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Cartels & Leniency 2021

A practical cross-border insight into cartels & leniency

14th Edition

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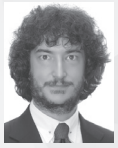
Gönenç Gürkaynak


Öznur İnanılır

ELIG Gürkaynak Attorneys-at-Law

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The statutory basis for cartel prohibition is the Law on the Protection of Competition No. 4054, dated 13 December 1994 ("Competition Law"). The Competition Law finds its underlying rationale in Article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure the free market economy. The Turkish cartel regime is "administrative" and "civil" in nature, not criminal. That being said, certain antitrust violations, such as bid rigging in public tenders and illegal price manipulation, may also be criminally prosecutable, depending on the circumstances. The Competition Law applies to individuals and companies alike, if and to the extent that they act as an undertaking within the meaning of the Competition Law.

After rounds of revisions and failed attempts of enactment over a span of several years, the proposal for an amendment to the Competition Law ("Amendment Proposal") has finally been approved by the Turkish parliament, namely the Grand National Assembly of Turkey. On 16 June 2020, the amendments passed through the parliament and entered into force on 24 June 2020 ("Amendment Law"). (The Amendment Law was published in the Official Gazette dated 24 June 2020 and numbered 31165.) According to the recital of the Amendment Proposal, these amendments aim at reflecting in the Competition Law (No. 4054) the Authority's experience in over 20 years of enforcement and at bringing Turkish competition law closer to the EU law. (Available at: https://www2.tbmm.gov.tr/d27/2/2-2875.pdf, last accessed on 17 June 2020.)

(Please refer to question 1.5 for the definition of "undertaking".)

1.2 What are the specific substantive provisions for the cartel prohibition?

The applicable provision for cartel-specific cases is Article 4 of the Competition Law, which lays down the basic principles of cartel regulation. The provision is akin to, and closely modelled on, Article 101 (1) of the EC Treaty. It 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 within a Turkish product or services market or a part thereof. Similar to Article 101 (1) of the EC Treaty, the provision does not give a definition of "cartel". Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity.

One of the most important amendments in the Amendment Law is the introduction of the "*de minimis*" principle, bringing Turkish competition law closer to the EU law. With this amendment, the Board will be able to decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. This principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Turkish Competition Authority appears to aim at steering its direction, as well as public resources, to more significant violations.

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

As is the case with Article 101 (1) of the EC Treaty, Article 4 brings a non-exhaustive list of restrictive agreements. It prohibits, in particular, agreements which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- share markets or sources of supply;
- limit or control production, output or demand in the market;
- place competitors at a competitive disadvantage or involve exclusionary practices such as boycotts;
- aside from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and
- make the conclusion of contracts, in a manner contrary to customary commercial practices, subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list is non-exhaustive and is intended to generate further examples of restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements which benefit from a block exemption and/or an individual exemption issued by the Board. To the extent not covered by the protective cloaks brought by the respective block exemption rules or individual exemptions, vertical agreements are also caught by the prohibition laid down in Article 4.

The block exemption rules currently applicable are: (i) Block Exemption Communiqué No. 2002/2 on Vertical Agreements; (ii) Block Exemption Communiqué No. 2017/3 on Vertical

Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) Block Exemption Communiqué No. 2008/3 for the Insurance Sector; (iv) Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; (v) Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and (vi) Block Exemption Communiqué No. 2016/5 on R&D Agreements, which are all modelled on their respective equivalents in the EC. Restrictive agreements that do not benefit from: (i) the block exemption under the relevant communiqué; or (ii) an individual exemption issued by the Board, are caught by the prohibition in Article 4.

A number of horizontal restrictive agreement types such as price-fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging have consistently been deemed to be *per se* illegal.

The Turkish antitrust regime also condemns concerted practices, and the Competition Authority ("Authority") easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called "the presumption of concerted practice". The definition of concerted practice in Turkey does not fall far from the definition used in the EC law of competition. 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 an exchange of letters. The special challenges posed by the proof standard concerning concerted practices are addressed under question 9.2.

