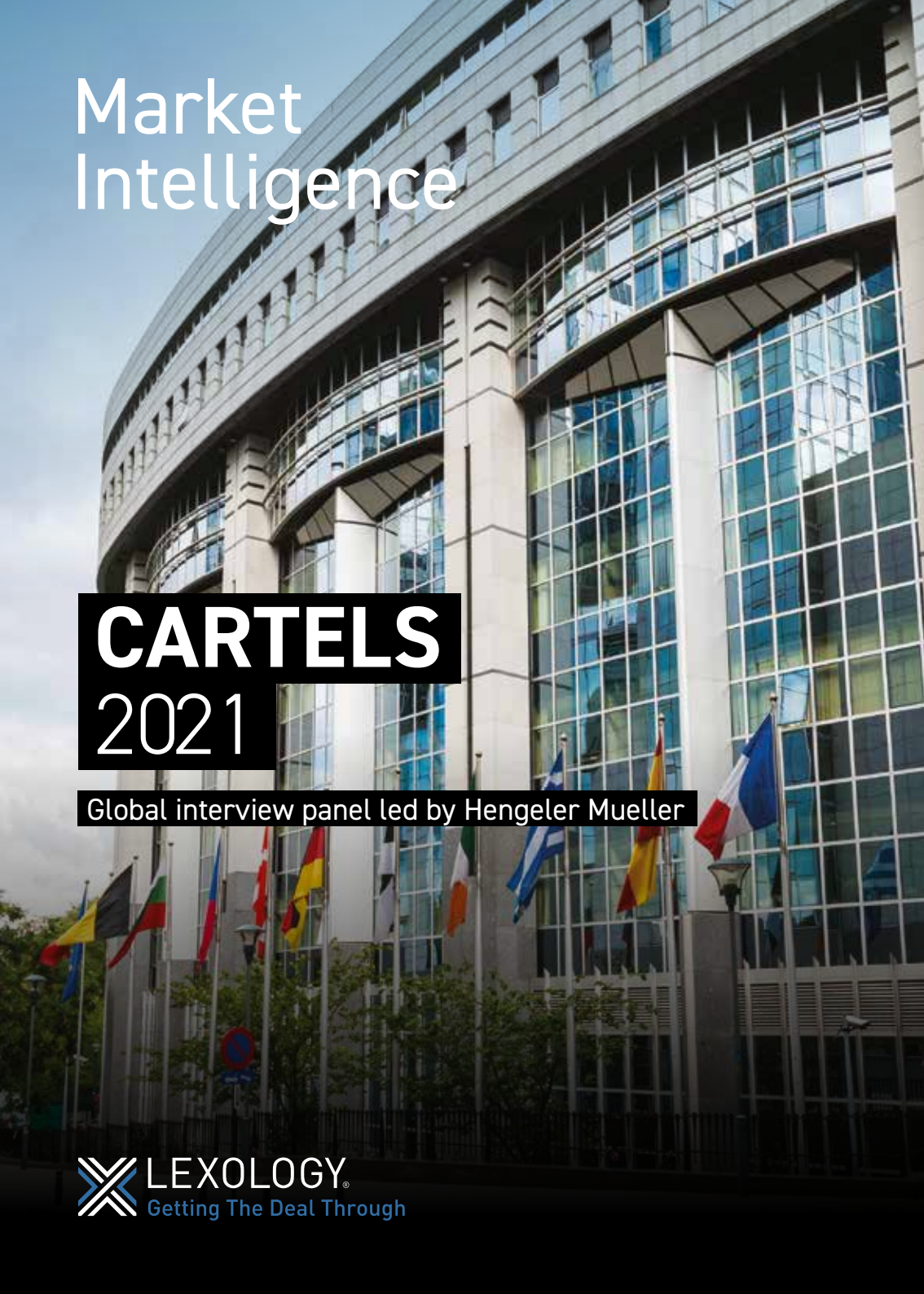

Market Intelligence

CARTELS 2021

Global interview panel led by Hengeler Mueller

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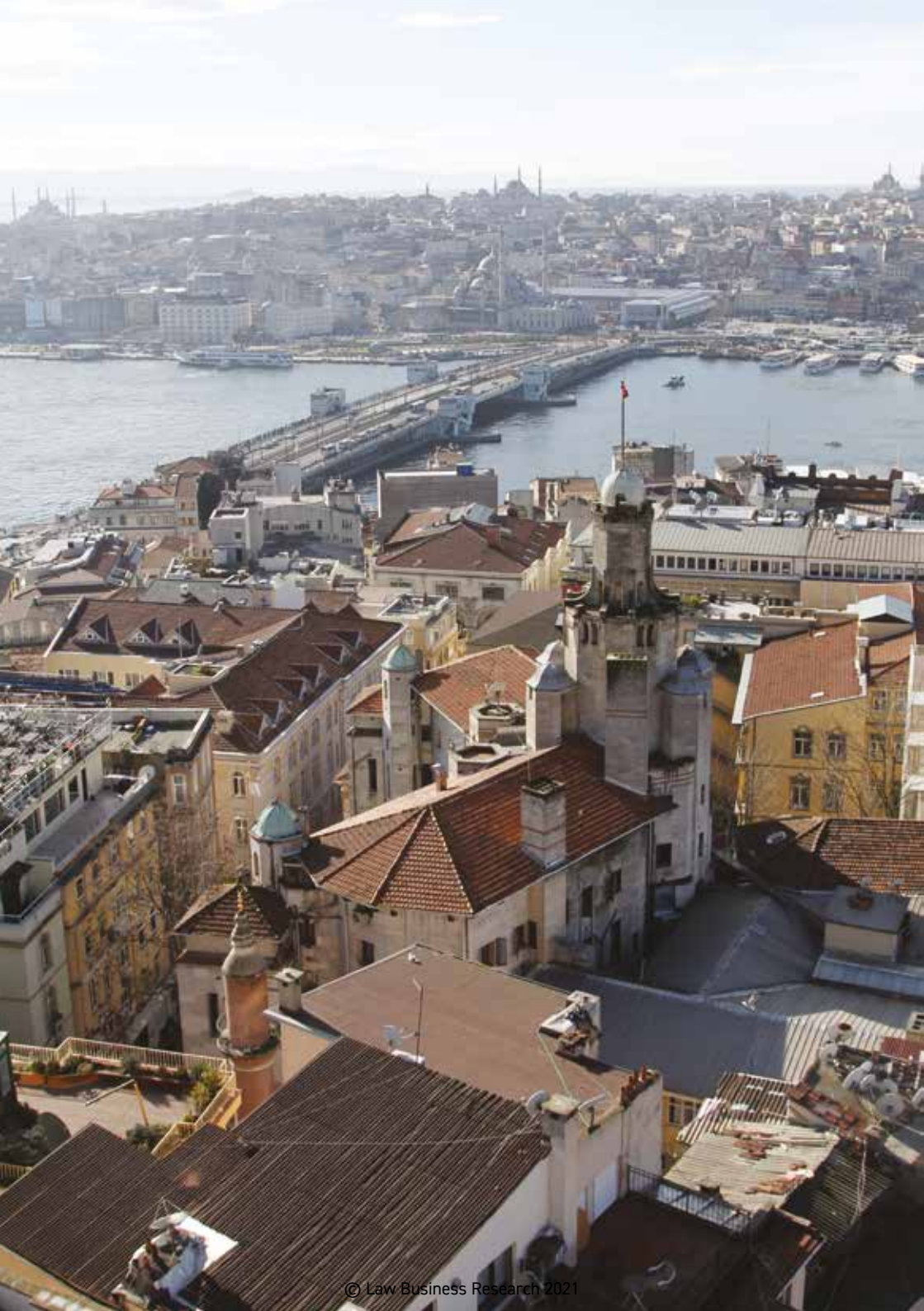


Turkey

Gönenç Gürkaynak is a founding partner at ELIG Gürkaynak Attorneys-at-Law, a leading firm of 90 lawyers based in Istanbul. After graduating from Ankara University faculty of law in 1997, he was called to the Istanbul Bar in 1998. He received his LLM from Harvard Law School and is qualified to practise in Istanbul, New York, Brussels and England and Wales.

