THE CARTELS AND LENIENCY REVIEW

NINTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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Editors
John Buretta and John Terzaken

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 29 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource to the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as consider the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition

authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 29 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the ninth edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

John Buretta
Cravath, Swaine & Moore LLP
New York

John Terzaken
Simpson Thacher & Bartlett LLP
Washington, DC

January 2021

Chapter 27

TURKEY

Gönenç Gürkaynak[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). In 2020, Competition Law was subject to essential amendments which passed through the Grand National Assembly of Turkey (the Turkish Parliament) on 16 June 2020, and entered into force on 24 June 2020 (the Amendment Law) – on the day of its publication in Official Gazette No. 31165.

The Competition Law finds its underlying rationale in Article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The Competition Law is similar European Union law and the Amendment Law seeks to add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to European Union law.

The applicable provision for cartel-specific cases is Article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

Article 4 is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices 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. Article 4 does not set out a definition of 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

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

Article 4 sets out a non-exhaustive list of restrictive agreements that is, to a large extent, the same as Article 101(1) of the TFEU. In particular, it prohibits agreements that:

a directly or indirectly fix purchase or selling prices or any other trading conditions;

b share markets or sources of supply;

c limit or control production, output or demand in the market;

d place competitors at a competitive disadvantage or involve exclusionary practices, such as boycotts;

e apart from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and

1 Gönenç Gürkaynak is the founding partner at ELIG Gürkaynak Attorneys-at-Law.

f conclude contracts in a manner contrary to customary commercial practice, subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

The list is intended to generate further examples of restrictive agreements.

The Competition Law authorises the Board to regulate, through communiqués, certain matters under Competition Law, such as Communiqué No. 2010/2 on Oral Hearings Before the Board, which regulates the procedures under which oral hearings are held before the Board, and Communiqué No. 2012/2 on the Application Procedure for Infringements of Competition, which regulates the procedures and principles related to applications to the Turkish Competition Authority (the Authority) on infringement of Article 4, 6 or 7 of the Competition Law.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels (the Leniency Regulation), entered into force on 15 February 2009. Moreover, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) sets out detailed guidelines as to the calculation of monetary penalties applicable in the case of an antitrust violation.

The Board published the Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels (the Leniency Guideline) on 19 April 2013. This Guideline was prepared to provide certainty in interpretations, to reduce uncertainty in practice and, as a requirement of the transparency principle, to provide guidance for undertakings to enable them to benefit from the leniency programme more efficiently.

II COOPERATION WITH OTHER JURISDICTIONS

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

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

The research department of the Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in to assess their results, and submits its recommendations to the Board. A cooperation protocol was signed on 14 October 2009 between the Authority and the Turkish Public Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority's actions.

Nevertheless, the interplay between jurisdictions does not materially affect the way the Board handles cartel investigations. The principle of comity is not included as an explicit provision in the Turkish Competition Law. Cartel conduct (whether Turkish or non-Turkish) that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on non-Turkish markets.

There is no regulation under the Competition Law on restricting or supporting international cooperation regarding extradition or extraterritorial discovery. Nevertheless, in the same way as many other competition authorities, the Authority faces various issues in which international cooperation is required. In this respect, there have been various decisions[2] for which the Authority has requested cooperation on dawn raids, information exchange, notifications and collection of monetary penalties from the competition authorities in other jurisdictions via the Ministry of Foreign Affairs and the Ministry of Justice. However, the Authority has been unsuccessful in these requests.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Turkey is an 'effects theory' jurisdiction in which the main concern is whether the cartel activity has affected the Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, unless there is an effect on Turkish markets.[3] The Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly because of enforcement handicaps (such as difficulties of formal service). The specific circumstances surrounding indirect sales have not been tried under Turkish cartel rules. Article 2 of the Competition Law could potentially support an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside Turkey does not in and of itself produce effects in Turkey.

The underlying basis of the Board's jurisdiction is found in Article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent that they have an effect on a Turkish market, regardless of where the conduct takes place.

The Competition Law applies both to undertakings and associations of undertakings. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Therefore, the Competition Law applies to individuals and corporations alike if they act as an undertaking.

