Cartels

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Turkey

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Overview of the law and enforcement regime relating to cartels

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Turkish Competition Authority ("***Competition Authority***"). The Competition Authority has administrative and financial autonomy. It consists of the Competition Board ("***Board***"), Presidency and service departments. There are five divisions, with sector-specific work distribution, that handle the Competition Law enforcement work through over 130 case handlers. The other service units consist of the following: (i) the department of decisions; (ii) the economic analysis and research department; (iii) the information management department; (iv) the external relations, training and competition advocacy department; (v) the strategy development, regulation and budget department; and (vi) the cartel and on-site inspections support division ("***Leniency Division***").

The statutory basis for cartel prohibition and the enforcement regime is Law No. 4054 on the Protection of Competition of December 13, 1994 ("***Competition Law***"). The Competition Law finds its underlying rationale in Article 167 of the Turkish Constitution of 1982, which authorises the state to take appropriate measures to secure the functioning of the markets and to prevent the formation of monopolies or cartels. The Turkish cartel regime by nature applies administrative and civil (not criminal) law. The Competition Law applies to individuals and companies alike and even to public corporations if they act as an undertaking within the meaning of the Competition Law.

Article 4 of the Competition Law is the applicable provision for cartel-specific cases and provides the basic principles of the cartel regulation. The provision is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union ("***TFEU***"). Article 4 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition. Similar to Article 101(1) of the TFEU, the provision does not define the term "cartel" explicitly. However, Article 4 prohibits all kinds of restrictive agreements, including any form of cartel agreements.

Unlike the TFEU, Article 4 does not refer to additional requirements such as "appreciable effect" or "substantial part of a market", and consequently does not provide for any *de minimis* exception. Therefore, Article 4 applies even to violations with minor effects on any market. The practice of the Board has not recognised any *de minimis* exceptions either. However, the enforcement trends and proposed changes to the legislation are increasingly focusing on *de minimis* defences and exceptions.

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, granting broad discretionary power to the Board. Additionally, Article 4 brings a non-exhaustive list which provides examples of possible restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption issued by the Board. Vertical agreements are also caught by the prohibition laid down in Article 4, to the extent they are not covered by block exemption rules or individual exemptions.

The Board's general practice shows that horizontal restrictive agreements such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be *per se* illegal.

The Turkish competition regime also condemns concerted practices. The Competition Authority may apply "the presumption of concerted practice" and thus can easily shift the burden of proof for the investigated parties in connection with concerted practice allegations too. Similar to the EU Competition Law regime, a concerted practice is defined as a form of coordination between undertakings which, without having reached the stage where a so-called agreement has been properly concluded, knowingly substitutes practical cooperation between them for the risks of competition. Therefore, this 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 does not need to be in writing; it is sufficient if the parties have expressed their joint intention to behave in a particular way, perhaps in a meeting, via a telephone call or through the exchange of letters.

Overview of investigative powers in Turkey

The Competition Law provides vast investigative powers to the Competition Authority such as the power to conduct dawn raids and to apply other investigatory tools (e.g., formal information request letters). The Board only needs a judicial authorisation if an undertaking refuses to allow the dawn raid. The prevention or hindering of a dawn raid could result in the imposition of an administrative monetary fine.

Article 15 of the Competition Law authorises the Board to conduct on-site investigations. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5% of the annual turnover. It may also lead to the imposition of a fine of 0.05% of the turnover for each day of the violation.

Although the Competition Law obliges employees to provide a verbal testimony during the dawn raid, case handlers usually allow for providing an answer after the occurrence of the dawn raid. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted in a mutually agreed timeline. Case handlers of the Competition Authority may fully examine computer records, including, but not limited to, deleted mail items.

Officials conducting a dawn raid must be in possession of a deed of authorisation issued by the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exceed their authorisation. Hence, the inspectors must not exercise their investigative powers in relation to matters that do not fall within the scope of the investigation specified in the deed of authorisation. Therefore, the Competition Authority officials may not copy documents or record verbal testimonies which are not related to or covered by the scope of the investigation.