Gönenç heads ELIG Gürkaynak's competition law and regulatory department, currently consisting of 45 lawyers. He has over 20 years' competition law experience and regularly represents multinational companies and large domestic clients in written and oral defences in Turkish Competition Authority investigations and merger clearances; and in antitrust appeal cases in the country's highest administrative court. He also coordinates worldwide merger notifications, drafts non-compete agreements and clauses, and prepares hundreds of legal memoranda on a range of Turkish and EC competition law topics.

Öznur İnanılır is a partner in ELIG Gürkaynak's regulatory and compliance department. She graduated from Başkent University faculty of law in 2005 and obtained her LLM in European law from London Metropolitan University in 2008. Öznur has extensive experience in all areas of competition law, including compliance matters, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters.

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

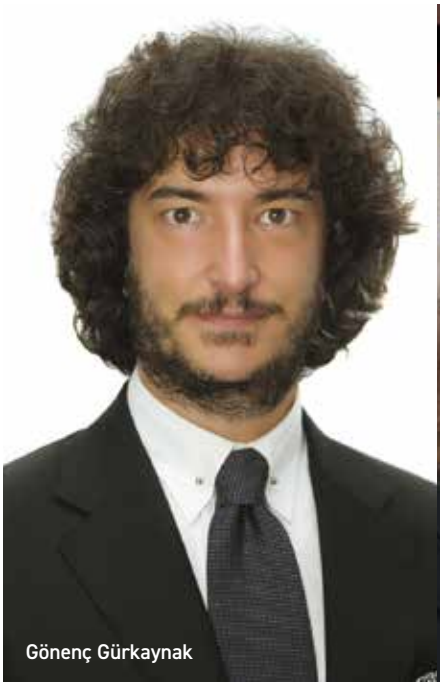
The Turkish Competition Authority (the Authority) places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under Law No. 4054 on the Protection of Competition of 13 December 1994 (the Competition Law) has nonetheless been repeatedly underlined by the President 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. 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 a 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 or ready-mix concrete producers, pharmaceuticals, traffic signal operations, gas stations, household appliances, roll-on/roll-off (ro-ro) transportation, consumer electronics products (including personal computers and games consoles), online 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 all been under investigation for cartel and concerted practice allegations in previous years.

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

In 2020, the Competition Law was subject to essential amendments, which were passed by the Grand National Assembly of Turkey (Parliament) on 16 June 2020, and entered into force on 24 June 2020 (the Amendment Law), the day of its publication in Official Gazette No. 31165. The Amendment Law introduces certain significant substantive and procedural changes to the Competition Law, which to a certain extent apply to cartel infringements.

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


Gönenç Gürkaynak


Öznur İnanılır

remains silent on the matter for 60 days. The Board decides to conduct a preliminary 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 of the pre-investigation decision being taken by the Board. The Board will then decide within 10 days whether to launch a formal 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 by the Board, once only, for an additional period of up to six months. 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

"Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity."

days to respond, extendible 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, which is extendible for a further 15 days under the Amendment Law. 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 are held within at least 30 days and at most 60 days of 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 six 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% 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 incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Overall, the Amendment Law introduces changes to article 15 that expand the scope of the Board's authority during dawn raids, and further details are provided in the newly enacted Guidelines on Examination of Digital Data During On-site Inspections. The amendments, match the recent practice of the case handlers and, currently, the Board is entitled to: examine and make copies of all information and documents in companies' physical records, as well as those in electronic mediums and information technology systems (including but not limited to any deleted items); request written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant Authority staff access to business premises may lead to the imposition of a fixed fine of 0.5% 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 34,809 Turkish lira.

