

IMMUNITY & SANCTIONS 2020 KNOW HOW

Turkey

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GCR INSIGHT

Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

Under the Turkish leniency regime, the first undertaking to file a leniency application that fulfils certain criteria before a pre-investigation is launched by the Turkish Competition Authority (Authority) may benefit from total immunity. In addition, even after the Authority has launched a pre-investigation, the first applicant could benefit from total immunity if:

- the application is made before the service of investigation report.
- at the time of application, the Turkish Competition Board (Board) does not possess any evidence implicating a cartel infringement

The Board has discretionary power in deciding whether the evidence in its possession suffices to conclude that there is an infringement or not.

As per article 16 of Law No. 4054 on the Protection of Competition (Law No. 4054), employees or managers of the undertakings concerned who had a determining effect on the creation of the violation might face fines of up to five per cent of the fine imposed on the undertaking. However, employees or managers of the first applicant would also benefit from the full immunity so long as the applicant has not been the coercer. If the applicant has forced other cartel members to participate in the cartel, there would only be a reduction of between 33 and 50 per cent for the undertaking and between 33 and 100 per cent for the employees or managers.

2 Do the protections extend to current and former officers, directors and employees?

As stated under question 1, the current employees of a cartel party can also benefit from the same level of leniency or immunity that is granted to the undertaking. Indeed, according to the Regulation on Active Cooperation for Detecting Cartels (Leniency Regulation), a manager or employee of a cartel member may also apply for leniency until the investigation report is officially served. Such an application would be independent from (if any) the application by the cartel member itself. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The conditions for immunity or reduction are the same as those designated for the cartel members. On the other hand, under the Guidelines on the Explanation of the Leniency Regulation (Leniency Guidelines), there are no barriers before former managers and employees benefiting from the applications filed by undertakings. However, there is no precedent yet for the status of former employees .

3 Is immunity available after an investigation begins?

Yes. As stated under question 1, even after the Authority has launched a pre-investigation, the first applicant can benefit from total immunity if:

- the application is made before the investigation report is served; and
- at the time of the application, the Board does not possess any evidence implicating a cartel infringement.

Therefore, immunity is available during the investigation up until the service of the investigation report. Immunity or fine reduction is not available after the service of the investigation report.

4 What are the eligibility requirements before an investigation begins?

Pursuant to the Leniency Regulation, the following conditions must be met for a cartelist to benefit from immunity or a fine reduction. The Leniency Regulation sets out the governing principle when assessing whether these conditions have been fulfilled as “interpretation to the advantage of the applicants”. The eligibility conditions are as follows:

- the applicant must submit information on (i) the products affected by the cartel; (ii) the duration of the cartel; (iii) names of the cartelists; (iv) specific dates, locations and participants of the cartel meetings; and (v) other information or documents about the cartel activity. In this regard, the applicant must submit all information and documents on the cartel it has in its possession. The required information may be submitted verbally. The officers may put this information in a written form;
- the applicant must avoid concealing or destroying information or documents on the cartel activity;

- unless the Authority's Cartel and On-Site Inspection Support Unit (Leniency Division) decides otherwise, the applicant must stop taking part in the cartel;
- unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served;
- the applicant must continue to actively cooperate with the Authority until the final decision on the case has been rendered;
- the application must be made independent from other undertakings, managers and employee parties to the cartel as it is not possible for the cartel members to make joint applications to benefit from the leniency regulation; and
- for immunity, the applicant must not coerce other members of the cartel into infringement, if so they will lose the right to immunity but can benefit from reductions in fines.

On a separate note, it is not required that the Authority should lack sufficient evidence to take a decision to conduct on-site inspections or the specific requirement for the submission of documents and information sufficient to conduct on-site inspections.

5 What are the eligibility requirements after an investigation begins?

Other than the above-stated conditions, for an undertaking to benefit from full immunity after the investigation begins, the Authority must not be in possession of any evidence implicating a cartel infringement and the application must be made before the investigation report is served. Additionally, as per the Leniency Guidelines, the possibility to be granted immunity from fines is deemed higher for those who apply soon after the Board's decision to conduct a pre-investigation or the preliminary inquiry is initiated compared to those who apply at later stages.

