Market Intelligence

CARTELS 2020

Global interview panel led by Hengeler Mueller

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1 | What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The Turkish Competition Authority (the Authority) places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) has nonetheless been repeatedly underlined by the president of the Authority.

The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not set out a definition of 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

There are no industry-specific offences or defences that lead to particular scrutiny. The Competition Law applies to all industries, without exception. Cement, ready-mix concrete, bread yeast, ro-ro transportation, consumer electronics products, including personal computers and game consoles, booking and retail technology superstores, jewellery, aluminium and PVC technologies, glass and glass products, insurance, tobacco and alcoholic beverages, driving schools and bakery industries have been under investigation for cartel and concerted practice allegations in previous years.

2 | What do recent investigations in your jurisdiction teach us?

The Authority's decision-making body, the Competition Board (the Board), is entitled to launch an investigation into alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent on the matter for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (eg, formal information-request letters) are used during the pre-investigation process. The preliminary report by the Authority's experts will be submitted to the Board within 30 days after the pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal


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investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months by the Board. Dawn raids and other investigatory tools are also used during the investigation process.

The investigated undertakings have 30 calendar days, as of the formal service of the notice, to prepare and submit their first written defences (the first written defence). Subsequently, the main investigation report is issued by the Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (the second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (the third written defence). When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings

"There is a marker system for leniency applications: the Authority can grant a grace period to applicants to submit the necessary information and evidence to complete their applications."

are held within at least 30 days and at most 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 will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal must be filed before the Ankara administrative courts within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterparty.

The Board may request any information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into

account). The minimum fine to be applied in such cases is currently 31,903 Turkish liras. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, a refusal to grant the staff of the Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (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).

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority does not possess any evidence to support a charge of cartel infringement. Employees or managers of the first applicant will also be totally immune; the applicant must, however, not have been the coercer. If the applicant has forced any other cartel members to participate in the cartel, it may only qualify for a reduction in fine of between 33 and 50 per cent for the firm and between 33 and 100 per cent for the employees or managers. There is a marker system for leniency applications: the Authority can grant a grace period to applicants to submit the necessary information and evidence to complete their applications.

There is also no legal obstacle to submitting a leniency application orally. In such cases, the information submitted should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives. Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately. Barring criminally prosecutable acts such as bid rigging in public tenders, there is no criminal sanction against employees for antitrust infringements in practice.

The Board may impose on the applicants a turnover-based monetary fine of 0.1 per cent 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) in cases where incorrect or misleading information is provided (as discussed earlier).

In terms of leniency applications, the Board's most important decision concerning leniency applications is the *Corporate Loans* decision (28 November 2017, 17-39/636 276), which concerned 13 financial institutions, including local

and international banks, active in the corporate and commercial banking markets in Turkey. The Board launched an investigation against 13 financial institutions, including local and international banks, into whether they had violated article 4 of Law No. 4054 by way of exchanging competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU) made a leniency application on 14 October 2015 to benefit from article 4 of the Regulation on Leniency. After a 19-month in-depth investigation, the Board unanimously concluded that BTMU, ING Bank AŞ (ING) and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi (RBS) had violated article 4 of Law No. 4054. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million Turkish liras and 66,400 Turkish liras, respectively, over their annual turnover in the 2016 financial year. However, the Board resolved that BTMU should not have an administrative monetary fine imposed pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.

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Another important decision concerning leniency applications was the *Mechanical Engineering* (14 December 2017, 17-41/640-279) decision. The Board initiated an investigation against 16 freelance mechanical engineers to determine whether they violated article 4 of Law No. 4054 by being part of a profit-sharing cartel. One of the investigated undertakings applied for leniency during the course of the preliminary investigation. The Competition Board concluded that 14 of the freelance mechanical engineers were engaged in a profit-sharing cartel. The leniency applicant received full immunity from fines, while also relieving one of the freelance mechanical engineers from an administrative monetary fine.

Most recently, in its decision regarding undertakings active in the ro-ro transportation sector (18 April 2019, 19-16/229-101), the Board decided that the undertaking that applied for leniency should be given half of the administrative fine in consideration of its leniency application. The Board noted that the information provided by the leniency applicant significantly contributed to the investigation. The Board further noted that the relevant contributions included that the starting point of the violation was earlier than what was detected in the on-site inspection, there was evidence to suggest that price information had been exchanged, information on the undertakings in violation, and further details on how the price exchange was conducted.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making and what are your experiences in this regard?

The current Turkish competition law regime does not provide for measures that could speed up or streamline the Authority's decision-making process, such as a settlement procedure. However, a settlement process has recently been considered within the scope of the draft Law on Protection of Competition (the Draft Law).

