasing agreements generally aim to create a level of purchasing power against the sellers, which the buying undertakings would be unable to obtain if they acted independently. The purchasing power created in this way can provide lower prices, more variety or better quality products for consumers. Particularly, it can enable smaller undertakings to obtain better purchasing conditions. The "Turkish FMCG Retailing Sector Final Examination Report" published by the Competition Authority makes a number of observations on fast moving consumer goods retailing in Türkiye, and suggests that purchasing associations that enable small/local retailers to purchase products at more suitable prices can be encouraged and those undertakings forming such association may not have to face sanctions.

The main difference between a purchasing cartel and a joint purchasing agreement is that a purchasing cartel basically focuses on restricting competition, while a joint purchasing agreement aims to achieve efficiency gains, such as cost advantages, by getting buyers to act together. Examples of these efficiency gains include decreasing unit product prices due to a rise in the amount purchased, and decreasing transaction costs from activities such as transportation or delivery or stocking. In addition, undertakings that are parties to a joint purchasing agreement generally have lower total market shares in the market than undertakings that are parties to a purchasing cartel.

BCE competition rules

Although the number of decisions taken by competition authorities concerning purchasing cartels is not greater than the number of decisions taken related to selling cartels, it is still considerable. In fact, the oldest known cartel case is a purchasing cartel case in Athens, related to a grain purchasing agreement. Between 395 and 387 BCE, there was a serious decrease in the grain supply to the Athenian market due to wars between the states, and as a result of this decrease in grain supply, the increase in grain prices directly resulted in an increase in bread prices. This increase in the price of bread, which was an important source of nutrition for the people of Athens, caused unrest among the people.

A government official in charge of the grain market, who wanted to eliminate the unrest caused by increasing bread prices in Athens, called on Athenian grain merchants to unite against grain importers in order to stop the price hikes. This agreement between grain merchants (purchasing cartel) worked as expected and reduced the grain purchasing prices of Athenian merchants by suppressing the grain purchasing prices.

Although this behavior of the Athenian grain merchants served the intended goal at first, it soon turned against the people. Grain traders illegally stocked grain at lower prices by means of the purchasing cartel and failed to supply the grain they stocked to the market. Moreover, grain importers started to bring in less product because they had to sell at lower prices. As a result, grain traders who participated in the purchasing cartel illegally stockpiled at low prices and then illegally sold it to retailers at profits above the profit ceiling regulated by law.

Although it is not known exactly who made the application for the relevant case, most likely upon a complaint by one of the grain importers, grain traders were invited before the senate to give account, and the first known competition law case in history was sent to the court by the senate.

At court, Athenian grain merchants were accused of buying grain in excess of legal limits, stockpiling it, and making a profit almost six times the profit ceiling specified.

From the moment this case was first brought on the agenda in Athens, some senators even demanded the execution of the traders who participated in the cartel. It is known that the Senate had no such authority, but there is no definite information about whether the arguments submitted by the grain merchants were accepted and what the outcome of the case was. However, it is certain that the case is one of the important cases in competition law.

The real interesting point is that the arguments of the grain merchants were not that much different from those submitted today. Indeed, the traders acknowledged that the purchasing cartel was unlawful, yet they claimed that selling the grain purchased from importers at a low price to the players in the downstream created efficiencies.

Decisions of the Competition Board

The Competition Authority, which has been operating for more than a quarter of a century, took many decisions concerning purchasing cartels. These include the *Leaf Tobacco Decision*, *Raw Milk Decision*, *Cherry Decision*, *Dried Fig Decision*, *Private Hospitals Decision* and the recently concluded *Labor Decision*, the reasoned decision for which has not yet been published. In these decisions, the Competition Board concluded that the anti-competitive agreements concerning the inputs used in the production of goods and services constituted behavior with cartel characteristics that infringe competition by purpose. As a result, in consideration of Competition Board decisions on purchasing cartels involving different sectors such as food, agriculture and labor, these cartels clearly fall within the Authority's field of examination in all aspects.

Practices that can be considered examples of cartel behavior by the buyers are: (i) purchase price fixing, (ii) supplier allocation, (iii) determination of purchasing quantities of inputs or products, and (iv) exchange of competitively sensitive information.