At the site of a dawn raid, the Competition Authority's staff is not obliged to wait for a lawyer to arrive. However, the staff usually agree to wait for a short while for a lawyer to arrive, but may impose certain conditions (e.g., to seal file cabinets or disrupt email communications).

The Competition Authority 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 a fixed period of time. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (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 Board may impose the same amount of fine if an undertaking provides incorrect or incomplete information in response to the Competition Authority's request for information.

An overview of cartel enforcement activity during the last 12 months

Developments in cartel enforcement in Turkey may be illustrated with an overview of the most notable cartel cases that the Board has examined in the recent years. The Board is usually reluctant to identify a violation as a cartel and prefers to use terms such as 'concerted practice', 'agreement' or 'information exchange' instead. The reasons for this approach are not totally clear; however, it appears that the Board may be aiming at avoiding the risk of having to impose astronomical monetary fines which could be deemed as disproportionate compared to the respective case at hand.

The Competition Authority's annual report for 2016 provides that the Board finalised a total of 41 cases relating to anti-competitive agreements; 26 of which concerned horizontal agreements. The Board issued monetary fines amounting to a total of TL 133.693.788 (approximately €31.8 million at the time of writing) for anti-competitive agreements in 2016. This figure shows that there was an increase in 2016 in terms of monetary fines issued for anti-competitive agreements contrary to the remarkable drop in recent years. Therefore, the trend over the course of several years has shown that the Board does not hesitate to impose administrative monetary fines when it comes to horizontal anti-competitive and cartel arrangements. In fact, although no monetary fines for cartel arrangements were issued in 2015, the Board imposed monetary fines totalling TL 14,662,151 (approximately €3.5 million at the time of writing) in 2014; and TL 1,126,817,183 (approximately €268 million at the time of writing) in 2013.

Ready mixed concrete manufacturers (16-05/117-52, February 18, 2016) is the most recent decision in which the Board imposed a monetary fine on the undertakings, which were alleged to have violated Article 4 of the Competition Law through a joint production and commercialisation agreement made between them. In this decision, the Board defined the relevant market as "*ready mixed concrete*" and recognised two different geographical markets due to the fact that ready mixed concrete must be used within a maximum of two

hours after it is manufactured and that it is transportable only within a 50km radius of a manufacturing plant. In its assessments, the Board indicated that establishing a new ready mixed concrete manufacturer could not be considered as a "joint venture", as executives of the undertaking have no joint control over the alleged joint venture. Therefore, the Board concluded that the relevant entity should not be considered a joint venture under the rules of Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"). The Board evaluated the newly formed commercial relationship between relevant undertakings as a "joint manufacturing and commercialisation agreement". The Board stated that this agreement is within the scope of Article 4 of the Competition Law, considering that it may raise several competitive concerns, such as customer allocation, price-fixing and coordination. The Board further evaluated the agreement within the scope of Article 5 of the Competition Law. However, the Board decided that this activity cannot be subject to an exemption as it will not be in accordance with the "*not eliminating competition in a significant part of the relevant market*" requirement stated in Article 5 of the Competition Law. It concluded that the manufacturing and commercialisation agreement does not satisfy the requirements laid down in the Article 5 of the Competition Law and thus the relevant undertakings violated the Competition Law. Consequently, a monetary fine at the rate of 0.2% over their annual turnover was imposed on each undertaking. That said, two Board members dissented the majority opinion, stating that the relevant market did not bear any entry barriers as it did not require high investment cost and that the agreement enabled undertakings to minimise equipment, workforce and fuel expenses and reflect the cost difference to the prices and create a favourable outcome for consumers. In other words, the dissent centred on the fact that the agreement failed to fulfil the requirements provided in Article 5 of the Competition Law.