The Amendment Law introduces the *de minimis* principle under Article 41 of the Competition Law, with the aim to steer direction and public resources to more significant

2 The Authority's *Elektrik Turbini* Decision No. 04-43/538-133 dated 24 June 2004, *Ithal Komur* Decision No. 06-55/712-202 dated 25 July 2006, *Ithal Komur II* Decision No. 06-62/848-241 dated 11 September 2006, *Cam Ambalaj* Decision No. 07-17/155-50 dated 28 February 2007 and *Condor Flugdienst* Decision No. 11-54/1431-507 dated 27 October 2011.

3 See, for example, *the suppliers of rail freight forwarding services for block trains and cargo train services* No. 15-44/740-267 dated 16 December 2015, *Güneş Ekspres/Condor* No. 11-54/1431-507 dated 27 October 2011, *Imported Coal* No. 10-57/1141-430 dated 2 September 2010, *Refrigerator Compressors* No. 09-31/668-156 dated 1 July 2009, *Sisecam/Yioula* No. 07-17/155-50 dated 28 February 2007 and *Gas Insulated Switchgears* No. 04-43/538-133 dated 24 June 2004.

violations. Accordingly, certain agreements and practices exceeding thresholds yet to be determined by the Board (i.e., turnover or market share, or both) do not to benefit from the *de minimis* principle. Moreover, the *de minimis* principle is not applicable to hardcore violations including price-fixing, territory or customer sharing and restriction of supply. The Board is yet to enact secondary legislation that is expected to provide details on the process and procedure related to application of the *de minimis* principle.[4]

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of Article 4. Nevertheless, there are sector-specific antitrust exemptions. The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board.

The applicable block exemption rules are:

a Block Exemption Communiqué No. 2002/2 on Vertical Agreements;

b Block Exemption Communiqué No. 2008/3 for the Insurance Sector;

c Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;

d Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;

e Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and

f Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector.

The Board has also published a significant secondary legislation instrument, namely the Guidelines on Horizontal Cooperation, which contains a general analysis of Articles 4 and 5 of the Competition Law and general competition law concerns on information exchanges, research and development agreements, joint production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. These are all modelled on their respective equivalents in the European Union.

Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in Article 4. A number of horizontal restrictive agreement types, such as price-fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be illegal per se.

The antitrust regime also condemns concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called the presumption of concerted practice. A concerted practice is a form of coordination without a formal agreement or decision by which two or more companies come to an understanding to avoid competing with each other. The coordination need not be in writing. It is sufficient that the parties have expressed their joint intention to behave in a particular way, for example in a meeting, a telephone call or an exchange of letters.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified decision of the Board. As per Article 27 of the Administrative Procedural Law, filing an administrative action does not

4 The draft communiqué was published on the Authority's website and shared for public opinion on 23 October 2020.

automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution of the decision if its execution is likely to cause serious and irreparable damage, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes between 12 and 24 months. As a result of recent legislative changes, which came into force in July, 2016, administrative litigation cases (and private litigation cases) are subject to judicial review before the newly established regional courts (established in 2016), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the Court of Appeals for private cases).

A regional court will go through a case file both on procedural and substantive grounds, and investigate the case file, then make a decision considering the merits of the case. The regional court's decision will be considered final, but in exceptional circumstances will be subject to review by the Council of State, as set out in Article 46 of the Administrative Procedure Law. In such cases, the decision of the regional court will not be considered final and the Council of State may decide to uphold or reverse that decision. If the decision is reversed by the Council of State, it will be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State's decision. As the regional courts are newly established, there is as yet insufficient experience of how long it takes for a regional court to finalise its review of a file. Accordingly, the Council of State's review period (for a regional court's decision) within the new system should also be tested before providing an estimated time period. Court decisions in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts between 24 and 30 months.

IV LENIENCY PROGRAMMES

The leniency programme is available to cartel members.[5] The Leniency Regulation does not apply to other forms of antitrust infringement. Section 3 of the Leniency Regulation provides for a definition of cartel that encompasses price-fixing, customer, supplier or market sharing, restricting output or placing quotas and bid rigging.

A cartel member may apply for leniency up to the point that the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine.

Pursuant to the Leniency Regulation, the following conditions must be met before a cartel member can benefit from immunity or fine reduction.

The applicant must submit:

a information on the products affected by the cartel;

b information on the duration of the cartel;

5 The Board levied administrative monetary fines in an investigation launched upon a leniency application against 13 financial institutions or banks active in Turkey's corporate and commercial banking markets (28 November 2017, 17–39/636–276). Even though the investigation concluded that Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU), ING Bank AŞ and Royal Bank of Scotland Istanbul violated Article 4 of the Competition Law by way of engaging in competition-restricting information exchange practices (and not cartel practices), BTMU was still granted will full immunity within scope of the leniency programme.

c the names of the cartelists;
d the dates, locations and participants of the cartel meetings; and
e other information or documents about the cartel activity.

