



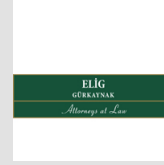
The Legal 500 Country Comparative Guides

Turkey: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Turkey.

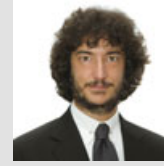
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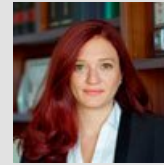
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1. What is the relevant legislative framework?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the '**Competition Law**'). The applicable provision for cartel-specific cases is Article 4 of the Competition Law. The provision is akin to, and closely modelled on, Article 101(1) of the Treaty on the Functioning of the European Union ('**TFEU**'). It prohibits 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 a product or services market in Turkey or a part thereof. The provision does not give a definition of 'cartel', its scope extends beyond cartel activity.

The Competition Law applies to all industries, without exception. There are sector-specific block exemptions regarding certain agreements such as; motor vehicle sector and in the insurance sector.

2. To establish an infringement, does there need to have been an effect on the market?

Article 4 prohibits any form of agreement that aims or has the 'potential' to prevent, restrict or distort competition. This specific feature grants broad discretionary power to the Turkish Competition Board (the '**Board**'). Additionally, Article 4 brings a non-exhaustive list which provides examples of possible restrictive agreements. Unlike the TFEU, Article 4 does not refer to additional requirements such as 'appreciable effect' or 'substantial part of a market', and consequently does not provide for any *de minimis* exception.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Turkey is one of the 'effect theory' jurisdictions, where what matters is the effect that a cartel activity has produced on the markets in Turkey, regardless of (i) the nationality of the cartel members, (ii) where the cartel activity took place, or (iii) whether the members have a subsidiary in Turkey. See; *13 Banks*, 17-39/636-276, 28.11.2017; *Rail Cargo Logistics*, 15-44/740-267, 16.12.2015; *Güneş Ekspres/Condor*, 11-54/1431-507, 27.10.2011; *Imported Coal*, 10-57/1141-430, 02.09.2010; *Refrigerator Compressor*, 09-31/668-156, 01.07.2009; *Sisecam/Yioula*, 07-17/155-50, 28.02.2007 and *Gas Insulated Switchgears* 04-43/538-133, 24.06.2004. It should be noted that however, the Board has yet to enforce monetary fines or other sanctions against undertakings located outside of Turkey without any presence in Turkey, as this is mostly due to the enforcement handicaps (such as difficulties of formal service to foreign entities).

4. Which authorities can investigate cartels?

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Turkish Competition Authority (the '**Authority**'). As the competent body, a cartel matter is primarily adjudicated by the Board that is responsible for,

inter alia, investigating and condemning cartel activity.

Administrative enforcement is also supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts. If a cartel activity amounts to a criminally prosecutable act such as bid rigging in public tenders, it may separately be adjudicated and prosecuted by Turkish penal courts and public prosecutors.

5. What are the key steps in a cartel investigation?

The Board may *ex officio*, or as a result of a notice or complaint, launch a preliminary investigation prior to initiating a full-fledged investigation. At the preliminary investigation stage, unless the Authority decides to conduct a dawn raid or apply other investigatory tools (i.e. formal information request letters), the undertakings concerned are not notified about the preliminary investigation. The preliminary investigation report of the Authority's experts will be submitted to the Board within 30 days after the Board's preliminary investigation decision. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate a full-fledged investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months once the Authority serves the investigation report to the undertakings. If deemed necessary, this period may be extended by the Board only once, for an additional period of up to six months.

The investigated undertakings have 30 calendar days as of the formal service of the investigation notice to prepare and submit their first written defences. Subsequently, the investigation report is issued by the Authority. Once the investigation report is served on the defendants, they have 30 calendar days to submit their second written defence, extendable for a further 30 days. The investigation committee will then have 15 days to prepare an additional opinion concerning the second written defence. The defending parties will have another 30-day period to submit their third written defence to the additional opinion. Once the defendant's written defences are submitted to the Authority, the written defence process will be completed (i.e. the written phase of investigation involving the claim/defence exchange will close with the submission of the third written defence). An oral hearing may be held upon request by the parties. The Board may also *ex officio* decide to hold an oral hearing. Oral hearings are held within at least 30, and at the most, 60 days following the completion of the written defence process under the provisions of Communiqué on Oral Hearings before the Board No. 2010/2. The Board will render its final decision within: (i) 15 calendar days from the hearing, if an oral hearing is held; or (ii) 30 calendar days from the completion of the investigation process, if no oral hearing is held. It usually takes around three to five months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

6. What are the key investigative powers that are available to the relevant authorities?

The Authority may request all information it deems necessary from all public institutions and

organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period determined by the Authority.