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

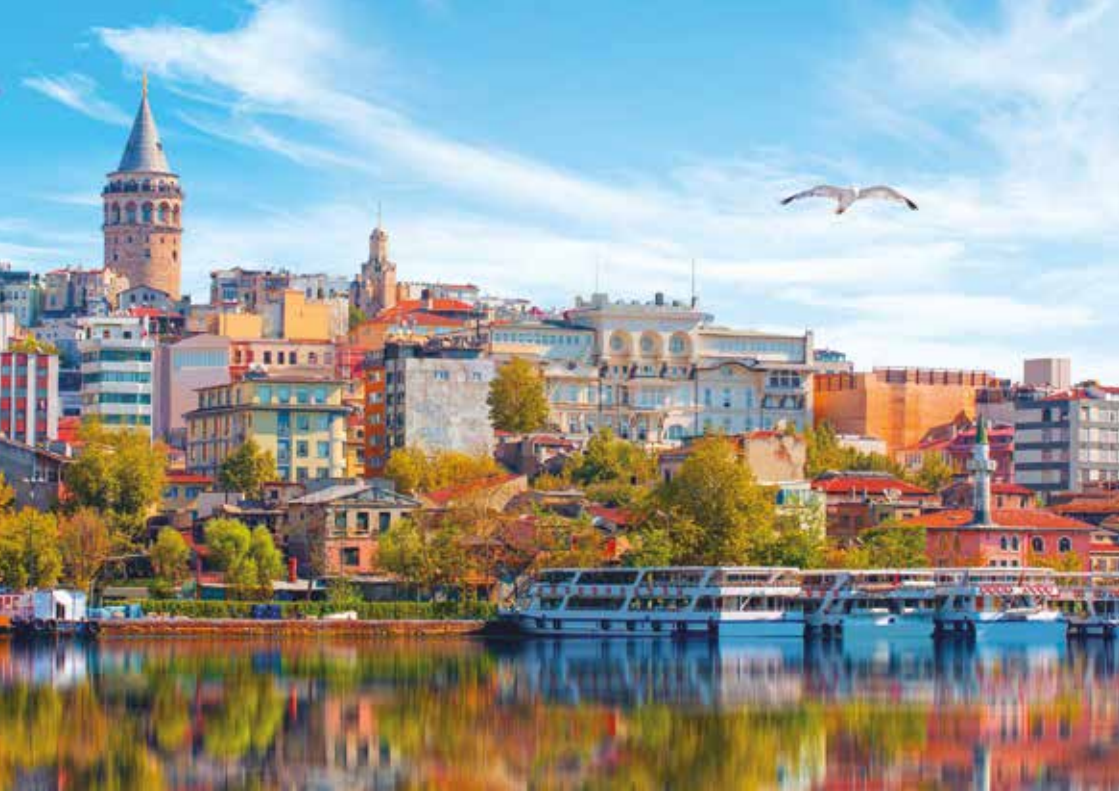
Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority does not possess any evidence to support a charge of cartel infringement. 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% for the firm and between 33% and 100% for the employees or managers. There is a marker system for leniency applications: the Authority can grant a grace period to applicants for submission of the necessary information and evidence to complete their applications.

There is also no legal obstacle to submitting a leniency application orally, in which case, 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% 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 was the Corporate Loans decision, 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 these financial institutions to determine whether they had violated article 4 of the Competition Law by 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 19 months of an 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 the Competition Law. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amounts of 21.1 million Turkish lira and 66.4 thousand Turkish lira, respectively, on their annual turnover in the financial year 2016. However, the Board resolved that an administrative monetary fine should not be imposed on BTMU following its leniency application, and granted full immunity to BTMU while also letting off the other investigated undertakings from imposition of an administrative monetary fine.

The Mechanical Engineering decision was another important decision concerning leniency applications. The Board initiated an investigation against 16 freelance mechanical engineers to determine whether they had violated article 4 of the Competition Law by being part of a profit-sharing cartel. One of the investigated undertakings applied for leniency during the course of the preliminary investigation. The Board concluded that 14 of the freelance mechanical engineers were engaged in a profit-sharing cartel. The leniency applicant received full immunity from fines



and the Board also excused another of the freelance mechanical engineers from imposition of an administrative monetary fine.

Most recently, in its decision regarding undertakings active in the ro-ro transportation sector, the Board decided that the undertaking that applied for leniency should have its administrative fine halved in consideration of its 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 the information that the starting point of the violation was earlier than detected in the on-site inspection and evidence illustrating that price information was exchanged, the undertakings acting in violation of the law and further details on how the price exchange was conducted. Moreover, in a recent leniency case, initiated following a leniency application by Arçelik Pazarlama AŞ (Arçelik) upon discovery of sharing of insider information by an Arçelik employee with various companies, including Arçelik's competitor Vestel Tipcart AŞ (Vestel), the Board found that Arçelik and Vestel did not violate article 4 of the Competition Law as the investigated practices took place without the knowledge of the senior management, they did not meet the mutual agreement criteria and did not constitute concerted practices.