One of the most recent decisions of the Board concerned six cement-producing undertakings that allegedly engaged in market partitioning and constrained their distributors not to sell any brands other than their own brands (16-02/44-14, January 14, 2016). The Board defined the relevant product market as "*grey cement*" and, due to the high transportation cost of cement, the geographic market was designated as the Aegean cities of Turkey. The Board held that the undertakings violated Article 4 of the Competition Law and infringed the Competition Law by allocating markets, fixing prices, pricing excessively and preventing market entry. The decision is pertinent in that the Board classified the case as "cartel" and defined cartels in a manner that encapsulates both agreements and concerted practices. In this case, a Board member dissented the majority opinion and stated that, although there was evidence to indicate that the undertakings raised prices in a parallel manner, secretive meetings or direct proof of a price-fixing cartel were absent in the case. Article 4 of the Competition Law stipulates that, where there is parallel behaviour between competitors but the existence of an agreement cannot be proven, the burden of proof shifts to the undertakings that need to prove the similar pricing does not stem from a concerted practice. In this case, however, the Board adjudicated on the existence of a cartel and imposed a monetary fine at the rate of 3% to four of the undertakings, and 4.5% to two of the undertakings over their annual turnover. The percentage amount of the fine has been deemed quite high in comparison to the Board's jurisprudence.

One of the Board's most important decisions in the year 2014 concerns four undertakings operating in the market for fresh yeast. The Authority investigated whether Dosu Maya Mayacılık A.Ş., Mauri Maya San. ve Tic. A.Ş., Öz Maya Sanayi A.Ş., and Pak Gıda Üretim ve Pazarlama A.Ş. violated Article 4 of the Competition Law by colluding to set sale prices of fresh bread yeast (14-42/783-346, October 22, 2014). Mauri Maya applied for a leniency (which is available only for cartelists). The Board resolved that the investigated companies

violated Article 4 and imposed administrative monetary fines on three of the undertakings while granting full immunity to Mauri Maya by virtue of the added value and sufficient content of its leniency application. Mauri Maya could otherwise have received a monetary fine of 4.5% of its annual turnover. The Board implicitly opened the door for more leniency applications, even for those cases where a preliminary investigation is already initiated and dawn raids are conducted.

The investigations that have been initiated by the Competition Authority so far clearly show that it does not focus on any specific sectors when it comes to the investigation of cartel behaviour but rather aims to tackle any conduct or practice which might point to a restriction of competition among competing undertakings. It is expected that the trend will continue in its future cases.

Key issues in relation to the enforcement policy

The Turkish Competition Authority places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under the Competition Law has nonetheless been repeatedly underlined by the Presidency of the Competition Authority.

There are neither industry-specific offences nor defences which lead to a particular scrutiny. The Competition Law applies to all industries, without exception. In terms of cartel enforcement, cement, bread yeast, driving schools and bakeries have recently been under investigation for cartel and concerted practice allegations.

It is fair to say that the Board may at times consider policies which are not directly related to the protection of competition in the markets. The Turkish paper sector investigation (13-42/538-238, July 8, 2013) marks one of the extremely rare files in Turkey where a policy concern not directly related to the Competition Law (i.e. a policy concern relating to minimising trade deficit) may have played a role in the ultimate decision, together with a state action defence of the parties concerned, as the parties' collective behaviour was influenced by a set of rules brought by the relevant ministry tackling trade deficit. The Board found that seven paper recycling companies had violated the competition laws by harmonising their commercial behaviours and colluding against waste paper producers that aimed to export waste paper. However, the Board did not levy turnover-based monetary fines against the defendants, and granted three-year exemptions under objective criteria.

Key issues in relation to investigation and decision-making procedures

As the competent body of the Competition Authority, the Board is responsible for, *inter alia*, investigating and condemning cartel activity. A cartel matter is primarily adjudicated by the Board.

The Board may *ex officio,* or as a result of a notice or complaint, launch a preliminary-investigation prior to initiating a full-fledged investigation. At this preliminary stage, the undertakings concerned are usually not notified that they are under an investigation, unless the Competition Authority decides to conduct a dawn raid or apply other investigatory tools (i.e., formal information request letters).