1.3 Who enforces the cartel prohibition?

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Authority. The Authority has administrative and financial autonomy. It consists of the Board, Presidency and Service Departments including: five supervision and enforcement departments; a department of decisions; an economic analysis and research department; an information management department; an external relations, training and competition advocacy department; a strategy development, regulation and budget department; a press department; and a support division for on-the-spot cartel inspections. As the competent body of the Authority, the Board is responsible for, *inter alia*, investigating and condemning cartel activity. The Board consists of seven independent members according to Article 22 of the Competition Law. The Presidency handles the administrative works of the Authority.

A cartel matter is primarily adjudicated by the Board. Administrative enforcement is supplemented with private lawsuits as well. In private suits, cartel members are adjudicated before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations are increasingly making their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Authority, and build their own decision on that decision (please see section 8 below for further background on private suits).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

As provided above, the Amendment Law has introduced the "*de minimis*" principle, bringing Turkish competition law closer to the EU law. With this amendment, the Board will be able to decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. This principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Turkish Competition Authority appears to aim at steering its direction, as well as public resources, to more significant violations.

The Amendment Law refers to "turnover" and "market share" thresholds for the *de minimis* exception but leaves the setting of the threshold to the Board. It is therefore not yet clear how the Board will define the limits of the safe harbour which the new law has introduced.

The Board is entitled to launch an investigation into an alleged cartel activity *ex officio* or in response to a notice or complaint. A notice or complaint may be submitted verbally or through a petition. The Authority has an online system in which complaints may be submitted via the online form on the official website of the Authority. In the case of a notice or complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected in cases where the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. 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, please see section 2 below), and other investigatory tools (e.g. formal information request letters), are used during this pre-investigation process. The preliminary report of the Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation or not. 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 by the Board only once, for an additional period of up to six months.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (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 (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence (additional opinion). The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Authority, the investigation process will 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 request by the parties. The Board may also *ex officio* decide to hold an oral hearing. Oral hearings are held within at least 30, and at the 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: (i) 15 calendar days from the hearing, if an oral hearing is held; or (ii) 30 calendar days from the completion of the investigation process, if no oral hearing is held. 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.

1.5 Are there any sector-specific offences or exemptions?

There are no industry-specific offences or defences in the Turkish jurisdiction. The Competition Law applies to all industries, without exception. To the extent they act as an undertaking within the meaning of the Competition Law (i.e. a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services), state-owned entities also fall within the scope of application of Article 4. Due to the "presumption of concerted practice" (further addressed under question 9.2), oligopoly markets for the supply of homogenous products (e.g. cement, bread yeast, etc.) have constantly been under investigation for concerted practices. Nevertheless, whether this track record leads to an industry-specific offence would be debatable. There are some sector-specific block exemptions (such as the block exemption in the motor vehicle sector and the block exemption regulations in the insurance sector).

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Turkey is one of the "effect theory" jurisdictions, where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of: (i) the nationality of the cartel members; (ii) where the cartel activity took place; or (iii) whether the members have a subsidiary in Turkey. The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members (see, e.g., *Şişecam/Yioula*, 28 February 2007, 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004, 04-43/538-133; *Refrigerator Compressor*, 1 July 2009, 09-31/668-156) in the past, as long as there is an effect in the Turkish markets. In recent years, the Board concluded an investigation conducted in relation to the allegation that nine international companies active in the railway freight forwarding services market have restricted competition by sharing customers (*Railway Freight Forwarding*, 16 December 2015, 15-44/740-267). The Board explained that the practices of foreign undertakings may be subject to the Competition Law if they have any effect on the Turkish markets in the meaning of Article 2, regardless of whether these undertakings have any subsidiaries or affiliated entities in Turkey; and that such anticompetitive activities of foreign undertakings should have "direct", "significant" and "intended/foreseeable" effects on the Turkish markets. The Board concluded that the agreements have not produced effects on the Turkish markets within the meaning of Article 2 of the Competition Law and, therefore, the allegations in question did not fall within the scope of the Competition Law. The decision establishes that the Competition Authority's jurisdiction is limited to conducts that create an effect in any given product market in Turkey, notwithstanding whether the agreement, decision or practice takes place in or outside of Turkey. It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service to foreign entities).

