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Cartels

Turkey
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chambers.com

2020

TURKEY

Law and Practice

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Primary Legislation

The main legislation prohibiting cartel activity in Turkey is the Law on Protection of Competition No 4054 (Competition Law).

Article 4 of the Competition Law provides the main principles related to cartels and is essentially 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 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.

As a general provision, Article 4 prohibits all forms of restrictive agreements, including any form of cartels. It also sets forth a non-exhaustive list of anti-competitive practices that potentially violate the Competition Law, which include most common types of cartels, such as price-fixing, market division and concerted control of output or input.

Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. This is a specific feature of the Turkish cartel regulation system, recognising the broad discretionary powers of the Turkish Competition Board.

Secondary Legislation

The secondary legislation of the Turkish Competition Authority includes specific provisions on cartels. The Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (the "Fine Regulation") provides the range of the base fines for cartels (see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**).

Under the Regulation on Active Co-operation for Detecting Cartels (the "Leniency Regulation"), parties that actively co-operate with the Authority regarding a cartel may be granted full immunity or a discount, depending on the timing of their leniency application.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The authority enforcing competition law in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy, which consists of the Board and case units. The Board is the decision-making body of the Authority and is responsible for, inter alia, deciding on whether agreements, concerted practices and decisions of undertakings active in various markets restrict competition. The Board has seven members and is seated in Ankara. The Authority has five case units, each of which focuses on all types of competition cases (ie, Article 4 cases, mergers and abuse of dominance) in certain industries.

Penalties

Penalties imposed under the Competition Law are administrative in nature. Therefore, the Competition Law can lead to administrative fines (and civil liability), but not criminal penalties. That said, when anti-competitive conduct such as bid-rigging in public tenders or price manipulation is also criminally prosecutable, potential legal liability extends to criminal fines as well as imprisonment.

Fines

The Fine Regulation provides the range of the base fines for cartels: for undertakings/association of undertakings, it is between 2% and 4% of turnover for the latest financial year before the date of the Authority's decision. After calculating the base fine, the Authority applies aggravating and mitigating factors to calculate the final fine for the relevant undertaking or association of undertakings.

The Authority's fine for cartels cannot exceed 10% of the relevant undertaking's turnover generated in Turkey in the financial year preceding the date of the decision to impose a fine. The minimum fine is TRY31,903 for 2020 (approximately USD4,800 and EUR4,400 based on the current exchange rate).

Liability

In addition to legal entities, executives or employees of undertakings may also be held liable for cartel activity. Under the Competition Law, employees or members of executive bodies of the undertakings or associations of undertakings that had a determining effect on a cartel may also be fined between 3% and 5% of the fine imposed on the relevant undertaking or association of undertakings.

Civil Awards

As regards civil awards, under Article 57 of the Competition Law persons and companies harmed by anti-competitive conduct have a right to claim treble damages, plus litigation costs and attorney fees.

1.3 Private Challenges of Cartel Behaviour/Effects

Under Article 57 of the Competition Law persons and companies harmed by an anti-competitive conduct have a right to claim treble damages, plus litigation costs and attorney fees. Claims for damages arising from the Competition Law are ultimately subject to the general tort rules, ie, the Turkish Code of

Obligations. Accordingly, in order for a private tort claim to be accepted by the court, the following four conditions must be cumulatively met:

- existence of an illegal act;
- fault;
- damage; and
- causal link.

1.4 Definition of "Cartel Conduct"

The general provision regarding cartels is Article 4 of the Competition Law, which prohibits all forms of "restrictive agreement," including any form of cartels. In contrast to the TFEU, Article 4 of the Competition Law does not refer to "appreciable effect" or "substantial part of a market," and thus does not provide any de minimis exception.

In line with Article 101(1) of the TFEU, Article 4 includes price-fixing, market allocation, and refusals-to-deal agreements as examples of restrictive agreements that have consistently been deemed to be anti-competitive per se.

Furthermore, cartels are explicitly defined by the secondary legislation of the Authority, namely the Fine Regulation and the Leniency Regulation. According to these regulations, "agreements restricting competition and/or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotas, and bid- rigging" are prohibited as cartels (see Article 3 of the Fine Regulation and Article 3 of the Leniency Regulation). Recital 5 of the Leniency Guidelines further describes cartels as "the most serious competition infringements."

The prohibition on restrictive agreements and practices is not applicable to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable exemption rules are parallel to those applicable in the EU. That said, given that cartels fail to fulfil the conditions for exemption under Article 5(3) and relevant block exemption regulations, this type of conduct does not benefit from an exemption from the prohibition of Article 4.

Under Article 3 of the Fine Regulation and Leniency Regulation, the following practices are classified as cartel activity:

- price-fixing;
- allocation of customers, providers, territories or trade channels;
- restricting the amount of supply or imposing quotas; and
- bid-rigging.

Bid-rigging and price manipulation can also result in a violation of the Competition Law. Bid-rigging is prohibited under Article 235 of the Turkish Criminal Code, and perpetrators of this offence face imprisonment. Furthermore, price manipulation in capital markets is specifically punishable with imprisonment, as per Article 106 of the Turkish Capital Market Law.

In Turkey, there is no sector or activity that is entirely exempt from the Competition Law.

1.5 Limitation Periods

The Board is entitled to impose administrative monetary fines within eight years of the date of infringement. In the case of a single continuous infringement, the eight-year period starts from the day on which the infringement ceased or repeated. The eight-year limitation period is suspended when the Board takes any action to investigate a claimed infringement.