The Competition Authority experts submit a preliminary report to the Board within 30 days after the Board decides to launch a preliminary investigation. The Board then decides within 10 days whether to launch a full-fledged formal investigation. If the Board decides to initiate an investigation, it sends a notice to the undertakings concerned within 15 days. The investigation is to be completed within six months. If deemed necessary, this period may be extended by the Board only once, for an additional period of up to six months.

Once the investigation notice has been formally served, the investigated undertakings have 30 days to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once this is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (this is the second written defence). The investigation committee will then have 15 days to prepare an additional opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When this reply is served on the Competition Authority, the investigation process is to be completed (i.e., the written phase of investigation involving the claim/defence exchange will close with the submission of the third written defence).

An oral hearing may be held upon the request of the parties. The Board may also *ex officio* decide to hold an oral hearing. Oral hearings are held between 30 and 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings before the Board. The Board renders its final decision within 15 days from the hearing, if an oral hearing is held. Otherwise, the decision is rendered within 30 days from the completion of the investigation process. It usually takes around three to five months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

The Competition Authority's administrative enforcement is also supplemented with private lawsuits. Accordingly, in case of private suits, cartel members are adjudicated before the courts. Due 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 Competition Authority and build their own decision on the Board's decision.

Leniency/amnesty regime

The Competition Law underwent significant amendments in February 2008. The current legislation brings about a stricter and more deterrent fining regime, coupled with a leniency programme for the undertakings. The secondary legislation specifying the details of the leniency mechanism is the Regulation on Active Cooperation for Discovery of Cartels ("***the Regulation on Leniency***"). The Guidelines on Explanation of the Regulation on Leniency were published in April 2013. With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set.

The Regulation on Leniency provides that the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringements. A definition of a cartel is also provided in the Regulation on Leniency for this purpose.

A cartelist may apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity/reduction includes both the undertakings and its employees and managers, with the exception of the 'ring-leader' which can only benefit from a second degree reduction of a fine. The conditions for benefiting from the immunity/reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees and managers can apply for leniency. A manager or employee of a cartelist may also apply for leniency until the 'investigation report' is officially served. Such an application would be independent from applications by the cartelist itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of a fine, for such manager or employee. The requirements for such individual application are the same as stipulated above.

The most recent Board decision where the Board granted full immunity is the case which concerned several suppliers of rail freight forwarding services for block trains and cargo train services (15-44/740-267, December 16, 2015). The Board initiated an investigation following the leniency application made by Deutsche Bahn Group of Companies against the relevant suppliers of rail freight forwarding services for block trains and cargo train services including Schenker & Co AG, Schenker A.E., Schenker Arkas Nakliyat ve Ticaret A.Ş., Fertrans AG (collectively "***Deutsche Bahn Group of Companies***"), Kühne+Nagel International AG & Co, Kühne + Nagel A.E., Rail Cargo Logistics – Austria GmbH, Express Interfracht Hellas A.E. and Raab-Oedenburg-Ebenfurter Eisenbahn AG, to determine whether they had violated Article 4 of the Competition Law through customer allocation. However, the Board's decision concluded that the relevant customer protection agreements cannot be assessed under the provisions of the Competition Law. As explained in detail within the Board's reasoned decision, in the event that the Competition Law violation takes place abroad, the application of the Competition Law rules would only be possible so long as the existence of effect(s) is proven in accordance with the general principles of public international law. In any event, the Competition Authority had granted full immunity to the relevant leniency applicant, subject to compliance with its duty of active cooperation.

One of the Board's notable decisions where it granted full immunity is the Yeast Cartel case (14-42/783-346, October 22, 2014). As summarised above, the Board launched an investigation against four fresh yeast producers to determine whether they had violated Article 4 of the Competition Law through colluding to set prices for fresh bread yeast. It resolved that the investigated companies violated Article 4 and imposed administrative monetary fines on three of the undertakings, with a total amount of TL 14 million (approximately € 3.3 million at the time of writing). The fourth undertaking, Mauri Maya, obtained full immunity, though it submitted its application for leniency after the preliminary investigation was initiated and following the dawn raids conducted at the premises of the undertakings. The Board considered the value and sufficient content of Mauri Maya's leniency application.