6 Will the applicant have to admit to a violation of law?

The leniency applicant must admit the violation of law and must provide the Authority with the evidence showing the violation of law.

7 Is immunity available to an applicant that admits exchanging commercially sensitive information with a competitor but does not admit entering into an agreement to fix prices or allocate markets?

Admitting the exchange of commercially sensitive information would suffice considering the Board's recent decision on 13 financial institutions. In this decision (Corporate Loans 28.11.2017; 17-39/636-276), the Board launched an investigation against 13 financial institutions active in corporate and commercial banking in Turkey. The investigation started with Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU)'s leniency application on an alleged cartel on loan conditions. The Board ultimately found that some of these 13 companies violated article 4 of Law No. 4054 by way of exchanging competitively sensitive information such as price, amount and maturity of loans, however, did not declare the violation as a cartel. The Board imposed an administrative monetary fine on ING Bank AŞ and The Royal Bank of Scotland Plc. in the amount of 21.1 million lira and 66.4,000 lira respectively. Contrary to its decisional practice and the explicit rule in the Leniency Regulation that the leniency regime only applies to cartel cases, the Board granted BTMU full immunity. The relevant decision suggests that the Board may not require admitting entering into an agreement to fix prices or allocate markets to benefit from immunity.

8 Is immunity available to an applicant that admits entering into a vertical price-fixing agreement if that agreement does not also include horizontal collusion?

According to the Regulation on Leniency, the leniency programme is only available for cartellists. It does not apply to other forms of antitrust infringement. A definition of "cartel" is provided in section 3 of the Leniency Regulation for this purpose: 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 quotes, and bid rigging. Unless the price fixing is at least with a potential competitor, it would not be possible to benefit from the leniency regime.

9 Is immunity available to an applicant that admits entering into an agreement not to solicit or hire another company's employees ("no-poach" agreements)?

As mentioned in question 8, immunity is available only for cartels. The Board acknowledged in the past that no-poach agreements could be anticompetitive (see, eg, TV Series Producers, 28.07.2005, 05-49/710-195; Private Schools, 03.03.2011, 11-12/226-76). Following the recent trend in other jurisdictions, the Board has looked into such arrangements more closely in a number of decisions and held that these agreements too can fall under the definition of "cartels" (see, eg, BFIT 19-06/64-27, 07.02.2019; Izmir Container Transporters 02.01.2020, 20-01/3-2). Indeed, the Board found in these decisions that wage-fixing/no-poaching agreements were no different from buying cartels. Based on this precedent, it may be concluded that immunity is available also for applicants regarding no-poaching agreements.

10 Are ringleaders or initiators of the conduct eligible?

To benefit from full immunity, the applicant must not have been the coercer. If the applicant has coerced any other cartel members to participate in the cartel, it will lose its right to immunity and a reduction is only available between 33 and 50 per cent for the undertaking and between 33 and 100 per cent for the employees or managers. Thus, coercers can only benefit from a second degree reduction in fine. Coercion can only be established when it is demonstrated, by hard evidence, that the applicant used physical violence, or severe economic pressure with a high probability of market foreclosure such as collective boycotts, or related threats. By example, being the largest player in the market, threatening to launch a price war in case of a refusal to participate in the market, lowering the price so as to reduce profitability or using various mechanisms to punish non-compliance with the collusion would not be interpreted as coercion to infringement.

11 When must the applicant terminate its involvement in the conduct?

The applicant must stop taking part in the cartel to benefit from leniency unless otherwise instructed by the Leniency Division. The Leniency Division evaluates whether the applicant must end its involvement in the cartel based on the dynamics of the case at hand. Therefore, the applicant must terminate its involvement in the cartel before the leniency application is submitted.

In addition, pursuant to paragraph 41 of the Leniency Guidelines, if the applicant suddenly terminates its involvement in the cartel before on-site inspections were conducted, other members of the cartel may become suspicious and start spoiling evidence. Therefore, under exceptional circumstances, leniency applicants may be asked to maintain the cartel, at least until the on-site inspections are conducted.