As regards private actions, the general provisions of the Turkish Code of Obligations are applicable to the statute of limitation. Accordingly, for a claim arising from a competition law infringement, the statute of limitation is two years from the date the plaintiff learns about the damage and who is liable from the damage, and in any case ten years from the event that caused the harm to the plaintiff.

Prosecution of offences of a criminal nature (such as bid-rigging and price manipulation) is subject to criminal statutes of limitation, which may vary depending on the severity of the sentence to be imposed.

1.6 Extent of Jurisdiction

In the Turkish competition law regime, effects theory is taken into account to determine the geographic scope of the Board's jurisdiction. Article 2 of the Competition Law provides that the relevant law covers all restrictive agreements, decisions, transactions and practices, to the extent that they affect markets for goods and services in Turkey, regardless of where the conduct takes place.

The nationality of the cartel members, where the cartel took place or whether the cartel members have a subsidiary in Turkey will not factor in the assessment of whether the Board has jurisdiction over a specific conduct.

The Board has decided it has jurisdiction over non-Turkish cartels or cartel members in the past, as long as there is an effect on the Turkish markets (see, eg, Block Train, 16 December 2015, 15-44/740-267; Imported Coal, 2 November 2010, 10-57/1141-430; Refrigerator Compressor, 1 July 2009, 09-31/668-156; Sisecam/Yioula, 28 February 2007, 07-17/155-50).

That being said, the specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of Law No 4054 would support at least an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

Additionally, it is fair to say that export cartels do not fall within the scope of jurisdiction of the Competition Authority as per Article 2 of the Law No 4054. In Poultry Meat Producers (25 November 2009; 09-57/1393-362), the Authority launched an investigation into allegations that included, inter alia, an export cartel.

The Board found that export cartels are not sanctioned as long as they do not affect the markets of the host country. Although some other decisions (Paper Recycling, 8 July 2013; 13-42/538-238) suggest that the Authority might sometimes be inclined to claim jurisdiction over export cartels, it is fair to assume that an export cartel would fall outside of the Authority's jurisdiction if and to the extent it does not have an impact on Turkish markets.

1.7 Principles of Comity

Article 43 of Decision 1/95 of the European Commission-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 in the European Union have adversely affected competition in Turkey. The provision grants reciprocal rights and obligations to the parties (ie, the European Union and Turkey), and thus the European Commission has the authority to request that the Board applies the necessary measures to restore competition in the relevant markets.

Upon receipt of such a request, the notified party will consider whether or not to initiate any enforcement action and, if such action is initiated, advise the notifying party of the outcome of the relevant action. This article, however, does not limit the discretion of the Authority and the European Commission under their respective competition laws.

There are also a number of bilateral agreements between the Authority and the competition agencies of other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia and Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The authority also has close ties with the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization, the International Competition Network and the World Bank.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

The Authority may initiate an investigation into an alleged cartel ex officio or upon a complaint. If the Board finds the complaint credible, the first step is a pre-investigation. At this preliminary stage, the undertakings concerned are not notified that they are under investigation, unless there is a "dawn raid" (ie, an unannounced on-site inspection).

After completing the pre-investigation in 30 calendar days, the case handlers submit their findings ("pre-investigation report") to the Board. The Board will then decide whether or not to launch an in-depth investigation within ten days of receiving the pre-investigation report. If the Board decides to initiate an in-depth investigation, it will notify the undertakings concerned in 15 days.

Although it is 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 AŞ (2 October 2002; 02-60/755-305) and the ongoing investigations against food retailers Board started on 7 February 2019 (decision No 19-06/75-M) and wholesalers of fresh fruits and vegetables the Board opened on 21 February 2019 (decision No 19-08/108-M).

The investigation must be completed within six months. If deemed necessary, the Board can extend this period once, for up to six months. The relevant parties then have 30 days from the formal service of the notice to submit their first written defence.

After receiving the parties' first written defence, the Authority issues an "investigation report" (equivalent of the European Commission's statement of objections). After receiving the investigation report, the parties have 30 days to respond to the report (ie, the second written defence), which is extendable for another 30 days. The case team then has 15 days to respond to the parties' second written defence (ie, the so-called "additional opinion"). Again, the parties have 30 days to reply to the additional opinion (ie, the third written defence). With the submission of the parties' third written defence to the Authority, the in-depth investigation process will be completed.

An oral hearing may be held upon the parties' request. The Board can also decide ex officio to hold an oral hearing. Oral hearings are held between 30 and 60 days after the completion of the investigation process.

The Board renders its final decision within 15 days from the oral hearing if an oral hearing is held or in 30 days from the completion of the investigation process. It usually takes around six to eight months from the announcement of the final decision for the Board to issue a reasoned decision.

2.2 Dawn Raids

Article 15 of the Competition Law authorises the Board to conduct dawn raids. The firm, individuals and outside counsel are obliged to co-operate with the Board during the dawn raid, as refusal to grant the case handlers access to business premises can lead to an administrative fine. The fine is fixed at 0.5% of the relevant undertaking's turnover generated in the financial year preceding the date of the Authority's decision to impose the fine (if the party's turnover for this year is not available, the turnover generated in the financial year closest to the date of the decision to impose the fine will be taken into account).

In any event, the relevant fine cannot be lower than a specific amount recalculated periodically by the Authority; the minimum fine for 2020 is TRY31,903 (approximately USD4,800 and EUR4,400 based on the current exchange rate). Furthermore, each day the party does not allow the case handlers to carry out an on-site inspection will incur an additional fine of 0.05% of the turnover generated in the financial year preceding the date of the fining decision.