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

The Amendment Law introduces commitment and settlement mechanisms under article 43 of the Competition Law in an effort to duly conclude investigation processes. The Board is yet to enact secondary legislation, which is expected to detail the process and procedure of these mechanisms.

The commitment mechanism allows parties to voluntarily offer commitments during a preliminary or fully fledged investigation to eliminate the Authority's competition concerns in terms of article 4 (anticompetitive agreements) and article 6 (abuse of dominant position). Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a fully fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. This commitment mechanism is not applicable to hard core violations, including price-fixing, territory or customer sharing, and restriction of supply; in other words, it is not applicable to cartels.

Nonetheless, the settlement mechanism is applicable to hard core violations – that is, it is applicable to cartels. Under the settlement mechanism, the Board may, ex officio or upon parties' request, initiate a settlement procedure. Up until the official notification of the investigation report, parties that admit to competition infringement may benefit from a reduction of the administrative monetary fine by up to 25%. The parties may not bring a dispute on the settled matters or the administrative monetary fine once an investigation has been finalised with a settlement.

Case law on the commitment and settlement mechanisms is still evolving.

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

Although the year in review saw only few cartel cases, some of those fully fledged investigations did not result in monetary fines against the defendants.

The Authority's annual activity report for 2019 provides that the Board finalised a total of 69 cases relating to competition law violations. Of the 69 cases, 30 were subject to article 4 of the Competition Law only, and 12 cases were subject to both article 4 and article 6.

The report provides that the Board issued monetary fines amounting to a total of 228,733,560 Turkish lira in 2019. While the monetary fine total for article 4 cases significantly increased in 2019, the monetary fine total imposed on article 6 cases

"Although the year in review saw only few cartel cases, some of those fully fledged investigations did not result in monetary fines against the defendants."

decreased. The Board imposed monetary fines totalling 164,392,558 Turkish lira on horizontal anticompetitive arrangements in 2019, while the monetary fines for 2017 and 2018 were 21,279,796 and 9,201,300 Turkish lira, respectively. Statistics for 2020 are pending.

In terms of cartel enforcement activity, the Board recently issued a short decision concluding with imposition of an administrative monetary fine against Novartis Sağlık Gıda ve Tarım Ürünleri San ve Tic AŞ and Roche Müstahzarları San AŞ for their cartel arrangement.

Furthermore, the Board found that certain ready-mix concrete producers operating in the Yozgat province infringed article 4 of the Competition Law by establishing two legal entities (namely Güven Beton and Sorgun Emek Beton) to coordinate sales, collectively determine prices and allocate customers. In this respect, the Board imposed administrative monetary fines of 1.2% of the annual gross income of the investigated parties.

In the investigation concerning the traffic signal market, the Board concluded that nine of the 10 investigated parties violated article 4 of the Competition Law by bid-rigging. Among other practices, the Board essentially found that undertakings

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prepared offers and entered into bids based on their mutual consensus. As a result, all but one of the investigated undertakings had an administrative monetary fine imposed, of either 2% or 3% of their annual gross income. During the investigation process, one of the investigated undertakings, Mosaş Akıllı Ulaşım Sistemleri AŞ, was fined separately for hindering the on-site inspection conducted by the Authority and for refusing to grant access to the Authority for 17 days.

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

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 investigating cartel behaviour, but rather aims to tackle any conduct or practice that might point to a restriction of competition among competing undertakings. It is expected that this trend will continue in its future cases.

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 the amount of their damage 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, waiting instead for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question.

"Competition compliance programmes are designed to reduce the risk of anticompetitive behaviour by companies."

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 if the decision is highly likely to be found to be against the law (ie, a prima facie case).

If the challenged decision is annulled in full or in part, the administrative court returns it to the Board for review and reconsideration.

Administrative litigation cases (including private litigation cases) are subject to judicial review before the 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 appeal 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 final in nature but will be subject to review by the Council of State in exceptional circumstances (as set out in article 46 of the Administrative Procedure Law). In such circumstances, the decision of the regional court will not be considered 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 takes for a regional court to finalise its review of a file. Overall, there is no judicial deadline for the relevant decisions and the decision-making periods vary greatly.