Article 15 of the Competition Law also authorises the Authority to conduct on-site investigations and dawn raids. Accordingly, the Authority is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking; and
- examine computer records, including but not limited to deleted items.

The Competition Law provides vast authority to the Authority on dawn raids. Only if the undertaking concerned refuses to allow the dawn raid, a court order may be obtained. Other than that, the Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Law is such that employees can be compelled to give verbal testimony, case handlers allow a delay in giving an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted within a mutually agreed time.

The case handlers are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (which is written on the deed of authorisation).

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

According to recent *İstanbul Custom Consultants Association* (19-22/352-158, 20.06.2019), *Warner Bros Turkey* (19-04/36-14, 17.01.2019), *Enerjisa* (16-42/686-314, 06.12.2016) and *Dow Turkey* (15-42/690-259, 02.12.2015) decisions, the attorney-client protection covers the correspondences made in relation to the client's right of defence and documents prepared in the scope of an independent attorney's legal service. Correspondences that are not directly related to use of the client's right of defence and that aim to facilitate/conceal a violation are not protected, even when they are related to a preliminary investigation, investigation or inspection process. While an independent attorney's legal opinion on whether an agreement violates the Competition Law can be protected under the attorney-client privilege, the correspondences on how the Competition Law can be violated between an independent attorney and client do not fall within the scope of this privilege. Correspondences with an independent attorney (i.e. without an employment relationship with her/his client) fall into the scope of attorney-client privilege and shall be protected.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The Regulation on Active Cooperation for Discovery of Cartels (*'Regulation on Leniency'*) provides that the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringements.

A cartel member may apply for leniency until the investigation report is officially served. Depending on the timing and quality of the application, the applicant may benefit from full immunity or fine reduction. The immunity or reduction includes both the undertaking and its employees/managers, with the exception of the 'ring-leader' which can only benefit from a second degree reduction of a fine.

The first one to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from full immunity. However, there are also several other conditions provided as follows; the applicant:

- shall submit information and documents in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of cartel participants, and specific dates, locations and participants of cartel meetings;
- shall not conceal or destroy information or evidence related to the alleged cartel;
- shall end its involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated;
- shall keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit; and
- shall maintain active cooperation until the Board's final decision on the investigation.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

The rules explained in Question 3.1 apply to subsequent cooperating parties as well. Also, the Board may consider the parties' active cooperation after the immunity application as a mitigating factor as per the provisions of the Regulation on Fines.

The second undertaking to file an appropriately prepared application would receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant that actively cooperate with the Authority would benefit from a reduction of between 33 and 100 per cent.

The third applicant would receive a 25 per cent to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or

managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

10. Are markers available and, if so, in what circumstances?

Although the Regulation on Leniency does not provide detailed principles on the 'marker system', the Authority can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, duration of the cartel and names of the parties.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Articles 6 and 9 of the Regulation on Leniency provide that unless stated otherwise by the authorised division, the principle is to keep leniency applications confidential until the service of the investigation report. The applicant is in any case obliged to maintain active cooperation until the final decision is taken by the Board following the conclusion of the investigation.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

While the Turkish cartel regime is administrative and civil in nature, certain antitrust violations such as bid-rigging in public tenders may also trigger criminal consequences. Immunity or leniency does not close the door on leveraging criminal procedures on the basis of a Board decision. Therefore, employees/managers of an offending company may face criminal liability, even in cases where the company benefits from immunity or leniency.

13. Is there an 'amnesty plus' programme?

Amnesty Plus is regulated under Article 7 of the Regulation on Fines. According to Article 7 of the Regulation on Fines, the fines imposed on an undertaking which cannot benefit from immunity provided by the Regulation on Leniency will be decreased by one-fourth, if it provides the information and documents specified in Article 6 of the Regulation on Leniency (see above) prior to the Board's decision of preliminary investigation in relation to another cartel.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The Competition Law does not contain settlement procedure. The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters has also not been tested in Turkey.

15. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

Article 43 of Decision No. 1/95 of the EC-Turkey Association Council authorises the Authority to notify and request the European Commission (Directorate-General for Competition) to apply relevant measures if the Board believes that cartels organised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the EU and Turkey, and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

There are also a number of bilateral cooperation agreements between the Authority and the competition agencies in other jurisdictions (e.g. Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Egypt, Mongolia, Portugal, Romania, Russia, Serbia, South Korea and Ukraine) on cartel enforcement matters. The Authority has close ties with the Organization for Economic Cooperation and Development, the United Nations Conference on Trade and Development, the World Trade Organization, the International Competition Network and the World Bank.