2.3 Restrictions on Dawn Raids

During a pre-investigation and in-depth investigation, the Authority can do the following:

- examine the books and documents of undertakings and trade associations;
- request undertakings and trade associations to provide written or verbal explanations on specific topics;
- conduct on-site investigations with regard to any asset of an undertaking; and
- examine computers and other electronic devices of the undertaking, including e-mails.

The Authority cannot seize documents, but can make copies.

2.4 Spoliation of Information

Spoliation of potentially relevant information would be considered as obstructing or preventing a dawn raid, which would result in an administrative fine on the undertaking of 0.5% of its turnover. Indeed, in the TTNET decision (18 July 2013; 13-46/601-M), an employee of TTNET deleted documents from computers during a dawn raid and the Board imposed a fine of 0.5% of TTNET's turnover, which amounted to around TRY15.5 million (USD8.1 million as per the Turkish Central Bank average buying rate in 2013, ie, a US dollar/Turkish lira exchange rate of 1.90, or EUR6.1 million as per the Turkish Central Bank average buying rate in 2013, ie, a euro/Turkish lira exchange rate of 2.53).

In addition, as mentioned in **2.2 Dawn Raids**, for each day the Authority cannot access the relevant information/document, the undertaking will be subject to an additional fine of 0.05% of its turnover generated in the financial year preceding the date of the fining decision. In a recent case (Mosaş, 18-20/356-176; 21.06.2018) the Board imposed an administrative monetary fine upon Mosaş Akıllı Ulaşım Sistemleri AŞ's ("Mosaş") for obstructing an on-site inspection in the scope of a cartel investigation regarding alleged bid-rigging. During the on-site inspection conducted at Mosaş's premises, Mosaş's employees cut off the electricity and internet connection, deleted e-mails, denied access to computers and also prevented case handlers from making copies of the reviewed documents.

The Board imposed two separate administrative monetary fines on Mosaş: a fixed fine for obstructing the on-site inspection, in the amount of 0.5% of Mosaş's 2017 turnover, and a proportional fine of 0.05% of Mosaş's 2017 turnover for each day that the violation continued (ie, until Mosaş invites the Authority for another on-site inspection). In a more recent case (Unilever, 7 November 2019, 19-38/584-250), the Boar imposed a fine of 0.5% upon Unilever for not granting access to Unilever's e-mail system for a search by using "eDiscovery" for approximately eight hours during the on-site inspection.

Apart from the monetary fine imposed by the Board, if the conduct also falls under criminal law (eg, bid-rigging in public tenders), individuals who destroy, delete, hide or change evidence may face imprisonment for a period of between six months and five years under Article 281 of the Turkish Criminal Code.

Moreover, the individuals could also be charged with forgery and resistance to public officers, if the conditions set out under Article 205 and 265 of the Turkish Criminal Code are met.

2.5 Procedure of Dawn Raids

The Authority may request all information that it deems necessary from private and public institutions, undertakings and trade associations. Employees and officers of these entities must provide the requested information within the period determined by the Board. Failure to comply with such a request may lead to a fine of 0.1% of Turkish turnover generated in the financial year preceding the date of the fining decision. The same penalty applies to incorrect or incomplete information.

Similarly, refusal to grant the Authority access to business premises may result in a fine of 0.5% of Turkish turnover generated in the financial year preceding the date of the fining decision

(see **2.4 Spoliation of Information**). In a recent case (Turkish Pharmacists Association - TEB, 7 November 2019, 19-38/582-248), the Board imposed a turnover-based administrative monetary fine at the rate of 0.1%, and a separate turnover-based administrative monetary fine at the rate of 0.05% for each day following the deadline for submitting the requested information and documents until the date TEB complied with the request (which was 20 days after the deadline).

The Authority's case handlers can interview employees and officers of undertakings, but if the requested information cannot be provided during the interview, the case handlers may grant additional time to respond to such a request. Therefore, in practice, employees and officers can delay responding to questions when they are not in a position to provide accurate or complete information, provided that a written response is submitted within the timeframe agreed upon with the case handlers.

Companies/interviewees have a legal right to request copies of the documents furnished to the enforcement agency regarding these interviews. Moreover, they are able to request that the copies of documents delivered by the case handlers are stamped as confidential for those that include commercial secrets.

2.6 Role of Counsel

Officers or employees have a legal right to counsel. An attorney at law can be present in order to supervise the inspection. The lawyer could be a company lawyer and/or an independent lawyer.

That said, case handlers of the Authority who conduct the dawn raid are not obliged to wait for the undertaking's counsel to assist with the dawn raid. Indeed, in a recent decision (Çekok Gıda, 8 February 2018; 18-04/56-31) where the Board imposed a fine upon an undertaking for obstructing a dawn raid, the Board dismissed the defence that the delay was due to waiting for external counsel.

Counsel may advise and speak during the interview, and interfere if the interview leads to any potential violation of the company's rights (regarding, in particular, prohibition against self-incrimination, request of information exceeding the scope of the current investigation or documents protected by attorney-client privilege).

2.7 Requirement to Obtain Separate Counsel

Turkish law does not prevent counsel from representing both the investigated corporation and its employees, as long as there is no conflict of interest.

2.8 Initial Steps Taken by Defence Counsel

As stated in **2.6 Role of Counsel**, an attorney at law can be present in order to supervise the inspection. The lawyer could be a company lawyer and/or an independent lawyer. In this respect, during the initial phase of an enforcement effort, a defence counsel should only assist its client (the undertaking accused of cartel behaviour), without obstructing the inspection rights of case handlers.