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 out a specific monitoring mechanism 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 to cartel enforcement policy or antitrust rules do you anticipate in the coming year? What effect will this have on clients?

In 2013, the Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was discussed by Parliament, but it became obsolete because of the general elections. The discussion processes were reinitiated at the Authority's request and the Draft Law was officially approved by Parliament on 16 June 2020. The Amendment Law, which entered into force on 24 June 2020, continues to set out main rules under article 4 (agreements, concerted practices and decisions restricting competition), article 6 (abuse of dominant position) and article 7 (merger or acquisitions). The amendments aim to achieve further compliance with the EU competition regime by introducing efficiency-enhancing procedures and mechanisms, and clarifying mechanisms to sustain legal certainty in practice, to a certain extent.

Among key changes introduced by the Amendment Law is the de minimis principle, whereby the Board can decide not to launch a fully fledged investigation for agreements, concerted practices or decisions of undertakings or associations of undertakings that do not exceed the market share or turnover thresholds to be

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determined by the Board. The de minimis principle is applicable to agreements falling under article 4 but not to hard core violations, including price-fixing, territory or customer sharing and restriction of supply.

Another key change is the introduction of the significant impediment of effective competition (SIEC) test in relation to merger control assessments, with the former dominance test set under article 7 being replaced by the new substantive SIEC test.

Also under the Amendment Law, structural remedies for anticompetitive conduct may now be applied in cases where behavioural remedies have failed. Application of the remedy mechanism has been newly introduced to articles 4 and 6, and the mechanism previously applicable to article 7 has changed. Accordingly, the new mechanism applicable for all anticompetitive conduct assessments sets application or proof of ineffectiveness of behavioural remedies as a precondition for structural remedies.

Finally, as regards the self-assessment procedure, further clarification and legal certainty has been provided in relation to the individual exemption regime and it is now clearly stipulated that the self-assessment principle applies to certain agreements, concerted practices and decisions that potentially restrict competition.

Overall, clarification of the majority of the amendments via enactment of the secondary legislation is pending. The Authority published its Guidelines on Examination of Digital Data During On-site Inspections on 8 October 2020, setting out the general principles on the examination, processing and storage of data and documents held in electronic media and information systems, during on-site inspections. Furthermore, the Authority has also conducted its public consultations in relation to the Draft Communiqué for De Minimis Practices and the Draft Communiqué for Commitments.

As in the rest of the world, technology and digital platforms feature on the Authority's radar. In May 2020, the Authority announced plans for a strategy development unit to focus on digital markets and on 16 July 2020 it launched a sector inquiry focusing on electronic marketplace platforms.

10 Has the antitrust authority recently adopted any covid-19 antitrust measures? To which industry sectors have they been they applied?

No specific measures have been implemented to address the pandemic through competition law rules. Moreover, the Authority has announced no limitations on its operational capacity and has not requested applicants' cooperation regarding the special circumstances of the ongoing pandemic. As usual, the Authority has encouraged use of the electronic submission system to ensure the continued smooth running of day-to-day activities.

Having said that, over the past year, the Authority made covid-19 pandemic-related infringement warnings to various stakeholders. On separate occasions, the Authority announced on its official websites different complaints received regarding price hikes in various sectors, such as fresh fruit and vegetables, and the health and hygiene sector, as well as the food sector in general. In this context, the Authority invited third parties to report any competition-sensitive practices and emphasised that they will be further investigating such practices. During this term the Authority launched various preliminary and fully fledged investigations for evaluation of practices adopted during the pandemic period.

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The Inside Track

What was the most interesting case you worked on recently?

We recently dealt with a case concerning five ro-ro transportation undertakings operating in the Marmara Sea and one association of undertakings, for collectively raising prices. After 17 months of investigation, the Board found that Tramola, Kale Nakliyat, İstanbullines, İDN and İDO had violated article 4 of the Competition Law. The Board levied turnover-based monetary fines against all five of the investigated undertakings at different rates.

Furthermore, we have assisted clients in a 36-undertaking cartel investigation in the postal courier sector. Administrative monetary fines were imposed on only four undertakings.

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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