Overall, the Turkish leniency regime requires high standards for cooperation in the leniency procedure. For instance, in the Steel Ring Manufacturers case (12-52/1479-508, October 30, 2012), the Board stated that the undertakings, MPS Metal Plastik Sanayi Çember ve Paketleme Sistemleri İmalat Tic. A.Ş. ("***MPS***") and BEKAP Metal İnş. San. ve Tic. A.Ş., fixed the prices of steel strapping materials and were acting in collusion regarding certain tenders, and decided that both undertakings had violated Article 4 of the Competition Law. The Board considered the leniency application of MPS and imposed a fine equal to 1% of its annual gross income in 2011. The reason for the granting of partial immunity was that the documents gathered at the on-site inspection allegedly already proved a cartel. However, it could be said that in this case the Board set a high standard for cooperation within the context of the leniency programme.

Another decision where the Board sent a negative message to the business community by showing that leniency applications might not always be beneficial was the 3M case (12-46/1409-461, 27.09.2012). In the 3M case, the investigation team recommended to the Board to revoke the applicant's full immunity on the grounds that the applicant did not provide all the documents that could be discovered during a dawn raid. Unfortunately, the Board's reasoned decision did not go into the details of the matter, as the case was closed without a finding of violation. It remains to be seen whether the Board will apply this approach again in the future.

In the Sodium Sulphate case (12-24/711-199, May 3, 2012), the Board imposed fines both on the cartelists and the persons having a determining effect on the violation, but eventually offered reductions on the fines after one cartelist and its general manager filed for leniency. In its decision, the Board stated that the undertakings, Otuzbir Kimya and Sodaş Sodyum, fixed prices of sodium sulphate and shared customers between the years 2005 and 2011. Additionally, it is also stated that Alkim Alkali Kimya, Otuzbir Kimya and Sodaş Sodyum collectively determined the prices of raw salt. The Board imposed a fine on Sodaş Sodyum equal to 3% of its annual gross income in the 2011 fiscal year, and simultaneously imposed a fine on Sodaş Sodyum's general manager, who was actively engaged in the infringement, in the amount of 3% of the administrative fine applied to Sodaş Sodyum. Sodaş Sodyum and its general manager filed for leniency and eventually received reductions at the rate of one-third and 50%, respectively, of the fines to be imposed.

In the decision regarding Gaz Cartel (10-72/1503-572, November 11, 2010), the Board offered full immunity to a leniency applicant, in spite of the fact that the new evidence uncovered during the on-site inspection had shed light on the investigation. This constituted a landmark decision. Berk Gaz, who received full immunity, was the first applicant to apply for leniency. That said, Berk Gaz managed to convince the Board that it provided sufficient documents and information, while also fulfilling the other conditions set out in the Leniency Regulation.

Administrative settlement of cases

The current Turkish Competition Law regime does not provide for a settlement procedure. However, a settlement process has recently been considered and is expected to be considered again, once the reform regarding the Competition Law is included in the government's agenda.

Third-party complaints

A notice or complaint may be submitted verbally or through a petition. The Competition Authority has an online system in which complaints may be submitted by the online form on the official website of the Competition Authority. In the case of a notice or complaint, the Board rejects the notice or complaint if it deems the complaint not to be serious. Any notice or complaint is deemed as rejected if the Board remains silent on the matter for 60 days. The Board will decide to conduct a pre-investigation if it finds the notice or complaint to be serious.

Investigated parties have a right to access the file (*Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets* ("***Communiqué No. 2010/3***")). The right to access the file can be exercised upon a written request at any time until the end of the period for submitting the last written statement.

Complainants and other third parties may request access to file for follow-on actions (Law No. 4982 on the Right to Access to Information). The approach of the Competition Authority is to consider not only the interests of the person requesting information, but also the personal data of other natural and legal persons, public interest as well as all other individuals' interests. This balance is regulated by way of exceptional provisions under Law No. 4982 on the Right to Access to Information. Most of the time, the Competition Authority is reluctant to grant access to the file and justifies the denial of access on the grounds that the access concerns internal documents and business secrets. Based on that, the Competition Authority usually denies access to documents such as investigation reports or information petitions submitted by the investigated parties.