In addition, a defence counsel should supervise and interfere in the inspection in question as necessary where case handlers exceed the scope of their authorisation during the dawn raid. The most common incidents that may require intervention from a defence counsel during a dawn raid involve preventing the case handlers from obtaining documents that are protected by attorney-client privilege, and outside the scope of the relevant investigation.

2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

As explained in **2.2 Dawn Raids**, as an enforcement agency, the Board may obtain documents and testimonies in the course of investigating an alleged cartel by:

- examining books, paperwork and documents of undertakings and trade associations, and, if necessary, taking copies of them;
- requesting undertakings and trade associations to provide written or verbal explanations on specific topics; or
- conducting on-site inspections on business premises and inspecting computers and e-mails.

Pursuant to Article 15 of the Law No 4054, case handlers are required to carry with them an authorisation certificate when they conduct on-site inspections showing the subject-matter and purpose of the inspection and explaining that an administrative fine shall be imposed if incorrect information is provided. The case handlers' authorisation for dawn raids is therefore limited to the scope written in this certificate.

2.10 Procedure for Obtaining Other Types of Information

As explained in **2.2 Dawn Raids**, **2.5 Procedure of Dawn Raids** and **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, the Board is entitled to request any public and private undertaking and trade association to provide written or verbal explanations on specific topics whilst conducting on-site inspections within the scope of Article 15 of the Competition Law.

2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

Pursuant to Article 44 of the Competition Law, the Board "may request the provision of any documents and information it deems necessary from the parties and other places concerned". In this regard, even if relevant documents or other evidence are located in another jurisdiction, the company or individual is obliged to produce it/them, as long as the cartel has an actual or potential effect on Turkish markets.

2.12 Attorney-Client Privilege

Correspondence with an independent attorney (ie, an attorney without an employment relationship with the relevant undertaking, regardless of being admitted to the Bar in Turkey) may benefit from attorney-client privilege, provided that it is related to the right of defence; communications with in-house counsel are not covered by this privilege.

In Sanofi Aventis (20 April 2009; 09-16/374-88), the Board recognised that the principles adopted by the European Court of Justice in AM&S Europe v European Commission (Case 155/79 [1982] ECR 1575) could apply to documents protected by attorney-client privilege in Turkey. In CNR/NTSR (20 August 2014; 14-29/496-262), the Board took another major step in favour of the attorney-client privilege by elaborating on the conditions of the European Court of Justice under which the privilege would apply, and concluded that the same rules are applicable in Turkish competition law.

If a document includes correspondence between the undertaking and external counsel (who is not an employee of the undertaking) and is related to the use of the right of defence of the undertaking, this document will be protected under attorney-client privilege (Dow, 2 December 2015; 15-42/690-259; Enerjisa (6 December 2016; 16-42/686-314; Warner Bros, 17 January 2019, 19-04/36-14; Istanbul Department of Customs Association, 20 June 2019, 19-22/352-158)).

If, however, the document includes counsel's advice regarding how to infringe the competition law, or how to cover an infringement, this will not be protected by this principle. Further, the Board has recently decided that an internal e-mail exchange among company employees would not be covered by the attorney-client privilege only because the company's independent counsel was copied throughout the e-mail chain, if the e-mails did not include any statement adressed to or from such independent counsel (Huawei, 14 November 2019, 19-40/670-288).

In another recent decision, the 8th Administrative Chamber of Ankara Regional Administrative Court recognised that attorney-client privilege would be available to the documents related to an ongoing investigation or trial (Enerjisa, 10 October 2018; E: 2018/658), and that any document not directly related to the right to defence (ie, not linked to a pre-investigation, an investigation or a legal action against a decision of the Board) would not be afforded attorney-client privilege.

2.13 Other Relevant Privileges

Article 38 of the Turkish Constitution provides that "no one shall be compelled to make a statement that would incriminate themselves or their legal next of kin, or to present such incriminating evidence".

Given that the ambit of the Board's power to request information is not determined under the Competition Law or secondary legislation, execution of this power raises objections from time to time on the basis of the privilege against self-incrimination. That said, such objections have thus far been rejected by the court appeal.

2.14 Non-cooperation with Enforcement Agencies

Requests for information by the Authority are not resisted, with very few exceptions, since refusal to provide information requested by the Authority may result in an administrative fine. See **2.4 Spoliation of Information** and **2.5 Procedure of Dawn Raids**.

2.15 Protection of Confidential/Proprietary Information

Competition Law, Article 25(2)

The main legislation regarding the protection of commercially sensitive information is Article 25(4) of the Competition Law and Communiqué No 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets (Communiqué No 2010/3). Communiqué No 2010/3 places the burden of identifying commercial secrets and justifying such classification on the undertakings. Therefore, undertakings must request confidentiality from the Board and justify their reasons for the confidentiality of the information or document in writing.

Communiqué 2010/3, Article 15(2)

Under Article 15(2) of Communiqué 2010/3, the Authority may not take confidentiality requests related to information and documents that are indispensable to prove the infringement of competition into consideration. In such cases, the Authority can disclose such information and documents that could be considered as trade secrets by taking into account the balance between public interest and private interest, and in accordance with the principle of proportionality.

Right of Access

The right of access to the file has two legal grounds in the Turkish competition law regime: Law No 4982 on the Right

to Information, and Communiqué No 2010/3. Article 5/1 of Communiqué No 2010/3 provides that the right of access to the case file will be granted upon the written requests of the parties (the investigated undertakings) within the due period during the investigations.

