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Cartels

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Contributing Editors: **Euan Burrows & Denis Fosselard**

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Turkey

Gönenç Gürkaynak & Öznur İnanılır
ELIG Gürkaynak Attorneys-at-Law

Overview of the law and enforcement regime relating to cartels

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Turkish Competition Authority ("***Competition Authority***"). The Competition Authority has administrative and financial autonomy. It consists of the Competition Board ("***Board***"), Presidency and service departments. There are six divisions, with sector-specific work distribution, that handle Competition Law enforcement work through approx. 160 case handlers. The other service units consist of the following: (i) the department of decisions; (ii) the economic analysis and research department; (iii) the information management department; (iv) the external relations, training and competition advocacy department; (v) the strategy development, regulation and budget department; (vi) the administrative services department; (vii) the human resources department; and (viii) the cartel and on-site inspections support division or the leniency division.

The statutory basis for cartel prohibition and the enforcement regime is Law No. 4054 on the Protection of Competition of 13 December 1994 ("***Competition Law***"). In 2020, the Competition Law was subject to essential amendments which passed through the Grand National Assembly of Turkey on 16 June 2020, and entered into force on 24 June 2020 ("***Amendment Law***") on the day of its publication in Official Gazette No. 31165.

The Competition Law finds its underlying rationale in Article 167 of the Turkish Constitution of 1982, which authorises the state to take appropriate measures to secure the functioning of the markets and to prevent the formation of monopolies or cartels. The Turkish cartel regime by nature applies administrative and civil (not criminal) law. The Competition Law applies to individuals and companies alike and even to public corporations if they act as an undertaking within the meaning of the Competition Law. The Competition Law is similar to European Union law and the Amendment Law seeks to add the Competition Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to European Union law. Article 4 of the Competition Law is the applicable provision for cartel-specific cases and provides the basic principles of the cartel regulation. The provision is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union ("***TFEU***"). Article 4 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition. Similar to Article 101(1) of the TFEU, the provision does not define the term "cartel" explicitly. However, Article 4 prohibits all kinds of restrictive agreements, including any form of cartel agreements.

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

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

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

The Amendment Law introduces the *de minimis* principle under Article 41 of the Competition Law, with the aim to steer the direction of the Competition Authority and public resources toward more significant violations. The secondary legislation (Communiqué No. 2021/3), which provides details on the process and procedure related to the application of the *de minimis* principle, came into force on 16 March 2021. Overall, the *de minimis* principle applies to (i) agreements signed between competing undertakings, if the total market share of the parties to the agreement does not exceed 10% in any of the relevant markets affected by the agreement, and (ii) agreements signed between non-competing undertakings, if the market share of each of the parties does not exceed 15% in any of the relevant markets affected by the agreement, and the relevant agreements do not significantly restrict competition in the market. Moreover, the *de minimis* principle is not applicable to "clear and hard core violations". On this note, Communiqué No. 2021/3 defines "clear and hard core violations" as "agreements and/or concerted practices as well as decisions and practices of associations of undertakings on the following subjects, the goal of which is to directly or indirectly prevent, distort or restrict competition in the market for a good or service, or which have led or may lead to such effects: (i) price fixing among competing undertakings, allocation of customers, suppliers, regions or trade channels, restriction of supply amounts or imposing quotas, collusive bidding in tenders, sharing competitively sensitive information including future prices, output or sales amounts; and (ii) fixing flat or minimum sales rates of the buyer in a relationship between undertakings operating at different levels of a production or distribution chain. A similar definition of "clear and hard core violations" is provided by Communiqué No. 2021/2. In other words, cartels do not benefit from the *de minimis* principle.

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

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

Overview of investigative powers in Turkey

The Competition Law provides vast investigative powers to the Competition Authority, such as the power to conduct dawn raids and to apply other investigatory tools (e.g., formal information request letters). The Board only needs judicial authorisation if an undertaking

refuses to allow the dawn raid. The prevention or hindering of a dawn raid could result in the imposition of an administrative monetary fine.