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory Power	Civil/ Administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes	No
Carry out an unannounced search of residential premises	Yes*	No
■ Right to 'image' computer hard drives using forensic IT tools	Yes	No
■ Right to retain original documents	No	No
■ Right to require an explanation of documents or information supplied	Yes	No
■ Right to secure premises overnight (e.g. by seal)	Yes	No

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The Competition Law provides vast authority to the Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid, which would also result in a monetary fine. While the mere wording of the Competition Law allows verbal testimony to be compelled from employees, case handlers do allow the delaying of an answer so long as there is quick written follow-up correspondence. 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. Computer records are fully examined by the experts of the Authority, including but not limited to the deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters which do not fall within the scope of the investigation (i.e. that which is written on the deed of authorisation).

In addition to be above, the Amendment Law also includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in companies' physical records as well as those in electronic space and IT systems, which the Authority already does in

practice. This is also confirmed in the Amendment Proposal's preamble as it indicates that the amendment provides "further" clarification on the powers of the Authority which are particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are not.

2.4 Are there any other significant powers of investigation?

No, there are not.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The sole category of people participating in on-site inspections is the case handlers of the Authority only. Case handlers have no duty to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to come but may impose certain conditions (e.g. to seal file cabinets and/or to disrupt email communications).

2.6 Is in-house legal advice protected by the rules of privilege?

Attorney-client privilege under Turkish competition law has been discussed in several decisions of the Board in the near past. Specifically, in *Sanofi Aventis* (20 April 2009, 09-16/374-88), the Board indirectly recognised that the principles adopted by the Court of Justice of the European Communities in *AM&S v. Commission* (Case. 155/79 *AM&S Europe v. Commission* [1982] ECR 1575) might apply to attorney-client privileged documents in Turkish enforcement in the future, and in *CNR/NTSR* (13 October 2009, 09-46/1154-290), the Board elaborated in detail the privilege rules applied in the EC and tacitly concluded that the same rules would apply in Turkish antitrust enforcement. In addition, according to a more recent *Dow Turkey* decision of the Competition Board (2 December 2015, 15-42/690-259), the attorney-client protection covers the correspondences made in relation to the client's right of defence and documents prepared in the scope of an independent attorney's legal service. Correspondences that are not directly related to the use of the client's right of defence or that aim to facilitate/conceal a violation are not protected, even when they are related to a pre-investigation, investigation or inspection process. For example, while an independent attorney's legal opinion on whether an agreement violates Law No. 4054 can be protected under the attorney-client privilege, the correspondences on how Law No. 4054 can be violated between an independent attorney and client do not fall within the scope of this privilege. On a final note, correspondences with an independent attorney (i.e. without an employment relationship with her/his client) fall into the scope of attorney-client privilege and shall be protected.

That said, the Eighth Administrative Chamber of the Ankara Regional Administrative Court issued a unique decision on attorney-client privilege in 2018 (*Enerjisa*, 2018/1236, 10 October 2018). The decision concerned an internal review report of outside counsel for competition law compliance purposes, which had been prepared before the authority opened an investigation against Enerjisa. The report was taken by the case handlers during a dawn raid conducted in the scope of the investigation against this company at a later stage. The court held that although the document was correspondence "between an independent attorney and the undertaking", it was not protected under attorney-client privilege given that "it was not directly related to the right to defence", due to its preparation prior to an investigation.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

This is not applicable.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1% 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 is TL 31,903 (around EUR 3,713 at the time of writing) for the year 2020. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, refusing to grant the staff of the Authority access to business premises may lead to the imposition of a daily-based periodic fine of 0.05% 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 case is also TL 31,903 (around EUR 3,713 at the time of writing).