The research department of the Authority makes periodic consultations with relevant domestic and foreign institutions/organisations about the protection of competition, and submits its recommendations to the Board. For example, a cooperation protocol was signed on 14.10.2009 between the Authority and the Turkish Public Procurement Authority about ensuring healthy competition environment for public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Authority's actions.

Nevertheless, the interplay between jurisdictions does not materially affect the Board's handling of cartel investigations. The principle of comity is not included as an explicit provision in the Competition Law.

Nevertheless, in the same way as many other competition authorities, the Authority faces various issues in which international cooperation is required. There have been cases where the Authority has requested cooperation on dawn raids, information exchange, notifications and collection of monetary penalties from the competition authorities in other jurisdictions via the Ministry of Foreign Affairs and the Ministry of Justice. However, the Authority has been unsuccessful in these requests (*Elektrik Turbini* decision (04-43/538-133, 24.06.2004), *Ithal Komur* decision (06-55/712-202, 25.07.2006), *Ithal Komur II* decision (06-62/848-241, 11.09.2006), *Cam Ambalaj* decision (07-17/155-50, 28.02.2007) and *Condor Flugdienst* decision (11-54/1431-507, 27.10.2011)).

16. What are the potential civil and criminal sanctions if cartel activity is established?

In the case of a proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year prior to the date of the fining decision (if this is not calculable, the Turkish turnover generated in the

financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings.

In addition to that, 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 and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter, in case there is a possibility of serious and irreparable damages.

Bid-rigging activity may be criminally prosecutable under Sections 235 *et seq.* of the Turkish Criminal Code. Illegal price manipulation (i.e. manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation was complete.

17. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The Competition Law makes reference to Article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, compliance with their commitments, etc., in determining the monetary fine.

In terms of the highest monetary fines imposed by the Board as a result of a cartel investigation, two decisions stand out:

1. The highest monetary fine imposed on a single undertaking is TL 213,384,545.76 (around EUR 35.3 million at the time of writing). This amount represented 1.5% of the 2011 annual gross revenue of the economic entity of Garanti Bankası (13-13/198-100, 08.03.2013).
2. The highest monetary fine imposed for an entire case (imposed on 12 undertakings active in the banking sector) was TL 1,116,957,468.76 (around EUR 185 million at the time of writing) for the same case (13-13/198-100, 08.03.2013).

18. Are parent companies presumed to be jointly and severally liable with an infringing

subsidiary?

The Board has a consistent approach to fine the legal entity which was involved in cartel behaviour rather than fining the parent company as a whole.

Article 16 of the Competition Law makes a reference to the term “undertaking” when it identifies the entity which the monetary fine is to be imposed on. Article 3 of the Competition Law defines the undertakings as natural and legal persons who produce, market and sell goods or services in the market, and entities which can decide independently and constitute an economic entity. Therefore, it can be argued that it technically leaves the impression that the Board is empowered to go up to the ultimate parent for calculation of turnover rather than solely focusing on the local turnover of the entity that actually violates the Competition Law. In this regard, for instance, there have been certain decisions of the Board whereby the parent companies of a joint venture were found liable instead of the joint venture itself (*Waste Paper* decision; 13-42/538-238, 08.07.2013).

That said, in practice, the Board does not tend to calculate the revenue by taking into consideration the whole group’s (i.e. the undertaking’s) revenue, and imposes monetary fines on the basis of the actual infringing legal entity’s (infringing subsidiary’s) revenue (e.g. *Automotive* decision, (11-24/464-139, 18.04.2011); *Cement* decision, (12-17/499-140, 06.04.2012); *Financial Institutions* decision (17-39/636-276, 28.11.2017)).

19. Are private actions and/or class actions available for infringement of the cartel rules?

Article 57 *et seq.* of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees.

Turkish procedural law does not allow for class actions or procedures. While Article 73 of Law No. 6502 on the Protection of Consumers allows class actions by consumer organisations, these actions are limited to violations of Law No. 6502, and do not extend to cover antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under Article 57 *et seq.* of the Competition Law.

20. What type of damages can be recovered by claimants and how are they quantified?

As above, any party that suffers damages due to actions contrary to the Competition Law can sue the infringing party for three times the value of the damages suffered plus litigation costs and attorney’s fees.