12 What constitutes termination of the conduct?

Neither the Leniency Regulation nor the Leniency Guidelines contain any explicit provision in terms of what constitutes termination of the conduct. However, termination of the conduct could be defined as ceasing to take part in the cartel arrangement.

13 Will the applicant be required to make restitution to victims?

Article 57 et seq of Law No. 4054 entitles any party injured in its business or property by reason of a competition law violation to sue the violators for three times their actual damages or the profits gained or likely to be gained by the violators plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. An immunity or leniency does not have a binding effect on the court so third parties that are aggrieved by the violation can sue offending parties before a civil court despite the existence of an immunity or leniency.

14 Can more than one applicant qualify for immunity?

Under the Turkish leniency regime, only the first applicant can benefit from full immunity and other applicants can only qualify for reduction in fines based on their marker status and they would benefit from a reduction of fine.

In addition, even in a case that more than one undertaking decides to make a joint application for leniency, as only one undertaking can be granted immunity, the joint applications would be void.

15 Can an applicant qualify if one of its employees reports the conduct to the authority first?

According to the Leniency Regulation, a manager or employee of a cartel member may also apply for leniency until the investigation report is officially served. Such an application would be independent from, if any, applications by the cartel member itself.

16 Does the afforded protection extend to any non-antitrust infringements?

No, under the Turkish leniency regime, the protection is limited to antitrust infringements and is solely applicable for cartel cases.

Immunity application and marker process

17 What confidentiality assurances are given to the first applicant to report?

Owing to the confidential nature of leniency programmes, information on applicants and their employees and managers is not made public by the Authority until the investigation report is officially served, unless the Leniency Division instructs otherwise.

Under the principles set out under the Leniency Regulation, the applicant (the undertaking or employees/managers of the undertaking) must also keep the application confidential until the investigation report is officially served, unless it is otherwise requested by the Leniency Division.

Nevertheless, to the extent the confidentiality of the investigation will not be harmed, the applicant (or other cooperating parties) can provide information to other competition authorities or institutions, organisations and auditors. Under paragraph 44 of the Leniency Guidelines, if the employees or personnel of the applicant undertaking disclose the leniency application to the other undertakings and breach the confidentiality principle, the Board will evaluate the situation on a case-by-case basis, based on the criteria of whether the person at issue is a high-level manager, or whether the Board was notified promptly enough after the breach or not.

Also, a leniency applicant or other cooperating party can request confidentiality of trade secrets under Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No 2010/3) published in the Official Gazette numbered 27556 and dated 18 April 2010 or confidentiality of information.

18 Does the authority publish guidance regarding the application of the programme?

Yes, the Authority published and announced the Leniency Guidelines on 19 April 2013. Moreover, the Board's reasoned decisions are being published on the Authority's website which shed a light on the application of Turkish competition law legislation.

19 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

Considering the purpose and nature of leniency programmes, it is quite unlikely for the rules of obtaining immunity in two different jurisdictions to conflict. There could only be minor differences, depending on the judicial system of each jurisdiction. Besides this, the Turkish leniency regime is closely modelled on the European Union (EU) leniency regime. It is akin to, if not the same as the EU leniency regime.

20 What is the initial process for making an application?

The initial process for making an application is obtaining a marker. This marker system allows all leniency applicants to protect their place in the queue for a period of time. This grace period can be granted by the Authority

in order to allow applicants to submit the necessary information and evidence provided under the Leniency Regulation and to complete their applications.

If the information and documents are completed within the grace period granted by the Leniency Division, the application will be considered to be filed on the date when the grace period was granted. Thus, applicants who want to benefit from the Leniency Regulation may either directly proceed to make formal application that includes all the necessary information or document or apply for a marker, either verbally or in written form, to gather the required information and documents. If the information required for a marker is submitted verbally, the submitted information should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives.

Further, the undertakings that wish to benefit from the leniency can anonymously call the Leniency Division in order to obtain information on whether they would be able to benefit from the immunity or reduction in fines in case they applied. In this case, those who wish to apply would need to provide sufficient information on the product and market related to the cartel to allow for an evaluation on the subject. The level of information required to allow an evaluation would vary depending on the specifics of the individual case.