In 2020, the Board fined a number of undertakings for hindering on-site inspections. In this respect, in its *Groupe SEB İstanbul* decision (9 January 2020; 20-03/31-14), Groupe SEB İstanbul was fined 0.05% of its turnover generated in 2018 for hindering an on-site inspection. Similarly, the Board imposed a fine of 0.5% upon Unilever for not granting access to Unilever's e-mail system for a search by using "eDiscovery" for approximately eight hours during the on-site inspection (*Unilever* Decision, 7 November 2019, 19-38/584-250).

In 2019, the total amount of fines imposed on undertakings that obstructed on-site inspections was TL 38,116,076.71 (around EUR 4,437,261.55 at the time of writing).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In the case of proven cartel activity, the companies concerned shall be separately 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/or managers of the undertaking/association of undertakings who had a determining effect on the creation of the violation are also fined up to 5% of the fine imposed on the undertaking/association of undertakings. The Competition Law makes reference to Article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as: the level of fault and the amount of possible damage in the relevant market; the market power of the undertaking(s) within the relevant market; the duration and recurrence of the infringement; the cooperation or driving role of the undertaking(s) in the infringement; the financial power of the undertaking(s); and compliance with the commitments, etc. in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the "Regulation on Fines") was enacted by the Authority in 2009. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both 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 first determining the basic level, 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 (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines also applies to managers or employees who had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

As for the highest monetary fines imposed by the Board as a result of a cartel investigation, two decisions stand out:

(i) The highest monetary fine imposed by the Board on a single company as a result of a cartel investigation is TL 213,384,545.76 (around EUR 24,841 million at the time of writing). This monetary fine was imposed by the Board on the economic entity composed of Türkiye Garanti Bankası A.Ş. and Garanti Ödeme Sistemleri A.Ş. and Garanti Konut Finansmanı Danışmanlık A.Ş. ("Garanti") in its decision dated 8 March 2013 and numbered 13-13/198-100. This amount represented 1.5% of Garanti's annual gross revenue for the year 2011.

(ii) The highest monetary fine imposed by the Board for an entire case (i.e. total fine on all companies covered by the cartel conduct) as a result of a cartel investigation was TL 1,116,957,468.76 (around EUR 130 million at the time of writing) for the same case (decision dated 8 March 2013 and numbered 13-13/198-100). The total fine was imposed on 12 undertakings active in the banking sector.

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 same level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed 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 of serious and irreparable damage.

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 not criminal sanctions. That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation was complete. 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 disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. (Please see section 8 below for private suits, which may also become an exposure item against the defendant.)

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The sanctions specified in question 3.1 may 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 and/or board members/executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific for individuals. 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 disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. (Please see section 8 below for private suits, which may also become an exposure item against the defendant.)

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

No. The enforcement record indicates that the Board fined entities that had gone bankrupt before the fining decision without a reduction. However, Section 17 of the Law on Minor Offences provides that the fining administrative entity (i.e. the Board) may decide to collect the fine in four instalments (instead of one) over a period of one year, on the condition that the first instalment is paid in advance. Also, the Regulation on Fines provides that the Board may reduce the fine by 1/4 to 3/5, if the turnover that is linked to the violation represents a very small portion of the fined undertaking's entire turnover.

3.4 What are the applicable limitation periods?

The Board's right to impose administrative monetary fines terminates upon the lapse of eight years from the date of infringement. In the event of a continuous infringement, the period starts running on the day on which the infringement has ceased or was last repeated. Any action taken by the Board to investigate an alleged infringement cuts the eight-year limitation period. The applicable periods of limitation in private suits (please see section 8) are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of 10 years from the event giving rise to the damage of the plaintiff. Prosecution of offences of a criminal nature (such as bid rigging activity and illegal price manipulation) is subject to the generally applicable criminal statutes of limitation, which would depend on the gravity of the sentence imposable.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. This does not constitute advice on tax deductibility or the accounting/bookkeeping aspects of such payment.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Competition Law does not provide any specific rules regarding the liability of implicated employees for the legal costs and/or financial penalties imposed on the employer. On the other hand, much would depend on the internal contractual relationship between the employer and the implicated employee, as there is no roadblock against the employer claiming compensation from the implicated employee under the general principles of Turkish contracts or labour laws. This does not constitute tax advice.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The Competition Board has a consistent approach of fining the legal entity which was involved in cartel behaviour rather than fining the parent company as a whole.