Article 58 of the Competition Law determines how to calculate the amount of any damages

suffered. Parties that suffer as a result of the prevention, distortion or restriction of competition may claim as damages the difference between the cost that they paid and the cost that they would have paid if competition had not been restricted. Pursuant to Article 58, in determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

21. On what grounds can a decision of the relevant authority be appealed?

Board decisions, including decisions on interim measures and fines can be appealed before the administrative courts under the appeal process. Since 2016, administrative litigation cases are subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of Administrative Courts, regional courts (appellate courts) and the Council of State.

The judicial review of the Board's decisions before the administrative courts is conducted pursuant to administrative law principles. Ankara administrative courts examine whether the Board's decision complies with the law in terms of subject matter, form, purpose, jurisdiction and reason.

On the other hand, the regional courts will go through the case file both on procedural and substantive grounds. The regional courts' decisions are considered as final in nature. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to Council of State's review and therefore will not be considered as a final decision. In such a case, the Council of State may decide to uphold or reverse the regional courts' decision. If the decision is reversed, it will be remanded back to the deciding regional court, which will in turn issue a new decision to take account of the Council of State's decision.

22. What is the process for filing an appeal?

As per Law No. 6352, the administrative sanction decisions of the Board can be submitted for judicial review before the Administrative Courts in Ankara by the filing of an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Board. As per Article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request by the plaintiff, the court, providing its justifications, may grant stay of execution if such execution is likely to cause serious and irreparable damage; and if the decision is highly likely to be against the law (i.e. the showing of a *prima facie* case).

The judicial review period before the Ankara Administrative Courts usually takes about 12 to 24 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the Administrative Courts' decisions will be submitted to the regional courts within 30 calendar days of the official

service of the reasoned decision of the Administrative Court.

23. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

According to 2019 annual activity report of the Authority, concerning a leniency application made in 2018, the Cartel and On-Site Inspection Support Division ("**Cartel Division**") have decided that the applicant should be awarded with 50% reduction from the monetary fine (*Ambarlı Ro-Ro* decision 19-16/229-101, 18.04.2019). However, according to 2018 annual activity report, there have been no significant cartel decisions in which the Board imposed significant administrative monetary fines. In 2018, there has been a decline in the number of investigations with monetary fines, according to 2017 and 2019 annual activity reports of the Authority, there have been two leniency applications; the process concerning the application made in 2019 is ongoing. Both applicants who made their leniency applications in 2017 were granted immunity in investigations where other undertakings were fined. First one concerns the mechanical engineering sector (17-41/640-279, 14.12.2017) in a region. The allegation was that the mechanical engineers in Burdur compiled revenue in a pool and shared their revenue. One of the undertakings became aware of the leniency regime during the on-site inspection and applied and consequently was granted immunity from the administrative monetary fine.

The second one, concerns 13 financial institutions active in the corporate and commercial banking markets in Turkey (17-39/636-276, 28.11.2017). The allegation concerned the exchange of competitively sensitive information on loan conditions regarding current loan agreements and other financial transactions. The Board resolved that BTMU would not face an administrative fine pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from administrative fines. The Board imposed an administrative monetary fine on ING and RBS in the amount of TL 21,100,000 (around EUR 3.5 million at the time of writing) and TL 66,400 (around EUR 11,000 at the time of writing), respectively, over their annual turnover in the financial year of 2016.

24. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?

The Authority's annual activity report for 2019 provides that the Board finalised a total of 69 cases relating to competition law violations. Among the 69 cases, 30 were subject to Article 4 of the Competition Law (anticompetitive agreements) only and 12 cases were subject to both Article 4 and Article 6 (abuse of dominant position).

The report provides that the Board issued monetary fines amounting to a total of 228,733,560 TL in 2019. While the monetary fine total for Article 4 cases have significantly increased in 2019, the monetary fine total imposed on Article 6 cases have decreased. The Board imposed monetary fines totalling 164,392,558 TL on horizontal anticompetitive arrangements in 2019, while the monetary fines for 2017 and 2018 were 21,279,796 and 9,201,300 TL, respectively.

The investigations that have been initiated by the Board so far clearly show that it does not focus on any specific sectors when it comes to the investigation of cartel behaviour but rather aims to tackle any conduct or practice which might point to a restriction of competition among competing undertakings.

25. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

The adoption of the Draft Proposal for the Amendment of the Competition Law (“**the draft law**”) is expected. The draft law issued in 2013 still remains null and void as it had not been submitted and proposed to the presidency of the Turkish parliament in the new legislative year.

Another significant anticipated development is the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition, which will replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. The draft law and the draft regulation were sent to the Turkish Parliament, but as yet no enactment date has been announced.