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# Cartels

Turkey

ELIG Gürkaynak Attorneys-at-Law

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# TURKEY

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## **LAW AND PRACTICE:**

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law and Practice

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# TURKEY LAW AND PRACTICE

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**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 our partner, Mr Gönenç Gürkaynak, along with three partners, three counsel and 40 associates. In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in de-

fending 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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## 1. Basic Legal Framework

### 1.1 Statutory Basis/Bases for Challenging Cartel Behaviour

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 (the “Board”).

The secondary legislation of the Turkish Competition Authority (the “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 **1.4 Potential Liability** below). 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

The authority enforcing competition law in Turkey is the Turkish Competition Authority (“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.

### 1.3 Private Right of Action for Challenging Cartel Behaviour

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 Potential Liability

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 is also criminally prosecutable, such as bid-rigging in public tenders or price manipulation, potential legal liability extends to criminal fines as well as imprisonment.

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.

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 association 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.

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.

### 1.5 Statutes Indirectly Taking Account of Alleged Cartel Behaviour

Bid-rigging and price manipulation can also result in a violation of the Competition Law. Bid-rigging is prohibited under Articles 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.

### 1.6 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 TCA, 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 cartel activity (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 for 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 is unlikely to benefit from an exemption from the prohibition of Article 4.

### 1.7 Variety of Competition Law Violations

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.

### 1.8 Limitations Period(s)

The Board is entitled to impose administrative monetary fines within eight years of the date of infringement. If it is 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 for the statute of limitations. Accordingly, for a claim arising from a competition law infringement, the statute of limitation is 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.

### 1.9 Industries, Sectors or Other Activities Exempt from Scrutiny Under Statutes or Precedent

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

### 1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants

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 into 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/Yioulas*, 28 February 2007, 07-17/155-50).

### 1.11 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 organised 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 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.

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”). The parties again 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 or Surprise Visits

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, with refusal to grant the case handlers access to business premises potentially leading 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 fine cannot be lower than a specific amount recalculated periodically by the Authority; the minimum fine for 2018 is TRY21,036 (approximately USD4,643 and EUR3,976). 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 or Surprise Visits

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 Obligations to Prevent or Avoid Spoliation of Potentially Relevant 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 (dated 18.07.2013, numbered 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 TRY15,512,258.87 (USD8,164,346.74 as per the Turkish Central Bank average

buying rate in 2013, ie, USD/TRY exchange rate of 1.90, or EUR6,131,327.59 as per the Turkish Central Bank average buying rate in 2013, ie, EUR/TRY exchange rate of 2.53). In addition, as mentioned above under **2.2 Dawn Raids or Surprise Visits**, 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.

Apart from the monetary fine imposed by the Board, when the conduct also falls under the 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 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit**

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. 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.

## **2.6 Companies/Interviewees Obtaining Copies of Documents**

Companies/interviewees have a legal right to request copies of the documents furnished to the enforcement agency. 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.

## **2.7 Right to 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 (dated 8 February 2018 and numbered 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.

## **2.8 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.

## **2.9 Principal Initial Steps Undertaken by the Defence Counsel**

As stated in **2.7 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. 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.

## **2.10 Obtaining Documentary Evidence or Testimony**

As explained under **2.3 Restrictions on Dawn Raids or Surprise Visits**, as an enforcement agency, the Board may obtain documents and testimonies in the course of investigating an alleged cartel by (i) examining books, paperwork and documents of undertakings and trade associations, and, if necessary, taking copies of them; (ii) 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.

## **2.11 Obtaining Other Types of Information**

As explained in **2.3 Restrictions on Dawn Raids or Surprise Visits**, **2.5 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit** and **2.10 Obtaining Documentary Evidence or Testimony**, the Board is entitled to request any public and private undertaking and trade as-

sociation to provide written or verbal explanations on specific topics whilst conducting on-site inspections within the scope of Article 15 of the Competition Law.

### 2.12 Obligation to Produce Documents or Other Evidence

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.

### 2.13 Principles of 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 would apply in Turkish competition law. More recently, the Board discussed the basic principles of legal professional privilege, considering its definition, scope, enforcement and boundaries in *Dow* (2 December 2015, 15-42/690-259) and *Enerjisa* (6 December 2016, 16-42/686-314). Accordingly, 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, said document will be protected under attorney-client privilege. Accordingly, if 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.

### 2.14 Other Recognised 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, the exercise of this authority raises objections on the basis of the privilege against self-incrimi-

nation. That said, such objections have thus far been rejected by the appeal court.

### 2.15 Resisting Initial Requests for Information

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 Obligations to Prevent or Avoid Spoliation of Potentially Relevant Information** and **2.5 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit**.

### 2.16 Protecting Confidential or Proprietary Information

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. 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.

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.

### 2.17 Persuading the Enforcement Agency to Modify Its Enforcement Action

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.

**2.18 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 TCA can grant additional time for applicants to submit the necessary information and evidence. In order for the applicant to be eligible for a marker, they must provide information on affected products, the duration of the cartel and the names of the parties, at least. A document showing the date and time of the application and requesting time to prepare the required information and evidence will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report will not benefit from immunity, but may benefit from reductions of fines, depending on the timing of their application. Accordingly, the second leniency applicant will be eligible for a 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 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 Seeking Information Directly from Company Employees**

As mentioned above in **2.5 Responding to Interviews/ Questions During the Dawn Raid or Surprise Visit**, 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 Seeking Information Directly from the Target Company or Others**

As explained in **2.10 Obtaining Documentary Evidence or Testimony** and **2.12 Obligation to Produce Documents or Other Evidence**, 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 Seeking Information Directly from Companies or Individuals Outside the Jurisdiction**

As explained in **1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants**, the jurisdiction of the Authority is determined on the basis of the 'effects theory'. Thus, as mentioned in **2.12 Obligation to Produce Documents or Other Evidence**, 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* (decision dated 19 December 2008, No 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-operating with Enforcement Agencies in Foreign Jurisdictions

See 1.11 Principles of Comity.