Article 16 of the Competition Law makes a reference to the term "undertaking" when it identifies the entity which the monetary fine is to be imposed on. Article 3 of the Competition Law defines undertakings as natural and legal persons who produce, market and sell goods or services in the market, and entities which can decide independently and constitute an economic entity. Therefore, it can be argued that it technically leaves the impression that the Competition Board is empowered to go up to the ultimate parent for the calculation of turnover rather than solely focusing on the local turnover of the entity that actually violates Law No. 4054.

That said, in practice, the Board does not tend to calculate the revenue by taking into consideration the whole group's (i.e. the undertaking's) revenue, and imposes monetary fines on the basis of the actual infringing legal entity's (infringing subsidiary's) revenue (e.g. the Board's *Automotive* decision dated 18 April 2011 and numbered 11-24/464-139, *Cement* decision dated 6 April 2012 and numbered 12-17/499-140, and *Financial Institutions* decision dated 28 November 2017 and numbered 17-39/636-276).

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Amendments to the Competition Law, which were enacted in February 2008, brought about a stricter and more deterrent fining regime, coupled with a leniency programme for companies.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels ("Regulation on Leniency"), came into force on 15 February 2009.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set. According to the Regulation on Leniency, the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringement. A definition of "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 or reduction includes both the undertaking and its employees/managers, with the exception of the "ring-leader" which can only benefit from a second degree reduction of a fine. The conditions for benefitting from the immunity/reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees/managers can apply for leniency.

Additionally, the Authority published the Guidelines on the Clarification of Regulation on Leniency on 19 April 2013. The perspective of the Board stands parallel with the perspective of the European Commission, since the leniency applications are quite minimal; however, it is not yet possible to say that Turkish competition law regulation has caught up with EU regulation concerning leniency procedures and reviews.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Although no detailed principles on the "marker system" are provided under the Regulation on Leniency, pursuant to the relevant legislation, a document (showing the date and time of the application and request for time (if such a request is in question) to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

There is no legal obstacle over conducting a leniency application orally. The Regulation on Leniency provides that information required for making a leniency application (information on the products affected by the cartel, information on the duration of the cartel, names of the cartelists, dates, locations, and participants of the cartel meetings, and other information/documents about the cartel activity) might be submitted verbally. However, it should be noted that in such a case, the submitted information should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or employees/managers of the undertaking) must keep the application confidential until the end of the investigation, unless it is otherwise requested by the assigned unit.

Articles 6 and 9 of the Regulation on Leniency provide that unless stated otherwise by the authorised division, the principle is to keep leniency applications confidential until the service of the investigation report. Nevertheless, to the extent the confidentiality of the investigation will not be harmed, the applicant undertakings could provide information to other competition authorities or institutions, organisations and auditors. The applicant is in any case obliged to maintain active cooperation until

the final decision is taken by the Board following the conclusion of the investigation. As per paragraph 44 of the Guideline, if the employees or personnel of the applicant undertaking disclose the leniency application to the other undertakings and breach the confidentiality principle, the Board will evaluate the situation on a case-by-case basis based on the criteria of whether the person at issue is a high-level manager or the Board was notified promptly after the breach or not.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Pursuant to the principles set forth under the Regulation on Leniency, the active (continuous) cooperation shall be maintained until the Board renders its final decision after the investigation is completed.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Amnesty Plus is regulated under Article 7 of the Regulation on Fines. According to Article 7 of the Regulation on Fines, the fines imposed on an undertaking which cannot benefit from immunity provided by the Regulation on Leniency will be decreased by one-fourth if it provides the information and documents specified in Article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