The required information may be submitted verbally.

Additionally:

a the applicant must avoid concealing or destroying information or documents on the cartel activity;
b unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel;
c unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served; and
d the applicant must continue to actively cooperate with the Authority until the final decision on the case has been rendered.

In any case where an application containing limited information is accepted, further information needs to be submitted subsequently. Although no detailed principles on the marker system are provided under the Leniency Regulation, pursuant to Section 6 of the Regulation, a document (showing the date and time of the application and request for time (if such a request is in question) to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

The first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority is not in possession of any evidence indicating a cartel infringement. Employees or managers of the first applicant will also be totally immune; however, the applicant must not have been the ringleader. If the applicant has forced any other cartel members to participate in the cartel, a reduction in the fine of only 33 to 50 per cent is available for the firm and between 33 and 100 per cent for the employees or managers.

In addition to this, the applicant must:

a end its involvement in the infringement;
b provide the Authority with all relevant information on the infringement (e.g., dates and locations of meetings, the products affected, the companies and individuals implicated);
c not conceal or destroy any information; and
d continue to cooperate with the Authority after applying for leniency and to the extent necessary.

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

The third applicant will receive a reduction of between 25 and 33 per cent. Employees or managers of the third applicant who actively cooperate with the Authority will benefit from a reduction of 25 to 100 per cent.

Finally, subsequent applicants will receive a reduction of between 16 and 25 per cent. Employees or managers of subsequent applicants will benefit from a reduction of between 16 and 100 per cent.

The current employees of a cartel member also benefit from the same level of leniency or immunity that is granted to the entity. There are, as yet, no precedents about the status of former employees. Apart from this, 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 applications (if any) by the cartel member itself. Depending on the application order, there may be total immunity from, or a reduction of, a fine imposed on the manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartel members.

In addition, according to the Regulation on Fines, cooperation by a party is one of the mitigating factors that the Board can consider while determining the amount of the fine to be imposed. In such a case, if mitigating circumstances are established by the violator, the fine would be reduced by between 25 and 60 per cent.

Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately.

V PENALTIES

The sanctions that may be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability) but no criminal sanctions. Cartel conduct will not result in imprisonment of the individuals implicated. That said, there have been cases in which the matter was referred to a public prosecutor before and after the investigation under the Competition Law was complete. On that note, bid rigging activity may be criminally prosecutable under Section 235 et seq. of the Criminal Code. Illegal price manipulation (i.e., manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a judicial monetary penalty under Section 237 of the Criminal Code.

In cases of proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of the turnover generated in Turkey in the financial year prior to the date of the fining decision (or, 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). Employees or members of the executive bodies of the undertakings or associations of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. The Competition Law makes reference to Article 17 of the Law on Minor Offences to require the Board to take into consideration factors, such as the following, in determining the magnitude of the monetary penalty:

a the level of fault and the amount of possible damage in the relevant market;
b the market power of the undertakings within the relevant market;
c the duration and recurrence of the infringement;
d the cooperation or driving role of the undertakings in the infringement; and
e the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity[6] and abuse of dominance[7] but does not cover illegal concentrations.[8] According to the Regulation, fines are calculated by first determining the basic level, which, in the case of cartels, is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (or, if this is not calculable, the turnover for the financial year nearest to the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines applies also to managers or employees who had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity) and provides for certain reductions in their favour.

In addition to the monetary sanction, restrictive agreements may be deemed legally invalid and unenforceable with all their legal consequences. Under Article 9, the Amendment Law stipulates that besides an Article 7 violation, in determination of Article 4 and 6 infringements, the Board may order behavioural as well as structural remedies to re-establish competition and end the infringement. Overall, the Board may order to end practices, adopt remedies to restore the status quo without imposing an administrative fine. Additionally, in cases where there is a possibility of serious and irreparable damages, the Competition Law authorises the Board to take interim measures until the final resolution on the matter.

The Amendment Law introduces a commitment and settlement mechanism under Article 43 of the Competition Law with an effort to end investigation processes in a timely manner. The Board is yet to enact secondary legislation that is expected to detail the process and procedure of such mechanisms; however, general information on relevant mechanisms is as follows.