Access to the case file grants the applicant access to information and documents in the case file that do not qualify as internal documents of the Authority or trade secrets of other firms or trade associations. Third parties cannot request access to the file as per Communiqué No 2010/3, but could apply for information as per Law No 4982.

2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

The defence counsel usually raises these arguments in the first, second and third legal defences and the oral hearing. Additionally, if the Authority issues any information requests during a pre-investigation and investigation, the defence counsel may also advocate against cartel allegations where appropriate.

2.17 Leniency, Immunity and/or Amnesty Regime

Pursuant to the Leniency Regulation, full immunity may be granted to the first applicant who provides all the information required under this regulation and before the investigation report is officially served. Employees or officers of the first applicant can also benefit from full immunity.

However, there are several conditions which an applicant must meet in order to receive full immunity from all charges. One condition is that they must not be the coercer of the cartel. If this is the case (ie, if the applicant has forced the other cartel members to participate in the cartel), the applicant and its employees may only receive a reduction of between 33% and 100%.

Other conditions are as follows:

- the applicant is to submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings that are party to the cartel, and specific dates, locations and participants of cartel meetings;
- the applicant is not to conceal or destroy information or evidence related to the alleged cartel;
- the applicant is to end their involvement in the alleged cartel, except when advised by the assigned unit on the ground that to do so would complicate the detection of the cartel;
- the applicant is to keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and
- the applicant is to maintain active co-operation until the Board takes the final decision after the investigation has been completed.

Under the Turkish leniency regime, it is also possible to apply for a marker. As stated above, a cartel member may apply for leniency until the investigation report is officially served. Although the Leniency Regulation does not provide detailed principles on the "marker system", the Authority can grant additional time for applicants to submit the necessary information and evidence.

Eligibility

In order for the applicant to be eligible for a marker they must, at least, provide information on affected products, the duration of the cartel and the names of the parties. A document showing the date and time of the application and granting time to prepare the required information and evidence will be given to the applicant by the assigned unit. A fine reduction may be available for the applicants that do not qualify for full immunity providing that they apply until the investigation report is served and they meet the conditions above.

Accordingly, the second leniency applicant will be eligible for a fine reduction of 33-50%, the third leniency applicant will be eligible for a reduction of 25-33%, and all other applicants will be eligible for a reduction of 16-25%. The same conditions for full immunity above also apply to fine-reduction.

Officers and employees of the relevant companies can also benefit from leniency independent from their companies. Accordingly, the first applicant (provided that there is no leniency application of a relevant undertaking prior to the application of the individual) may benefit from full immunity, the second applicant may be a granted 33-100% reduction, the third applicant may be granted a 25-100% reduction and other applicants may be granted a 16-100% reduction. The same conditions for the leniency application of undertakings also apply to employees and officers.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly from Employees

As mentioned in **2.5 Procedure of Dawn Raids**, the Authority's case handlers can interview employees and officers of undertakings, but if the requested information cannot be provided during the interview, the case handlers may grant additional time to respond to such a request. Therefore, in practice, employees and officers can delay responding to questions when they are

not in a position to provide accurate or complete information, provided that a written response is submitted within the timeframe agreed upon with the case handlers.

3.2 Obtaining Documentary Information from Target Company

As explained in **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony** and **2.10 Procedure for Obtaining Other Types of Information**, pursuant to Article 44 of the Competition Law, the Board "may request the provision of any documents and information it deems necessary from the parties and other places concerned." To that end, as an investigating authority the Board is entitled to seek and obtain any relevant evidence and/or documents related to the cartel activity directly from the target company or other companies and third parties concerned. The Board can either issue information requests to the relevant party or conduct dawn raids to obtain documentary evidence.

3.3 Obtaining Information from Entities Located Outside this Jurisdiction

As explained in **1.6 Extent of Jurisdiction**, the jurisdiction of the Authority is determined on the basis of the "effects theory". Thus, as mentioned in **2.10 Procedure for Obtaining Other Types of Information**, the Authority is able to request information directly from any company involved in a cartel affecting Turkish markets. Companies located outside Turkey are therefore also required to provide these documents.

3.4 Inter-agency Co-operation/Co-ordination

The Board may request information that it deems necessary from public institutions and organisations, undertakings and trade associations. Officials from these bodies are obliged to provide such information within the period fixed by the Board. The Board also has co-operation agreements with various government agencies, including the Public Tenders Authority.

Accordingly, when certain conduct potentially violates both the Competition Law and other laws (such as regulations on public tenders), the Authority co-operates with the relevant authority (as well as the public prosecutor's office when the conduct falls under criminal law) to exchange information.

For instance, in "Medical Consumables" (19 December 2008; 08-74/1180-455), the Authority opened a pre-investigation regarding bid-rigging allegations against medical consumable suppliers in public tenders for medical consumables. During the pre-investigation, the Authority conducted dawn raids but could not find any evidence proving a violation of the Competition Law.

However, the Authority took notice of a parallel criminal investigation of the public prosecutor's office and co-operated with the public prosecutor to collect evidence. Accordingly, the public prosecutor shared its indictment with the Authority, which included numerous recordings of communications regarding price fixing and allocation of tenders among the relevant companies. The Authority imposed administrative fines upon 11 companies that were involved in the cartel.

3.5 Co-operation with Foreign Enforcement Agencies

See **1.7 Principles of Comity**.