A manager/employee of a cartelist may also apply for leniency until the "investigation report" is officially served. Such an application would be independent from applications – if any – by the cartelist itself. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager/employee. The requirements for such individual application are the same as those stipulated under question 4.1 above.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Amendment Law introduces two new mechanisms that are inspired by the EU law and aim to enable the Board to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is the commitment procedure. It will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6 of the Law No. 4054, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing and the restriction of supply. Additionally, the Board may reopen an investigation in the following cases: (i) substantial change in any aspect of the basis of the decision; (ii) the relevant undertakings' non-compliance with the commitments; or (iii) realisation that the decision was decided on deficient, incorrect or fallacious information provided by the parties. Second, the Amendment Law also introduces the settlement procedure. As the relevant provision is added to Article 43 concerning investigations of anticompetitive conduct in general, and considering that the Amendment Law does not limit the settlement option to cartels only, it appears that this new procedure will also be applicable to "other infringements" under Article 4 and abuse of dominance cases under Article 6. The Board will provide the details of these new procedures by secondary legislation.

The new law will enable the Board, *ex officio* or upon parties' request, to initiate the settlement procedure. Unlike the commitment procedure, settlement can only be offered in full-fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The Board will set a deadline for the submission of the settlement letter and if settled, the investigation will be closed with a final decision including the finding of a violation and an administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25%. Other procedures and principles regarding settlement will be determined by the Board's secondary legislation.

7 Appeal Process

7.1 What is the appeal process?

As per Law No. 6352, the administrative sanction decisions of the Board can be submitted for judicial review before the Administrative Courts in Ankara by the filing of an appeal case within 60 days upon receipt by the parties of the justified (reasoned) decision of the Board. As per 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 by the plaintiff, the court, providing its justifications, may decide the stay of execution of the decision if such execution is likely to cause serious and irreparable damage, and if the decision is highly likely to be against the law (i.e. the showing of a *prima facie* case).

The judicial review period before the Ankara Administrative Courts usually takes about 12 to 24 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the Administrative Courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the Administrative Court.

Since 2016, administrative litigation cases are 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 go through the case file both on procedural and substantive grounds. The regional courts investigate the case file and make their decision considering the merits of

the case. The regional courts' decisions are considered as final in nature. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review and therefore will not be considered as a final decision. 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.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 36 months.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No. As stipulated under question 7.1 above, 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 on a stay of execution.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The Administrative Courts and High State Council do not cross-examine witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Articles 57 *et seq.* of the Competition Law entitle any person who is 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 actually a condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. 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.

8.2 Do your procedural rules allow for class-action or representative claims?

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 class actions by consumer organisations, these actions are 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 suits under Articles 57 *et seq.* of the Competition Law.

8.3 What are the applicable limitation periods?

As noted above in question 3.4, the applicable periods of limitation in private suits are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of 10 years from the event giving rise to the damage of the plaintiff.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Competition Law and judicial precedents do not specifically recognise "passing on" defences in civil damages claims. "Passing on" defences are yet to be tested in Turkish enforcement. However, this is still an area of controversy: a part of the doctrine suggests that passing on defences should be allowed, whereas some other scholarly writings defend that they should not be accepted. However, there is no roadblock under the general civil claims rules against a defendant to put forward a "passing on" defence in civil damages claims. Nevertheless, the issue requires a case-by-case analysis, as the admissibility of the defence depends on the position of the claimant and the nature of the claim.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Any person who is injured in his business or property by reason of cartel activity is entitled to sue the violators for three times their damages, plus litigation costs and attorney fees. Other than this, there are no specific cost rules for cartel cases. The general cost rules for civil law claims also apply in cartel cases.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Antitrust-based private lawsuits are rare, but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations. Civil damage claims have usually been settled among the parties involved prior to the court rendering its judgment.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

According to the annual activity report of the Turkish Competition Authority, the Authority received two leniency applications in 2019, whereas the processes for these two applications are ongoing. A leniency application with respect to an investigation centred on the Ro-Ro sector resulted in the reduction of the administrative monetary fine in accordance with Article 5 of the Regulation on Leniency.