The commitment mechanism allows parties to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of restrictive agreements and abuse of dominance. Commitment mechanism is not applicable to hardcore violations including price-fixing, territory or customer sharing and restriction of supply.

Yet the settlement mechanism is applicable to hardcore violations. Under the settlement mechanism, the Board may, *ex officio* or upon parties' request, initiate a settlement procedure. Parties that admit to competition infringement until the official notification of the investigation report may benefit from a reduction of the administrative monetary fine by up to 25 per cent.

Additionally, the participation of an undertaking in cartel activities requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Competition Law, and especially of the 'object or effect of which' rationale, the Board has established an extremely low standard of proof concerning cartel activity. 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 parallelism is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an Article 4 enforcement if price changes in the market, the supply and demand equilibrium or fields of activity of enterprises bear a resemblance to those in markets where

6 Article 4.

7 Article 7.

8 Article 7.

competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that conscious parallelism is rebuttable evidence of forbidden behaviour and constitutes sufficient grounds to impose fines on the undertakings concerned. The burden of proof is very easily swapped, and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice but has economic and rational reasons behind it.

VI 'DAY ONE' RESPONSE

Article 15 of the Competition Law authorises the Board to conduct dawn raids. The Amendment Law introduces changes to Article 15 that expand the scope of Board's authority during dawn raids and indeed, match the recent practice of the case handlers.

Accordingly, the Board is entitled to:

a examine and make copies of all information and documents in companies' physical records as well as those in electronic space and IT systems (including but not limited to any deleted items.;

b request written or verbal explanations on specific topics; and

c conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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). The minimum fine for 2020 is 31,903 Turkish liras. A refusal may also lead to the imposition of a periodic daily fine rate of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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) for each day of the violation.

The Competition Law therefore provides broad authority to the Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. While the specific wording of the Law allows verbal testimony to be compelled of employees, case handlers do allow a delay in giving an answer as long as this is quickly followed up by written correspondence. Therefore, in practice, employees can avoid providing answers on issues about which they are uncertain, provided that a written response is submitted within a mutually agreed timeline. Computer records are fully examined by the experts of the Authority, including, but not limited to, deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (which is written on the deed of authorisation). The Board may also request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

VII PRIVATE ENFORCEMENT

A cartel matter is primarily adjudicated by the Board. Enforcement is also supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts.

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq. of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Authority, then build their own decision on that finding.

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. Antitrust-based private lawsuits are rare but increasing in practice.

VIII CURRENT DEVELOPMENTS

The Amendment Law introduces certain significant substantive and procedural changes to Competition Law. As elaborated in the previous Sections, the Amendment Law introduces new provisions concerning the *de minimis* principle, on-site inspection powers, behavioural and structural remedies and commitment and settlement mechanisms. Inter alia, the Amendment Law replaces the dominance test taken into consideration in merger control assessments under Article 7 with the 'significant impediment of effective competition' (SIEC) test, clarifies the self-assessment procedure applied to individual exemption cases under Article 5 and also grants the Authority with 15 more days for preparation of its additional opinion in response to the undertakings' second written defence in a full-fledged investigation under Article 45.

The Authority's annual report for 2019 provides that the Board finalised a total of 69 cases concerning competition law violations. Among the 69 cases, 30 were subject to Article 4 of the Competition Law (anticompetitive agreements) and 12 cases were subject to both Article 4 and Article 6 (abuse of dominant position). The Board issued monetary fines amounting to a total of 228,733,560 Turkish liras in 2019 for Article 4 cases. The monetary fine total for Article 4 cases in 2019 was roughly 12 times that of 2018, while the total monetary fine imposed on Article 6 cases has decreased by nearly 37 times when compared to fines imposed in 2018. In this regard, during the course of the year in review, there have been no significant cartel decisions in which the Board imposed significant administrative monetary fines. However, there has been an increase in the number of investigations with monetary fines. In fact, the Board imposed monetary fines totalling 164,392,558 Turkish liras on horizontal anticompetitive arrangements in 2019, while the monetary fines for relevant arrangements on 2017 and 2018 were 21,279,796 and 9,201,300 Turkish liras, respectively.

In terms of its recent cartel enforcement activity, the Board found that certain ready mixed concrete producers operating in Yozgat province infringed Article 4 of the Competition Law by way of establishing two legal entities (namely, Güven Beton and Sorgun Emek Beton) in order to coordinate sales, collectively determine prices and allocate customers (19 March 2020, 20-15/215-107). In this respect, the Board imposed an administrative monetary fine of 1.2 per cent of the annual gross income of the investigated parties.