3.6 Procedure for Issuing Complaints/ Indictments in Criminal Cases

As indicated in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, the sanctions that could be imposed under the Competition Law are administrative in nature, although bid-rigging activity may be criminally prosecutable under Article 235 et seq of the Turkish Criminal Code. For price manipulation in capital markets, the defendant may also be sentenced to imprisonment for two to five years or incur a criminal fine under Article 106 of the Capital Market Law.

The crimes mentioned above are litigated before criminal courts in Turkey, which are also responsible for acting as the finder of facts, along with the prosecution office. In an investigation process, the accused are entitled to access information possessed by the enforcement agencies unless the judge decides not to allow access to information, upon the request of the prosecutor.

3.7 Procedure for Issuing Complaints/ Indictments in Civil Cases

Under Article 57 of the Competition Law, persons and companies harmed by anti-competitive conduct have a right to claim treble damages plus litigation costs and attorney fees.

The private damages claims must be brought before civil courts in Turkey. In practice, courts do not usually analyse whether there is an anti-competitive agreement or concerted practice, and defer to the Board to render its opinion on the matter, thus treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision rather than decide on the matter themselves, the court decision can be obtained in a shorter period in follow-on actions.

As per Article 195 of the Civil Procedure Code, the parties can request the court to collect certain evidence to support their claim. Upon the request of the relevant party, the court may issue a request for information to official institutions as well as third parties.

Also, the parties themselves could seek information based on the right to information. The right of access to the file has two legal bases in the Turkish competition law regime: Law No 4982 and Communiqué No 2010/3 on the Regulation of the Right to Access to File and Protection of Trade Secrets. Article 5/1 of Communiqué No 2010/3 ensures that the right of access to the case file will be granted upon the written request of the parties, within due period during the investigations. Access to the file can be requested any time until the end of the period for submitting the last written defence.

That said, in order to preserve the confidentiality of the investigation and prevent the destruction of evidence, the Authority may delay access to the file until after the Investigation Report is delivered to the relevant parties (Article 8/2 of Communique No 2010/3). This right can only be used once, unless there has been new evidence obtained during the investigation. Access to the case file enables the applicant to access information and documents that are not specified as internal documents of the Authority or trade secrets of other companies or trade associations.

Law No 4982 has more exceptions to access to file, including information or documents regarding state secrets, intelligence, administrative actions that are not subject to judicial review, information or documents that may harm Turkey's economic interest if disclosed from the scope of the right to information, or those related to administrative investigations and may harm individuals' right to privacy, risk their life or safety, risk the security of the investigation or those which may jeopardise revealing information/documents relevant to the investigation.

3.8 Enforcement Against Multiple Parties

As an enforcement agency in Turkey, the Authority is entitled to take actions against multiple parties in a single proceeding, and in practice the Authority usually opts for this method. Indeed, the Authority actually investigates alleged cartel activity, not only specific undertakings. Although the parties could request the Authority to separate the proceeding, the Authority is likely to continue the proceeding with multiple parties due to various reasons, such as procedural efficiency.

Furthermore, if the Board decides to hold an oral hearing at the end of the investigation, all relevant undertakings involved in the investigation are entitled to attend the hearing (although they may request individual sessions if they need to reveal trade secrets and other confidential information).

3.9 Burden of Proof

The standard of proof adopted by the Board is frequently criticised as being too low. In order to prove an undertaking's participation in cartel activity, the Authority must demonstrate that there was such cartel activity or, in the case of multilateral discussions or co-operation, that the particular undertaking was a participant. The Board has established an extremely low standard of proof concerning cartel activity with a broad interpretation of the Competition Law, and especially the "object or effect of which…" part of Article 4.

The standard of proof is even lower as far as concerted practices are concerned; in practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice but is based on economic and rational business decisions. The Competition Law provides a "presumption of concerted practice", which enables the Board to bring an Article 4 case where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted.

That said, in a majority of decisions, the Board recognised that companies may consciously follow commercial strategies of their competitors and, in the absence of communication between competitors regarding a collusion or exchange of commercially sensitive information, parallel conduct alone will not be sufficient to meet the standard of proof for a cartel.

3.10 Finders of Fact

In civil proceedings, the burden is on the plaintiff to prove the facts of the case, whereas the criminal court is responsible to act as the finder of facts in criminal litigation. Nevertheless, as mentioned above, criminal proceedings are rare in the Turkish competition law regime, and limited to bid-rigging in public tenders and price manipulation.

3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

Any information or document collected through the use of investigative powers is discoverable in court, including emails, telephone calls and an exchange of letters. Legal privilege (confidentiality between the associates and the clients) constitutes an exception for discoverability in court. In any event, civil courts are not authorised to collect evidence independently in antitrust damage actions. The parties must bring all evidence to the attention of the court.

As regards evidence provided to the Authority within a leniency application, the leniency reward does not protect the applicant from liability in other (civil and criminal) proceedings. Pursuant to Article 6 of the Leniency Regulation, information or documents provided by the parties can still be used as evidence before the courts.

As regards proceedings before the Authority, according to Communiqué No 2010/3, no one other than the undertakings under investigation has a right to access the information and documents submitted within the scope of a leniency application. In addition, those undertakings being investigated may refer to such information and documents only for their defence in relation to the case file, and for their applications before the administrative courts.

3.12 Rules of Evidence

The parties must bring all evidence to the attention of the court in civil proceedings. In criminal proceedings, the court collects the evidence to prove a crime.