21 What information is required to secure a marker?

Pursuant to the Leniency Regulation, to secure a marker the applicant should provide rough information on:

- the products affected by the cartel;
- the duration of the cartel; and
- the names of the cartelists.

22 How much time will an applicant have to perfect its marker?

The Leniency Regulation does not provide an explicit provision concerning “the period that could be determined”. Such period shall be set on the dynamics of each individual case. However, according to the Leniency Guidelines, this grace period shall not be more than a month in principle.

23 Can the deadline for perfecting the marker be extended?

According to paragraph 59 of the Leniency Guidelines, the Leniency Division may extend the period owing to valid justifications such as examination of thousands of documents, interviewing dozens of employees meaning it struggles to have sufficient time. Paragraph 60 of the Leniency Guidelines further provide that requests for a time extension should be considered carefully since they may increase the possibility of taking measures that diminish the success of the investigation, and the possibility of leaking information to other cartel members. Thus, in the letters concerning time and time extensions, it would be beneficial to provide detailed information on the kinds of examinations that the applicant needs to conduct within the undertaking and the reason why the set time is essential for the examinations and whether the cartel formation is still in existence.

24 What is required to perfect the marker?

To perfect the marker within the time frame granted by the Authority the applicant must submit:

- information on the products affected by the cartel;
- information on the duration of the cartel;
- names of the cartelists;
- dates, locations and participants of the cartel meetings; and
- other information or documents about the cartel activity.

Apart from the above listed information confined to specific aspects, submitting all types of books, documents, information and other resources which may be used to substantiate the meetings concerning the cartel (including invoices, notes, organisers, meeting minutes, internal-external letters, travel records, reports, working texts, tables, electronic records, computer printouts, credit card statements and detailed phone records) will also serve for the purpose of perfecting the marker.

25 Can the scope of the marker be expanded if additional information is discovered by the applicant?

For the Leniency Division to grant the requested period of time, the information on the products that the cartel effects, duration of the cartel and information about the names of the cartel members should be submitted by the applicant. Therefore, the scope of the marker should be well defined. Even though it is not yet regulated or tested under the Turkish leniency regime, it is quite likely that the Authority will be reluctant to expand the scope of the marker, especially in cases where there is already a second applicant.

Immunity cooperation obligations

26 Can an applicant lose its marker if a second applicant comes forward with better information?

So long as the first applicant perfects its marker within the time frame granted by the Authority by submitting the information listed in question 24, there will be no reason for the first the applicant to lose its marker even if the second applicant comes forward with better information obtained during internal investigation.

27 What if the applicant's investigation reveals that no violation exists?

Although there is no explicit principle for dealing with this scenario under the Turkish leniency regime, if the applicant's investigation conducted within the undertaking reveals that no violation exists, and it failed to demonstrate a violation, it is highly likely that by the end of the marker duration the application would be void.

28 What if the authority decides not to investigate?

Where the Board determines that no violation exists, the Board would not investigate the matter further. Although such a scenario is not regulated under the legislation, since there would not be any investigation and potential fine to be imposed to the undertaking, it is highly likely that the leniency application would be invalid.

29 What is the applicant required to produce?

The applicant should substantiate the existence of the infringement. To that end, the applicant must provide information on the products affected by the cartel, duration of the cartel, names of the cartelists, dates, locations and participants of the cartel meetings and other information or documents about the cartel activity. In this regard, the applicant must, submit all information and documents on the cartel they have in their possession. Moreover, the applicants are also obligated to submit any new information or documents they receive until the Board takes its final decision following the conclusion of the investigation.

30 Will the applicant be required to make a written confession?

Even though the applicant is required to accept its involvement in the violation, the applicant is not required to make a formal written confession under the Turkish leniency regime.

31 Can third parties obtain access to the materials provided by the applicant?

According to paragraph 67 of the Leniency Guidelines, in accordance with Communiqué No. 2010/3, persons other than the ones under investigation, for example, complainants, cannot access the documents submitted under leniency application. Also, those who are under investigation can request access to the information and documents used as evidence in the cartel after the investigation report is served by the Authority and use these documents solely in relation to the defence and administrative judiciary purposes limited to the file. In any event, the content that other investigated undertakings could access would be the non-confidential redacted versions of such documents.