The Prime Ministry sent the Draft Law, which is designed to introduce new concepts to the Turkish competition cartel regime such as the de minimis defence and the settlement procedure, to the Presidency of the Turkish Parliament on 23 January 2014. However, the Draft Law is now null and void following the beginning of the new legislative year of the Turkish parliament. To reinitiate the parliamentary process, the Draft Law must again be proposed and submitted to the presidency of the Turkish parliament. At this stage, it remains unknown whether the new Turkish parliament or the government will renew the Draft Law.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The past year has not witnessed ground-breaking cartel cases or record fines for cartel activity. In fact, there has been an easily detectable decline in the number of cartel cases. Most of the fully fledged investigations did not result in monetary fines against the defendants.

Some of the most recent decisions of the Board are the *Corporate Loans* (28 November 2017, 17-39/636-276) and *Mechanical Engineering* (14 December 2017, 17-41/640-279), which are related to the leniency applications explained above.

According to 2019 annual report of the Authority, concerning a leniency application made in 2018, the Cartel and On-Site Inspection Support Division (the Cartel Division) has decided that the applicant should be awarded a 50 per cent reduction from the monetary fine (*Ambarlı Ro-Ro* decision 19-16/229-101, 18 April 2019). However, according to the 2018 annual report, there were no significant cartel decisions in which the Board imposed significant administrative monetary fines. In 2018, there was a decline in the number of investigations with monetary fines; according to the 2017 and 2019 reports, there have been two leniency applications in total – the process concerning the application made in 2019 is ongoing. Both applicants who made their leniency applications in 2017 were granted immunity in investigations where other undertakings were fined. The first application concerned the mechanical engineering sector (17-41/640-279, 14 December 2017). The allegation was that mechanical engineers in Burdur compiled revenue in a pool and shared it. One of the undertakings became aware of the leniency regime during the on-site inspection and applied and consequently was granted immunity from the administrative monetary fine.

The second application involved 13 financial institutions active in the corporate and commercial banking markets in Turkey (17-39/636-276, 28 November 2017). The allegation concerned the exchange of competitively sensitive information on loan conditions regarding current loan agreements and other financial transactions. The Board resolved that BTMU would not face an administrative fine pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from administrative fines. The Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million Turkish liras and 66,400 Turkish liras, respectively, over their annual turnover in the 2016 financial year.

The Authority's annual report for 2019 provides that the Board finalised a total of 69 cases relating to competition law violations. Among the 69 cases, 30 were

"While the monetary fine total for article 4 cases significantly increased in 2019, the monetary fine total imposed on article 6 cases decreased."

subject to article 4 of the Competition Law (anticompetitive agreements) only and 12 cases were subject to both article 4 and article 6 (abuse of dominant position).

The report provides that the Board issued monetary fines amounting to a total of 228,733,560 Turkish liras in 2019. While the monetary fine total for article 4 cases significantly increased in 2019, the monetary fine total imposed on article 6 cases decreased. The Board imposed fines totalling 164,392,558 Turkish liras on horizontal anticompetitive arrangements in 2019, while the fines for 2017 and 2018 totalled 21,279,796 and 9,201,300 Turkish liras, respectively.

The Board's *Raw Meatball* decision (10 October 2019, 19-03/13-5) is also one of the landmark decisions of the Board with regard to price-fixing agreements. The decision concerned the preliminary investigation conducted against raw meatball producers, in Gaziantep regarding allegations that the relevant undertakings had violated article 4 of Law No. 4054. The decision carries importance given that the Board decided to issue an opinion letter pursuant to article 9(3) of Law No. 4054 although there was concrete evidence showing a price-fixing agreement, a mechanism for monitoring of that agreement, a punishment mechanism for cheating and the effects of this agreement on the market. The Board conducted its analysis mainly

based on the document titled 'Raw Meatballs Producers Discussion Meeting'. The meeting took place at the Gaziantep Chamber of Commerce, and the document was signed by the representatives of six raw meatball stores active in the Gaziantep province. The relevant evidence indicates that (1) starting from a specific date (that is redacted in the reasoned decision), the price of raw meatballs was determined to be fixed at a specific amount (also redacted in the reasoned decision); (2) 500g packs of raw meatballs sold to stores would be priced at a specific amount (redacted); (3) the determined price included in the agreement would be applicable in Gaziantep whereas a different minimum price would be applied throughout Turkey; (4) the producers would not conduct sales under different brands and under the market value; (5) a WhatsApp group would be created to report any failure to comply; and finally (6) a fine of 13,000 Turkish liras would be imposed on those who did not comply with the rules as agreed upon. Based on these findings, the Board explicitly stated that the relevant agreement established the existence of a violation of competition law. That said, the Board referred to article 9 of Law No. 4054, pursuant to which the Board may issue an opinion letter to undertakings to terminate the infringement.