3.13 Role of Experts

In proceedings before the Authority, the parties are able to submit the analyses and opinions of independent experts, including economists. Although the Authority does not rely solely on economic analyses in cartel cases, it is increasingly recognising the added value of such analyses. The Authority itself has a dedicated department for economic analysis and research (the "Economic Analysis and Research Department"), which assists the case teams where relevant.

In civil law proceedings, depending on the course of the proceeding of the trial, the judge may assign an expert, which could be an economist or part of another discipline, to review the case and evidence from an expertise point of view. The parties may also bring in a consultant to submit an opinion to the court, which could be an expert in a specific area.

3.14 Recognition of Privileges

Please see **2.12 Attorney-Client Privilege**.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

As mentioned in **3.4 Inter-agency Co-operation/Co-ordination**, multiple administrative authorities and criminal courts may initiate proceedings in parallel regarding the same activity.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

It is possible for the Board to impose sanctions itself without bringing suit against the companies and/or undertakings in a court. Administrative fines are regulated in the Competition Law, along with civil liability. Criminal sanctions are not included in the Competition Law, excluding prosecutions on conduct such as bid-rigging in public tenders and price manipulation.

The Authority's fine for cartel activity cannot exceed 10% of the relevant undertaking's turnover generated in Turkey in the financial year preceding the date of the decision to impose a fine (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

4.2 Procedure for Plea Bargaining or Settlement

The Board does not enter into plea bargains. Neither has any mutual agreement on other liability matters (which would have to take the form of an administrative contract) been tested in Turkey. When enacted, the new Draft Proposal for the Amendment of the Competition Law (Draft Law) issued by the Turkish Competition Authority in 2013 is expected to introduce a form of settlement procedure into Turkish cartel enforcement. However, the Draft Law 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. Currently, there are no indications as to whether or not the Draft Law will be renewed but it could be anticipated that there will be no comprehensive and significant changes to the previous version.

4.3 Collateral Effects of Establishing Liability/ Responsibility

Private Damages Claims

As explained in **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**, private damages claims must be brought before civil courts in Turkey. The Board's finding of a cartel is not ipso facto considered as prima facie evidence. In practice, courts do not usually analyse whether there is an anti-competitive agreement or concerted practice, and defer to the Board to render its opinion on the matter, thus treating the issue as a prejudicial question.

Since courts usually wait for the Board to render its decision rather than decide on the matter themselves, the court decision can be obtained in a shorter period in follow-on actions.

Plea-Bargaining and Settlement

As regards plea-bargaining and settlement (see **4.2 Procedure for Plea Bargaining or Settlement**), the Board does not enter into plea-bargain arrangements and there is no settlement procedure in Turkey. Neither has any mutual agreement on other liability matters (which would have to take the form of an administrative contract) been tested in Turkey.

However, as mentioned in **2.17 Leniency, Immunity and/or Amnesty Regime**, pursuant to the Leniency Regulation and the Leniency Guidelines, full immunity may be granted to the first applicant who applies for leniency in accordance with the conditions under the Leniency Regulation before the investigation report is officially served. Employees or managers of the

first applicant can also benefit from full immunity. On the other hand, leniency protects against collateral effects in other proceedings, such as being banned from public tenders.

4.4 Sanctions and Penalties Available in Criminal Proceedings

Please see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **1.4 Definition of "Cartel Conduct"**, for bid-rigging in public tenders and price manipulation. According to Article 235 of the Turkish Criminal Code, individuals who are involved in bid-rigging shall incur a monetary fine or be sentenced to imprisonment from three to seven years. Also, according to Article 106 of the Turkish Capital Market Law, individuals who are involved in price manipulation in capital markets shall incur a monetary fine or be sentenced to imprisonment from two to five years.

4.5 Sanctions and Penalties Available in Civil Proceedings

See **1.3 Private Challenges of Cartel Behaviour/Effects**.

4.6 Relevance of "Effective Compliance Programmes"

In its precedent, the Board has acknowledged the importance of compliance programmes for undertakings (see, eg, Frito Lay, 29.08.2013, 13-49/711-300; Kraft Gıda 7.07.2015, 15-28/345-115) and considered the existence of a compliance programme as an indication of good faith (Unilever 28.08.2012, 12-42/1258-410). However, the Board has also found that a compliance programme would not constitute a mitigating factor when calculating a fine for anti-competitive conduct and rejected such defences (see, eg, Linde Gaz 29.08.2013, 13-49/710-297; Consumer Electronics 7.11.2016, 16-37/628-279).

This being said, in a recent decision the Board took note of the companies' comprehensive compliance efforts, which appear to have factored in the fine calculation (Mey İçki 16.02.2017, 17-07/84-34).

4.7 Mandatory Consumer Redress

Sanctions in governmental proceedings for cartel activities are limited to administrative monetary fines. Thus, consumer redress would not be a mandatory proceeding based on sanctions, but it is the consumers' initiative to obtain remedies.

4.8 Available Forms of Judicial Review or Appeal

Decisions of the Board are administrative acts, so legal actions against them are to be pursued in accordance with the Turkish Administrative Procedural Law, which is a common procedure against the Board's decisions. The judicial review comprises both procedural and substantive review.

As per Law No 6352, which entered into force on 5 July 2012, the relevant parties can appeal against final decisions of the Board, including on interim measures and fines, before the administrative courts in Ankara within 60 calendar days of the official service of the reasoned decision.

As stated in Article 27 of the Administrative Procedural Law, filing an administrative action does not automatically cease execution of the decision of the Board. However, at the request of the plaintiff, the court may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and if the decision is highly likely to be reversed (that is, showing of a prima facie case).