During the course of the year in review, there have not been any significant cartel decisions in which the Board has imposed

significant administrative monetary fines. On the contrary, there has been a decline in the number of cartel cases as well as the number of investigations with monetary fines. According to the annual report of the Turkish Competition Authority for 2019, the Board decided on 312 cases and 69 of them are related to competition law violations. Twenty-nine out of 69 are related to Article 4 and/or 6 of the Law No. 4054. Similarly, in a preliminary investigation initiated against *Çiğ Köfte* (a traditional version of steak tartare) producers operating in Gaziantep province in Turkey, the Board noticed price-fixing agreements regarding the sale price and conditions of *Çiğ Köfte* concluded between undertakings and acknowledged the presence of an agreement restricting competition in the relevant product market (10 January 2019; 19-03/13-5). Having said that, instead of imposing an administrative monetary fine on the relevant undertakings, the Board addressed an opinion letter to the *Çiğ Köfte* producers pursuant to Article 9/3 of the Competition Law, requiring the cessation of any behaviour which may generate competition law infringements.

Finally, the Board has recently levied an administrative monetary fine within the investigation launched against five undertakings and one association of undertakings active in cabotage Ro-Ro transportation lines in Turkey (18 April 2019, 19-16/229-101). The Board concluded that Tramola Gemi İşletmeciliği ve Ticaret A.Ş. ("Tramola"), Kale Nakliyat Seyahat ve Turizm A.Ş. ("Kale Nakliyat"), İstanbullines Denizcilik Yatırım A.Ş. ("İstanbullines"), İstanbul Deniz Nakliyat Gıda İnşaat Sanayi Ticaret Ltd. Şti. ("İDN") and İstanbul Deniz Otobüsleri Sanayi ve Ticaret A.Ş. ("İDO") had violated Article 4 of the Competition Law by way of collectively determining prices. In this respect, the Board imposed an administrative monetary fine on (i) Tramola and İstanbullines, equivalent to 4% of their annual gross income, (ii) İDN and İDO, equivalent to 0.8% of their annual gross income, and (iii) Kale Nakliyat, equivalent to 1.6% of its annual gross income as the Board did not grant full immunity to the leniency applicant. Moreover, the Board imposed an additional fine on İstanbullines of 0.01% of its annual gross income for the submission of incomplete information to the Competition Authority. Overall, the total amount of the fine imposed on all the undertakings is TL 7,404,850.77 (around USD 1 million and EUR 862,031).

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

The most recent change with respect to the Turkish cartel regime was the publication of the amended Guidelines on Vertical Agreements, which concluded a two-year project of the Competition Authority in this regard. The amended version of the Guidelines now includes internet sales, which are acknowledged to provide a wider data set that allows price comparison for consumers. Furthermore, revisions concerning most favoured customers ("MFN") clauses, a contemporary topic deemed significant by competition authorities around the globe, were also made.

Mr. Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr. Gürkaynak received his LL.M. degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales. Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr. Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority.
Mr. Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish by various international and local publishers. Mr. Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

ELIG Gürkaynak Attorneys-at-Law
Çitlenbik Sokak No. 12
Yıldız Mahallesi Beşiktaş
34349 Istanbul
Turkey

Tel: +90 212 327 17 24
Email: gonenc.gurkaynak@elig.com
URL: www.elig.com

Ms. Öznur İnanılır joined ELIG Gürkaynak Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LL.M. degree in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Ms. Öznur İnanılır became a partner within the "Regulatory and Compliance" department in 2016 and has extensive experience in all areas of competition law, in particular, compliance to competition law rules, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. Ms. İnanılır has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

ELIG Gürkaynak Attorneys-at-Law
Çitlenbik Sokak No. 12
Yıldız Mahallesi Beşiktaş
34349 Istanbul
Turkey

Tel: +90 212 327 17 24
Email: oznur.inanilir@elig.com
URL: www.elig.com

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, and consists of three partners, four counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

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

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and/or vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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