### 3.6 Steps Taken to Issue a Complaint/Indictment Against a Criminal Case

As indicated in 1.4 Potential Liability, 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 Steps Taken to Issue a Complaint/Summons in a Civil Case

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 Communiqué No 2010/3). This right can only be used once, unless there has been new evidence obtained during the investigation. On the other hand, Law No 4982 does not conclude such a restriction in terms of timing or scope. 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.

### 3.8 Enforcement Actions Against Multiple Parties in a Single Proceeding

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 proceed-

ing, 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 Definition and Application of 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...' branch. 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 Finder of Fact in Enforcement Proceedings**

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 Evidence Obtained in One Proceeding Being Used in Other Proceedings**

Any information or document collected through the use of investigative powers is discoverable in court, including e-mails, 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 in-

dependently 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 Application of 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 Typically Played by Retained 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 Recognised Privileges**

Please see 2.13 Principles of Attorney-Client Privilege.

### **3.15 Multiple or Simultaneous Enforcement Proceedings Involving the Same or Related 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 Investigatory Agency Imposing Sanctions Directly

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 of "Plea Bargaining" or Settlement

The Board does not enter into plea bargains. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. However, the proposed amendment to the Competition Law, which is currently pending before the parliament, intends to introduce a settlement procedure into Turkish cartel enforcement.

### 4.3 Collateral Effects if Liability or Responsibility is Established

As explained in 3.7 Steps Taken to Issue a Complaint/Indictment Against a Criminal Case, 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.

As regards plea-bargaining and settlement (see 4.2 Procedure of "Plea Bargaining" or Settlement), the Board does not enter into plea-bargain arrangements and there is no settlement procedure in Turkey. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. However, as mentioned above in 2.18 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 col-

lateral effects in other proceedings, such as being banned from public tenders.

### 4.4 Sanctions and Penalties in Criminal Proceedings

Please see 1.4 Potential Liability and 1.5 Statutes Taking Account of Alleged Cartel Behaviour 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 in Civil Proceedings

Please see 1.3 Private Right of Action for Challenging Cartel Behaviour.

### 4.6 "Effective Compliance Program"

In *Kraft Gıda San. Tic. A.Ş* (dated 7 July 2015 and numbered 15-28/345-115) and *Linde Gaz* (dated 29 August 2013 and numbered 13-49/710-297), the Board acknowledged the importance of compliance programmes for undertakings. Nevertheless, the Board emphasised that a compliance programme does not constitute a mitigating factor when calculating a fine for anti-competitive conduct.

### 4.7 Sanctions Extending to 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 Forms of Judicial Review or Appeal Available from Decisions in Governmental Enforcement Proceedings

Decisions of the Board are administrative acts, and thus 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.

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 12 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 will be 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.

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).

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 to Seek Relief**

Please see 1.3 **Private Right of Action for Challenging Cartel Behaviour**.

### **5.2 Threshold Requirements**

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.

### **5.3 Actions Styled as “Class Actions” or Other Forms of 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.

### **5.4 Handling Questions of Indirect Purchasers or “Passing-on” Defences in Private Actions**

Indirect purchaser claims or “passing-on” defences have not yet been tested in the Turkish courts.

### **5.5 Process for Hearing and Resolving Claims**

Please see 3.7 **Steps Taken to Issue a Complaint/Indictment Against a Criminal Case**.

### **5.6 Evidence from Governmental Investigations or Proceedings**

Please see 3.11 **Evidence Obtained in One Proceeding Being Used in Other Proceedings**.

### **5.7 Differences in Standards for Relief in a Private Civil Action and Governmental Proceedings**

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.

### **5.8 Forms of Relief That Can Be Sought by the Claimant**

Please see 1.3 **Private Right of Action for Challenging Cartel Behaviour**.

### **5.9 Forms of Relief Commonly Obtained**

As 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.

### **5.10 Claims Proceeding to Completed Litigation as Opposed to Dismissal or Settlement**

As 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.

### **5.11 Compensating Successful Attorneys**

The amount of attorney fees are 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.

## 5.12 Obligation for the Unsuccessful Claimants to Pay Defence Costs and/or Attorneys' Fees

As stated above, 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.

Class actions are not yet adopted by Turkish law.

## 5.13 Forms of Judicial Review or Appeal Available from 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 Items of Information Pertinent to an Understanding of the Process, Scope and Adjudication of Claims

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 Governmental Authorities Publishing Written Guides

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](http://www.rekabet.gov.tr/Dosya/guidelines/14-pdf)); and
- Guidelines on Horizontal Co-operation Agreements ([www.rekabet.gov.tr/Dosya/guidelines/7-pdf](http://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 ([www.rekabet.gov.tr/en/Sayfa/competition-advocacy/principles-of-competition-law](http://www.rekabet.gov.tr/en/Sayfa/competition-advocacy/principles-of-competition-law)).

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