Granting immunity

32 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

According to paragraph 76 of the Leniency Guidelines, the Board may not grant immunity to the applicant in cases where one or more of its employees refuse to cooperate. In its decision, the Board will consider the facts such as the number of executives or employees who do not cooperate with the Authority, their positions within the undertaking and the effort made by the undertaking to enable these individuals' cooperation. Therefore, in practice, granting immunity or application of any reduction to the undertaking and whether it will impose any fine to the non-cooperating manager or employee is at the Board's sole discretion.

33 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

According to article 6 of the Leniency Regulation, the undertaking must cooperate with the Leniency Division until the final decision of the Board. Therefore, if one of its employees engages in obstructive conduct the undertaking may lose its protection. It is up to the Board's discretion whether to revoke the immunity. If, for instance, a manager informs the managers of other cartellists on the leniency application of its company, the applicant may lose its immunity protection; however, the applicant may still receive a fine reduction due to its significant contribution to the investigation (paragraph 74 of the Leniency Guidelines).

34 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

The applicant is not explicitly required to provide materials protected by attorney–client privilege under the Turkish leniency regime. Correspondence between the outside counsels and the undertaking concerned are classified as confidential and privileged and protected under the attorney-client privilege if they are related to the use of the right of defence of the undertaking (Warner Bros 17.01.2019, 19-04/36-14). The request for reviewing these documents could be rejected. However, the correspondence between the undertaking concerned, its employees and internal lawyers does not benefit from the attorney–client privilege [regardless of whether the outside counsel is copied or the correspondence is related to legal matters (Huawei 07.08.2019, 19-28/433-M)].

Individual immunity or leniency

35 Does the existence of an effective compliance programme affect whether an applicant meets the eligibility requirements?

There is no specific provision in the Leniency Regulation indicating that compliance programmes may have a positive impact on the eligibility assessment. That said, the Leniency Regulation provides that in the relevant assessment the Board will interpret the relevant conditions favourably for the applicants.

36 Does the authority consider the existence of an effective compliance programme at the time it becomes aware of an infringement when determining the leniency benefits granted?

Compliance programmes are not listed among the eligibility requirements for leniency (see question 4) or mitigating factors (see question 59). 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).

37 Will the applicant be required to implement or enhance a compliance programme to obtain leniency benefits?

There is no such requirement to obtain leniency benefits.

38 How does the authority announce its promise not to charge or sanction?

Upon the proper application for leniency, the Board would grant provisional acceptance to the applicant when it decides whether to launch a full-fledged investigation into the matter after taking the opinion of the Leniency Division and serves it solely to the applicant (ie, owing to the confidentiality reasons the outcome of the application is not made public). Final acceptance is subject to the applicant's continued cooperation throughout the investigation. The final acceptance occurs with the final decision of the Board.

39 Does the authority put its commitment in writing?

Yes, the Board issues its decision regarding the leniency application in written form.

40 Who is given access to the document?

The document containing the decision of the Board on the leniency application can only be seen by the applicant until the investigation report is served due to the confidentiality.

41 Does the authority publish a model letter for conferring immunity?

There is no model letter for conferring immunity published by the Authority. Upon application, the Board grants its written decision.

42 Is there an individual immunity programme?

Yes, according to article 7 of the Leniency Regulation, the employee or executive of the undertaking that applies for leniency and provides the information and documents specified in article 9 of the Leniency Regulation (see, first bullet point in question 4) before the Authority conducts its preliminary investigation or after the preliminary investigation up until the investigation report is officially served will not be subject to any fines.

43 What is the process for applying?

The application process is the same as the process for undertakings, see question 20 et seq.

44 What are the criteria for qualifying?

In cases where the manager or employee applies before the pre-investigation or after the pre-investigation up until the service of the investigation report, and provided that the Authority does not already have sufficient evidence to find a cartel, full immunity from the fine can be granted, provided that the applicant is not the ringleader.