Article 15 of the Competition Law authorises the Board to conduct on-site investigations. The Amendment Law introduces changes to Article 15 that expand the scope of the Board's authority during on-site investigations, 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 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 IT 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.

Additionally, the Guidelines on Examination of Digital Data during On-site Inspections enables the Competition Authority to examine mobile devices (such as mobile phones and tablets), unless it is determined that such devices are used solely for the personal use of a given employee. Regardless, the Board is authorised to conduct a quick review of any portable electronic device to determine its intended purpose. Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5% of the annual turnover. The minimum fine for 2022 is TRY 47,409 (approximately EUR 3,110 as of 26 January 2022). It may also lead to the imposition of a fine of 0.05% of the turnover for each day of the violation.

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

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

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

The Competition Authority may also request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within a fixed period of time. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The Board may impose the same amount of fine if an undertaking provides incorrect or incomplete information in response to the Competition Authority's request for information.

Overview of cartel enforcement activity during the last 12 months

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

The Competition Authority's annual report for 2020 provides that the Board finalised a total of 65 cases relating to competition law violations. Among the 65 cases, 36 were subject to Article 4 (anti-competitive agreements) only, and seven cases were subject to both Article 4 and Article 6 (abuse of dominant position). The Board issued monetary fines amounting to a total of TRY 1,656,837,739 (approximately EUR 108 million as of 26 January 2022) for Article 4 cases. The monetary fine figures of 2020 for Article 4 cases show that the Board has in total imposed roughly seven times the monetary fines imposed last year, while the monetary fines imposed in Article 6 cases have increased by nearly 34 times when compared to the number of fines imposed in 2019.

Overall, there is an increase in the number of investigations that result in monetary fines. In fact, the Board imposed monetary fines totalling TRY 1,656,837,739 (approximately EUR 108.7 million as of 26 January 2022) for Article 4 cases in 2020 while the monetary fines for relevant cases in 2018 and 2019 were TRY 19,014,529 (approximately EUR 1.2 million as of 26 January 2022) and TRY 228,733,560 (approximately EUR 15 million as of 26 January 2022), respectively.

Novartis and Roche

Recently, the Board decided that Novartis Sağlık Gıda ve Tarım Ür. San. Ve Tic. A.Ş. ("***Novartis***") and Roche Müstahzarları San. A.Ş. ("***Roche***") violated Article 4 of the Competition Law regarding their conduct in relation to the drugs Lucentis and Altuzan, both of which are used for the treatment of the eye disease AMD (Age Related Macular Degeneration) (21 January 2021, 21-04/52-21). In the relevant decision, the Board determined that Novartis and Roche agreed to shift market demand towards Lucentis in intraocular treatment and dissuaded the use of Altuzan by providing misleading information that highlighted the endophthalmitis risk and side effects of Altuzan to administrative and judicial authorities. Thus, the Board finally determined that Novartis and Roche were engaged in cartel activity and acquired unlawful profits in order to shift demand towards the more expensive medication Lucentis. The Board concluded that these actions by Novartis and Roche constituted a violation of Article 4 of the Competition Law and decided to impose an administrative fine of TRY 165,464,716.48 (approximately EUR 10.9 million as of 26 January 2022) on Novartis and TRY 112,972,552.65 (approximately EUR 7.4 million as of 26 January 2022) on Roche.

Gaziantep auto-expert opinion decision

Moreover, the Gaziantep auto-expert opinion decision is one of the most significant decisions of 2020 regarding price-fixing arrangements (9 July 2020, 20-33/439-196). The decision concerns an investigation initiated against auto-expert opinion providers operating in the Gaziantep province of Turkey. The Board found concrete evidence of a horizontal cartel agreement to determine auto-expertise price tariffs, refusal to provide services on Sundays or providing services on Sundays in a rotating manner according to a schedule set among them, and thereby imposed a monetary fine on the relevant undertakings. One of

the parties to the investigation was granted a reduction of its administrative monetary fine due to its leniency application.