If the challenged decision is annulled in full or in part, the Administrative Court remands it to the Board for review and reconsideration.

The judicial review of the administrative court usually takes about eight to 24 months. The relevant parties can appeal against administrative courts' decisions before the regional courts within 30 calendar days of the official service of the reasoned decision of the administrative court.

As of 20 July 2016, administrative litigation cases have been 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 High State Court.

The regional courts review the case on both procedural and substantive grounds, and their decisions will be considered as final in nature. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the parties can appeal against the decision of the regional court before the High State Court and, therefore, the decision will not be considered final. In such a case, the High State Court 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 High State Court's decision.

The judicial review of the administrative courts and appeal usually take about 24 to 30 months.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

See **1.3 Private Challenges of Cartel Behaviour/Effects**. There is no threshold requirement for private actions under Turkish

law: any person who has been harmed by a competition law violation may claim damages.

In terms of the differences in standards for relief in a private civil action, in the Authority's proceedings, the purpose or intent to restrict competition is considered adequate to prove an infringement of the Competition Law. In civil actions, however, the plaintiff has to demonstrate the wrongful act, fault, damages and the causal link altogether.

As regards the forms of relief that are most commonly sought/obtained, since private action arising from competition law violations is a rather new concept in Turkish competition law, there is no publicly available court decision that has exhausted all appeal stages.

5.2 Collective Action

Turkish procedural law does not allow class actions or procedures. Group actions are permitted under Turkish Procedure Law No 6100, and can be initiated by associations and other legal entities aiming to protect the interest of their members, or determine their members' rights and remove the illegal situation, or prevent any future breach. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The court decision is to cover all individuals within the group.

5.3 Indirect Purchasers and "Passing-On" Defences

Indirect purchaser claims or "passing-on" defences have not yet been tested in the Turkish courts. See **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

See **3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings**.

5.5 Frequency of Completion of Litigation

As explained in **4.2 Procedure for Plea Bargaining or Settlement**, when enacted, the Draft Law is expected to introduce a form of settlement procedure into Turkish cartel enforcement. Also, as mentioned in **5.1 Private Right of Action**, private action arising from competition law violations is a new concept in Turkish competition law and there is no publicly available court decision that has exhausted all appeal stages. Therefore, it is not yet possible to comment on how often the claims of this type proceed to completed litigation as opposed to dismissal or settlement.

5.6 Compensation of Legal Representatives

The amount of attorney fees is based on the value of the claim. Under Article 330 of the Code of Civil Procedure, the court will determine the attorney fee based on the Minimum Attorneyship Fee Tariff, in which the fee of the attorney ranges from 1% to 12% of the value of the claim.

Furthermore, under Article 329 of the Code of Civil Procedure, a malevolent defendant or a complainant who takes legal action although he does not have any legal ground to take such an action could be obliged to compensate the other party's contractual attorney fees, in addition to the amount determined pursuant to the Minimum Attorneyship Fee Tariff.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

As stated in **5.6 Compensation of Legal Representatives**, under Article 329 of the Code of Civil Procedure, a complainant who takes legal action although he does not have a right to do so could be obliged to compensate the other party's contractual attorney fees, in addition to the amount determined pursuant to the Minimum Attorneyship Fee Tariff, along with the litigation costs. However, the amount of the cost (defence costs and/or attorneys' fees) depends on the nature of the case.

As mentioned in **5.2 Collective Action**, class actions are not yet adopted by Turkish law.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

As a general rule, according to the Turkish law of procedure, plaintiffs or defendants are able to appeal the decision of the general civil courts before the Regional Courts of Civil Chambers within two weeks of the reasoned general civil courts' decision. Parties to the lawsuit are also able to appeal the decision of the Regional Courts of Civil Chambers within two weeks of the reasoned appealable decision before the High Court of Appeal.

6. Supplementary Information

6.1 Other Pertinent Information

There are no other items of information that are pertinent to an understanding of the process, scope and adjudication of claims involving alleged cartel conduct in Turkey.

6.2 Guides Published by Governmental Authorities

The Authority has published two important guidelines regarding cartel conduct:

- Guidelines on the Explanation of the Regulation on Active Co-operation For Detecting Cartels (www.rekabet.gov.tr/Dosya/guidelines/14-pdf); and
- Guidelines on Horizontal Co-operation Agreements (www.rekabet.gov.tr/Dosya/guidelines/7-pdf).

There is also an "application guideline" on the Authority's website, which provides basic information on Article 4 infringements and the leniency procedure.

7. COVID-19

7.1 Cartels and COVID-19

Unlike some competition authorities elsewhere in the world, the Authority has not requested the cooperation of applicants with special circumstances and they have not announced any limitation on their bandwidth either. While things can change rapidly, it appears to be business as usual so far at the Authority. It is, however, recommended for businesses to expect a longer investigation process as the COVID-19 positive numbers are exponentially growing and the state administrative measures are getting tougher.

In press releases on 23 and 25 March 2020; the Authority stated that in food markets, especially fresh vegetables and fruits, they observed excessive price increases. The Authority emphasised that it will continue closely monitoring these price increases and will have zero tolerance for anti-competitive conducts.

Accordingly, the Authority appears to be adamant that they will not allow companies to take advantage of the current situation in the detriment of the consumer welfare and effective competition. Investigations in these markets could be expected in the near future.

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services, combining a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of clients in their international and domestic operations. The competition law and regulatory department is led by partner Gönenç Gürkaynak, along with three partners, four counsel and 40 associates. In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

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