In addition, in cases where the manager or employee applies as of pre-investigation until the service of investigation report, the first applicant will be totally immune. The second applicant can be granted 33 per cent to 100 per cent reduction in fines, third applicant can receive a 25 per cent to 100 per cent and subsequent applicant(s) can benefit from a reduction of 16 per cent to 100 per cent.

Revocation of immunity

45 On what basis can corporate immunity be revoked?

In cases where the conditions stated in article 6 of the Leniency Regulation are not met (as set out under question 4), the leniency can be revoked by the Board.

Within this framework, article 6(6) of the Leniency Regulation states that, where the immunity is revoked on the grounds that conditions stated under the first prong of article 6 of the Leniency Regulation (set out in question 4) are not fulfilled, or the applicant coerced the other undertakings that are members of the alleged cartel, the undertaking may be granted a 33 per cent to 50 per cent reduction in fine due to its contributions to the investigation. In addition, if immunity is revoked for an undertaking due to the reasons mentioned above, the managers and employees of the undertaking who admit to the violation and enter into cooperation may still be granted full immunity or the fine to be imposed on them may be reduced by at least 33 per cent upon the discretion of the Board.

46 When can it be revoked?

When the conditions stated under the first prong of article 6 of the Leniency Regulation that must be met to be granted immunity (set out in question 4) are not fulfilled, the Board can revoke the immunity.

47 What notice is required to revoke?

The Board issues its written decision on the revocation of the immunity granted to the undertaking.

48 Can the applicant file a judicial challenge to a decision to revoke?

As per article 7 of Law No 2577 on Administrative Procedure, the administrative decisions of the Board can be challenged before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the justified (reasoned) decision of the Board by the parties. As per article 27 of the Administrative Procedure, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide the stay of the execution if:

- the execution of the decision is likely to cause serious and irreparable damages; and
- the decision is highly likely to be against the law (ie showing of a prima facie case).

Reduction in sanctions

49 Does the leniency programme allow for reductions in sanctions?

Yes, in cases where the applicant fails to be granted full immunity, they can still be granted reduction in fines under certain conditions. For details, see question 50. For mitigating factors please refer to question 59.

50 What is the process for seeking a reduction in sanctions?

According to the Leniency Regulation, those who submit applications concerning the same cartel after the first and the second applicant will also be entitled to receive a reduction in fines according to their order of application. In this regard, the second and third undertaking to file an appropriately prepared application could receive a fine reduction in cases where the conditions stated under article 6 of the Leniency Regulation (which are set out under question 4) are met. The second applicant undertaking to file a correctly prepared application would receive a 33 per cent to 50 per cent reduction of the fine and its employees and managers, who actively cooperate with the Authority would benefit from a reduction between 33 per cent and 100 per cent. The third applicant would receive a 25 per cent to 33 per cent reduction and its employees and managers, who actively cooperate with the Authority, would benefit from a reduction of between 25 per cent and 100 per cent. The subsequent applicant undertakings would receive a 16 per cent to 25 per cent reduction and their employees and managers would benefit from a reduction of between 16 per cent and 100 per cent.

In cases where the Authority is in possession of any evidence implicating a cartel infringement by the time application is made, the first applicant could also be granted a fine reduction instead of full immunity.

51 Is there a marker process similar to immunity applications?

Yes, the marker process for the reduction in a fine is the same as the marker process for the immunity applications.

52 Are the reductions in sanctions fixed or discretionary?

The range of the reductions is regulated under the Leniency Regulation and the Board has discretionary power to apply the reduction within the ranges prescribed in it (see question 50).

53 How are the reductions in sanctions calculated?

The range of the reduction is already determined by the Leniency Regulation and the Board has discretionary power to apply the reduction based on the dynamics of each case.

54 Are there sentencing guidelines?

Yes. In February 2009, the Board announced the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position.

Cooperation obligations for sentencing reductions

55 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

According to articles 5 and 8 of the Leniency Regulation, if the applicant is the first to provide the relevant evidence which led to an increase in the fine, in particular because extending the duration of the fine, such evidence will not be taken into account in the fine against the relevant applicant.