A recent decision (16-26/433-192, August 4, 2016) defines the parties who have the right to access the file narrowly, stipulating that Communiqué No. 2010/3 allows the access request only of those who are being investigated. In this regard, the Competition Authority did not grant the complainant permission to access the file.

Third parties can attend the oral hearing and be heard by submitting a petition and presenting information and documents that show their interest in the subject matter of the oral hearing.

Penalties and sanctions

In case of a proven cartel activity, the companies concerned may be subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision (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 and managers of the undertakings or association of undertakings that had a determining effect on the creation of the violation can also be fined up to 5% of the fine imposed on the undertaking or association of undertaking. The current minimum fine is set as TL18,377 (approximately €4,365 at the time of writing).

The Competition Law makes reference to Article 17 of Law on Misdemeanours to require the Board to take into consideration factors such as: (i) the level of fault and the amount of possible damage in the relevant market; (ii) the market power of the undertaking within the relevant market; (iii) the duration and recurrence of the infringement; (iv) cooperation or driving role of the undertaking in the infringement; (v) the financial power of the undertaking; and (vi) compliance with the commitments in determining the magnitude of the fine. In line with this, the Turkish Competition Authority enacted the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("***the Regulation on Fines***"). The Regulation on Fines provides detailed guidelines regarding the calculation of monetary fines applicable in cases of antitrust violations. The Regulation on Fines applies both to cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines.

According to the Regulation on Fines, fines are calculated by determining the basic level first, which in the case of cartels is between 2% and 4% of the company's turnover in the financial year preceding the date of the fining decision. Aggravating and mitigating factors are then factored in.

The Regulation on Fines also applies to managers or employees that 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, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement.

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

The sanctions that could 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. That said, there have been cases where the matter had to be referred to a public prosecutor after the Competition Law investigation has been completed. On that note, bid rigging activity may be criminally prosecutable under sections 235 *et seq* of the Turkish Criminal Code. Illegal price manipulation (i.e., manipulation through misinformation or other fraudulent means) may also be condemned by up to two years of imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code. The abovementioned sanctions may also apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees or board members or executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. There are no sanctions specific to individuals other than those mentioned above.

Right of appeal against civil liability and penalties

The Board decisions can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt of the justified (reasoned) decision of the Board by the parties. Filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide for stay of the execution if the execution of the decision is likely to cause serious and irreparable damages; and if the decision is highly likely to be against the law (i.e., showing of a *prima facie* case). The judicial review period before the administrative court usually takes about 12 to 24 months. If the challenged decision is annulled in full or in part, the administrative court returns it to the Board for review and reconsideration.

After the recent legislative changes, administrative litigation cases (private litigation cases as well) are subject to judicial review before the newly established regional courts ("***regional courts***"), 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). The regional courts will (i) go through the case file both on procedural and substantive grounds, and (ii) investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In such cases, the decision of the regional court will not be considered as a final decision and the Council of State may decide to uphold or reverse the regional court's 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 which takes into account the Council of State's decision.

Criminal sanctions

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law does not lead to criminal sanctions. However, cases might be referred to a public prosecutor after the Competition Law investigation is completed. On that note, bid rigging activity may be criminally prosecutable under sections 235 *et seq*. of the Turkish Criminal Code. Illegal price manipulation (i.e., manipulation through misinformation or other fraudulent means) may also be condemned by up to two years of imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

Cross-border issues

Turkey is one of the 'effect theory' jurisdictions where the effect that a cartel activity has produced on Turkish markets is what matters, 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 refrained from declining jurisdiction over non-Turkish cartels or cartel members (e.g., the suppliers of rail freight forwarding services for block trains and cargo train services, 15-44/740-267, December 16, 2015; Güneş Ekspres/Condor, 11-54/1431-507, October 27, 2011; Imported Coal, 10-57/1141-430, September 2, 2010; Refrigerator Compressor, 09-31/668-156, July 1, 2009; Şişecam/Yioula, 07-17/155-50, February 28, 2007; Gas Insulated Switchgear, 04-43/538-133, June 24, 2004) in the past. It should be noted, however, that the Board has yet to enforce monetary fines or other sanctions against firms located outside of Turkey without any presence in Turkey, as this is mostly due to the enforcement handicaps (such as difficulties of formal service to foreign entities).