In the investigation concerning traffic signalling market, the Board concluded that nine of the 10 investigated parties violated Article 4 of the Competition Law by way of bid rigging (12 March 2020, 20-14/191-97). Among other practices, the Board essentially found that undertakings prepared offers and entered into bids based on a mutually reached consensus. As a result, all but one of the investigated undertakings, had an administrative monetary fine of either 2 or 3 per cent of their annual gross income imposed by the Board. During the investigation process, one of the investigated undertakings – Mosaş Akıllı Ulaşım Sistemleri AŞ (Mosaş) – was fined separately for hindering the on-site inspection conducted by the Authority (21 June 2018, 18-20/356-176) and refusing to grant access to the Authority for 17 days (5 July 2018, 18-22/378-185).

In another decision, the Board concluded that gas stations located in Burdur province violated Article 4 of the Competition Law by way of fixing prices (9 January 2020, 20-03/28-12). The Board found that the cartel arrangement was essentially formed via WhatsApp groups and messages created between certain employees of the relevant gas stations. Despite an explicit finding of a cartel violation, the Board took into consideration the lowest base fine rate stipulated under the Regulation on Fines applicable for violations other than cartel violations, since the profit margins of the investigated undertakings were significantly low and imposition of a high fine would restrict sustainability of their business.

Additionally, in a preliminary investigation initiated against *çiğ köfte* (a traditional version of steak tartar) producers operating in Gaziantep province, the Board noticed price-fixing agreements concluded between the undertakings, and acknowledged the presence of an agreement restricting competition in the relevant product market (10 January 2019, 19-03/13-5). Having said that, instead of imposing an administrative monetary fine, the Board addressed an opinion letter to the *çiğ köfte* producers pursuant to Article 9/3 of the Competition Law, ordering them to cease any behaviour that may generate competition law infringements.

Moreover, in a recent leniency case, which initiated with Arçelik Pazarlama AŞ's (Arçelik) leniency application upon discovery of sharing of insider information by an Arçelik employee with various companies including Arçelik's competitor Vestel Tipcart AŞ (Vestel), the Board found that Arçelik and Vestel did not violate Article 4 of the Competition Law as the investigated practices took place without knowledge of the senior management, so they did not meet the mutual agreement criteria and did not constitute concerted practice (2 January 2020, 20-01/13-5).

In another leniency case, the Board levied an administrative monetary fine in an investigation launched against five undertakings and one association of undertakings active in cabotage roll-on, roll-off transportation lines in Turkey (18 April 2019, 19-16/229-101). The Board concluded that Tremolo Gem İşletmeciliği ve Ticaret AŞ (Tramola), Kale Nakliyat Seyahat ve Turizm AŞ (Kale Nakliyat), İstanbullines Denizcilik Yatırım AŞ (İstanbullines), İstanbul Deniz Nakliyat Gıda İnşaat Sanayi Ticaret Ltd Şti (İDN) and İstanbul Deniz

Otobüsleri Sanayi ve Ticaret AŞ (İDO) had violated Article 4 of the Competition Law by way of collectively determining prices. In this respect, the Board imposed an administrative monetary fine on:

a Tramola and İstanbullines, equivalent to 4 per cent of their annual gross income;
b İDN and İDO, equivalent to 0.8 per cent of their annual gross income; and
c Kale Nakliyat, equivalent to 1.6 per cent of its annual gross income (the Board did not grant full immunity to the leniency applicant).

Additionally, the Board imposed an additional fine on İstanbullines for the submission of incomplete information to the Competition Authority by 0.1 per cent of its annual gross income.

Moreover, in a fully fledged investigation initiated against 16 freelance mechanical engineers based on the allegations concerning a profit-sharing cartel, the Board concluded that 14 of the engineers engaged in a profit-sharing cartel and thus violated Article 4 of the Competition Law. Having said that, the Board granted full immunity from fines to the leniency applicant, while also relieving one of the freelance mechanical engineers of an administrative monetary fine since it was decided that the relevant engineer did not violate the Competition Law (14 December 2017, 17-41/640-279).

Appendix 1

ABOUT THE AUTHORS

GÖNENÇ GÜRKAYNAK

ELIG Gürkaynak Attorneys-at-Law

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 more than 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 EC 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 by 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.

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
www.elig.com

an LBR business

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