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The investigations that have been initiated by the Board so far clearly show that it does not focus on any specific sectors when it comes to the investigation of cartel behaviou,r but rather aims to tackle any conduct or practice that might point to a restriction of competition among competing undertakings. Emphasising the importance of the difference between the prices applied before and after the execution of the agreement, the Board found that the market prices for raw meatballs had decreased following new entries into the market. However, the Board concluded that the prices were increased through the agreement executed by the relevant undertakings due to cost increases. The Board then observed that the pricing decisions taken during the meeting had been applied by all of the producers whose names were mentioned in the agreement and follow-ups were made via the WhatsApp group; and that the penalty clause was inserted to demonstrate that the undertakings were taking the agreement seriously.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The Authority is an independent administrative body and is not required to apply to another body or authority before rendering its decisions. However, the existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing the violators to seek compensation for damage suffered. As in US antitrust enforcement, one of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. That way, administrative enforcement is supplemented with private lawsuits. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually an infringing agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Board. Under article 27 of the Administrative Procedural Law, 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 to stay the execution of the decision if its execution is likely to

cause serious and irreparable damage, and the decision is highly likely to be against the law (ie, a prima facie case).

The judicial review period before the Ankara administrative courts usually takes between 12 and 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.

Following the recent legislative changes, administrative litigation cases (including private litigation cases) are now subject to judicial review before the newly established regional courts (the appellate 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 court will go through the case file, both on procedural and substantive grounds, and will investigate the case file and make its decision considering the merits of the case. The regional court's decision will be considered as final in nature, but will be subject to review by the Council of State in exceptional circumstances (as 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 regional court, which will in turn issue a new decision taking into account the Council of State's decision. As the regional courts are newly established, we have yet to see how long it will take for a regional court to finalise its review of a file. Accordingly, we cannot provide an estimate as to the Council of State's review period for a regional court decision within the new system, as that also remains to be tested.

7 | How is private cartel enforcement developing in your jurisdiction?

There is no private cartel enforcement in the Turkish competition law regime.

The existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing violators to seek compensation for any damage suffered.

8 | What developments do you see in antitrust compliance?

Competition compliance programmes are designed to reduce the risk of anti-competitive behaviour by companies. The Competition Authority Competition Law Compliance Programme (the Compliance Programme) states that a regular assessment and monitoring mechanism is essential for the success of a compliance programme. Since each company operates in different markets with different market conditions, the Authority does not set forth a specific monitoring mechanism

"As the regional courts are newly established, we have yet to see how long it will take for a regional court to finalise its review of a file."

requirement; however, briefly, it would be appropriate to test employees' knowledge of the law and of the undertaking's policy and procedures regarding the compliance programme, and to monitor the activities of the employees on a given date, or without notice, to control actual or potential infringements. In addition, notifying senior management of actual or potential infringements and determining suitable problem-solving mechanisms require a regular assessment system to be developed. Moreover, the Compliance Programme suggests that if the undertaking's size permits it and there is the opportunity, it should have a specific department or a consultant for competition policy. According to the Compliance Programme, the company official or consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. Therefore an effective compliance programme with all essential monitoring mechanisms would minimise the risk of competition infringement.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

In 2019, the Competition Board initiated 29 investigations and several of them were based on allegations related to the violation of article 4 of Law No. 4054. In this respect, it is expected that the Competition Board will render its decision on most of these case files in 2020. It is expected that the case where the investigated conducts are regarded as cartel behaviour by the Competition Board and the respective assessment will shed further light on the Competition Authority's current stance on cartel activity.

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The Inside Track

What was the most interesting case you worked on recently?

We recently represented two reseller cargo companies in an investigation against 36 cargo/logistic companies concerning allegations on customer allocation through bilateral agreements.

During the investigation, a majority of the case team alleged that the written correspondence between integrators and resellers showed cartel agreements on customer allocation and suggested that these companies should be subject to administrative monetary fines. After its examination, the Turkish Competition Board, however, concluded that integrators restricted the sales of resellers through their vertical relationships under article 4 of Law No. 4054. The Board imposed monetary fines on four integrators: DHL, TNT, UPS and Yurtiçi Kargo Servisi AŞ, while resellers were not found in violation of Law No. 4054.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The Authority already has an economic analysis and research department (the Department), which is empowered to conduct examinations and analyses in sectors or markets relevant to Board investigations. Ideally the Department would be expanded and would also be charged with submitting its independent opinion to the Board in each investigation. That way, the Department's know-how would be much better utilised, enabling the Board to incorporate more sophisticated economic analyses into its reviews of alleged anticompetitive behaviour.

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