56 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

According to article 5 of the Leniency Regulation, 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 who actively cooperate with the Authority would also benefit from a reduction of between 33 and 100 per cent.

57 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

Yes, Amnesty Plus is regulated under article 7 of the Regulation on Fines.

58 Does the competition authority publish guidance regarding sentencing reductions?

Yes. In April 2013, the Board published the Leniency Guidelines.

59 Does the authority provide for "Leniency Plus" benefits?

Parties who are unable to benefit from immunity in an investigation concerning a particular market and file the first application concerning a cartel in a different market, will both benefit from immunity from fines in relation to the cartel in the latter market and from additional reduction in fines imposed due to the cartel in the former market.

According to article 7 of the Regulation on Fines, imposition of fines for the undertaking which cannot benefit from immunity under the Leniency Regulation will be decreased by 25 per cent if it provides the information and documents specified in article 6 of the Leniency Regulation (see question 4) prior to the Board's decision of pre-investigation in relation to another cartel.

60 How is the Leniency Plus discount calculated?

The amount of the reduction is regulated in the Regulation on Fines and explained further in question 59.

61 Are the cooperation obligations similar to those for immunity applicants?

Yes, the cooperation obligations are same as immunity applicants. The obligations are stated under first prong of article 6 of the Leniency Regulation (see question 4). See also questions 20 and 21.

62 Will the applicant be required to make a written confession?

Even though the applicant is required to accept its involvement in the violation, the applicant is not required to make an official written confession.

63 Can third parties obtain access to the materials provided by the applicant?

Undertakings and persons other than the ones under investigation, for example, complainants, cannot access the documents submitted under a leniency application (see question 31).

64 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

This issue is not clearly settled under the Turkish competition law legislation. However, the Board may not grant a reduction in fines to the applicant in cases where one or more of the firm's employees refuse to cooperate. In its decision, the Board considers the number of executives or employees who do not cooperate with the Authority, their positions within the undertaking and effort made by the undertaking to enable these persons' cooperation. To that end, in practice, it is up to the Board's discretion to apply a reduction or not and whether it will impose any sanction to the non-cooperating manager or employee is at the Board's sole discretion.

65 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

According to article 6 of the Leniency Regulation, the undertaking must cooperate with the Leniency Division until the final judgment of the Board. Therefore, if one of its employees engages in obstructive conduct, the undertaking may lose its protection. The decision of revocation will be given by the Board based on the dynamics of each case.

66 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

The applicant is not required to provide materials that are protected by attorney-client privilege. See the explanations under question 34 for further information regarding the attorney-client privilege.

67 Can an applicant challenge the amount of the reduction of sanctions?

As per article 7 of Law No 2577 on Administrative Procedure, the administrative decisions of the Board can be challenged before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the Board's reasoned decision. Therefore, a decision to revoke immunity can also be appealed. See the explanations under question 48.



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Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School and is qualified to practise in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and European Commission competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish with various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.



Burcu Can

**ELIG Gurkaynak
Attorneys-at-Law**

Burcu Can is a partner at ELIG Gürkaynak Attorneys-at-Law. She graduated from Ankara University, Faculty of Law in 2008. With close to 10 years of competition law experience, Burcu relocated from Brussels to Istanbul to join ELIG Gürkaynak in 2018.

While more than half of this time, over five years, was devoted to the Turkish Competition Authority as a competition expert case handler, Burcu also worked for many years at the Brussels office of one of the top international law firms as a competition lawyer.

During her years at the Turkish Competition Authority, Burcu took part in leading antitrust and merger cases concerning banking, finance, motor vehicle and transportation sectors, contributed to the preparation of secondary legislation for competition law and several International Competition Network projects.

In addition to obtaining an LLM degree from Harvard Law School, Burcu also has a master's degree in commercial law from Gazi University in Turkey. Burcu is a member of the New York Bar and the Istanbul Bar Association.

ELİG
GÜRKAYNAK

Attorneys at Law

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by partner Gönenç Gürkaynak, 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.

During the past year, ELIG Gürkaynak has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence projects in investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 antitrust education seminars to employees of its clients.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis on a wide range of business transactions that almost always involve antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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