Developments in private enforcement of antitrust laws

The most distinctive feature of Turkish Competition Law regime is that it allows for lawsuits for treble damages. Hence, administrative enforcement is supplemented with private lawsuits.

Articles 57 *et seq*. of the Competition Law entitles any person who may be injured in his business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is an actual condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, thereby treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

Due 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. In 12 banks decision (March 8, 2013, 13-13/198-100), the Board had launched an investigation to determine as to whether 12 banks violated Article 4 of Law No.4054 by a reconciliation to harmonise their trade terms for cash deposit interests, credits, and credit card fees. The Board imposed administrative fines ranging between 0.3% and 1.5% to investigated undertakings involved. Moreover, the Board ruled that courts shall have absolute discretion to award treble damages in Competition Law-based damages claims, establishing a strong deterrent from cartel activity. Recently, in light of the abovementioned Board decision, Istanbul 12th Consumer Court on May 9, 2017 awarded single damages up to an intimidating total of TL 11,479.73 to a single plaintiff (approximately €2,732.64 at the time of writing).

Turkish procedural law denies any class action or procedure. Class certification requests would not be granted by Turkish courts. While Article 25 of Law No. 4077 on the Protection of Consumers allows for class actions by consumer organisations, these actions are only limited to violations of Law No. 4077 on the Protection of Consumers, and do not extend to cover antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private lawsuits provided under Article 57 *et seq*. of the Competition Law.

Reform proposals

The major development expected in the Turkish Competition Law regime is the adoption of the draft law amending Law 4054 on the Protection of Competition. To that end, the draft law was officially submitted to the presidency of the Turkish Parliament on January 23, 2014 and was reviewed by a parliamentary sub-committee. However, the parliamentary sub-committee could not conclude its work on the necessary changes within the relevant parliamentary legislative year. Therefore, at present the draft law is statute-barred. In order to re-initiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish Parliament. Although it is impossible to say when this will happen, it is likely that a draft reform law will remain on the Competition Law agenda.

The draft law aims to achieve further compliance with the EU competition regime, on which it is closely modelled. It adds several new dimensions and changes which should result in a procedure that is more efficient in terms of time and resource allocation. The draft law proposes several significant changes in terms of merger control:

- The substantive test for concentrations will be changed. The EU significant impediment of effective competition test will replace the existing dominance test.
- In accordance with EU Competition Law, the draft law will adopt the term 'concentration' as an umbrella term for mergers and acquisitions.
- The draft law will eliminate the exemption for acquisition by inheritance.
- The draft law will abandon the Phase II procedure (which was similar to the investigation procedure) and provide a four-month extension for cases requiring in-depth assessments. During in-depth assessments, parties can deliver written opinions to the Competition Board, which will be akin to written defences.
- The draft law will extend the appraisal period for concentrations from the existing period of 30 calendar days to 30 business days, which equates to approximately 40 days in total. As a result, the period in which to obtain a decision on a preliminary review is expected to be extended.

Further, the draft law proposes to abandon the fixed turnover rates for certain procedural violations, including failing to notify a concentration and hindering onsite inspections; and to cap the monetary fines imposed for these violations. This new arrangement gives the board discretion to set fines by conducting case-by-case assessments.

Another significant anticipated development is the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition, which will replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the draft regulation clearly demonstrates the authority's intention to bring the secondary legislation into line with EU Competition Law during the harmonisation process. The draft regulation was sent to the Turkish Parliament on January 17, 2014, but as yet no enactment date has been announced.

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