MDF decision

In the MDF decision (1 April 2021, 21-18/229-96), the Board concluded that AGT Ağaç Sanayi ve Ticaret A.Ş., Çamsan Ordu Ağaç San. ve Tic. A.Ş., Divapan Entegre Ağaç Panel San. Tic. A.Ş., Gentaş Dekoratif Yüzeyler Sanayi ve Ticaret A.Ş., Kastamonu Entegre Ağaç Sanayi ve Ticaret A.Ş., Kronospan Orman Ürünleri San. ve Tic. A.Ş., Orma Orman Mahsulleri Entegre San. ve Tic. A.Ş., Starwood Orman Ürünleri Sanayii A.Ş., Teverpan MDF Levha Sanayii ve Ticaret A.Ş., Yıldız Entegre Ağaç San. ve Tic. A.Ş., and Yıldız Sunta Orman Ürünleri Sanayi Tesisleri İth. İhr. ve Tic. A.Ş., all producers of medium density fibreboard ("***MDF***") and chipboard, were involved in a cartel agreement to fix the price increase timing and percentages regarding MDF and chipboard products. In the relevant case, although the violation had occurred in two different time periods (namely 2014 and 2016–2017), the Board determined that a single base fine for both time periods should be applied with respect to the violation.

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

Key issues in relation to enforcement policy

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

There are neither industry-specific offences nor defences subject to particular scrutiny. The Competition Law applies to all industries, without exception. In terms of cartel enforcement, food, cement, insurance, information and communication technology, pharmaceuticals, healthcare, medical equipment, cleaning products, household appliances, transportation, building material and petroleum have recently been under investigation for cartel and concerted practice allegations.

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

Key issues in relation to investigation and decision-making procedures

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

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

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

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

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

The Competition Authority's administrative enforcement is also supplemented with private lawsuits. Accordingly, in case of private suits, cartel members are adjudicated before the courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on the Board's decision.

Leniency/amnesty regime

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

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

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

With respect to leniency applications, there are no statistics specified in the annual report of the Competition Authority for 2020. Having said that, the Board has launched an investigation against 12 undertakings operating in the auto-expertise market for violating Article 4 by way of collectively fixing prices, as detailed above. Süper Test Oto Ekspertizlik Hizmetleri Sanayi ve Ticaret Ltd. Şti. ("***Süper Test***") made a leniency application on 4 April 2019 by providing information and documents including the names of the participants, dates and places regarding the cartel enforcement activity. Upon the Board's finding that the information and document stipulating the dates, parties and conduct of the violation provided by Süper Test contributed to the investigation, the Board reduced the administrative fine to be imposed on Süper Test by half pursuant to the Regulation on Fines (see "Civil penalties and sanctions" below), while also imposing administrative fines on the remaining investigated parties (9 July 2020, 20-33/439-196).

Moreover, in a recent leniency case – initiated by Arçelik Pazarlama AŞ's ("***Arçelik***") leniency application upon its discovery of the 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, so they did not meet the mutual agreement criteria and it did not constitute concerted practice (2 January 2020, 20-01/13-5).

In another leniency case, the Board levied an administrative monetary fine in an investigation launched against five undertakings and one association of undertakings active in cabotage roll-on, roll-off transportation lines in Turkey (18 April 2019, 19-16/229-101). The Board concluded that Tramola Gemi İşletmeciliği ve Ticaret AŞ ("***Tramola***"), Kale Nakliyat Seyahat ve Turizm AŞ ("***Kale Nakliyat***"), İstanbullines Denizcilik Yatırım AŞ ("***İstanbullines***"), İstanbul Deniz Nakliyat Gıda İnşaat Sanayi Ticaret Ltd Şti ("***İDN***") and İstanbul Deniz Otobüsleri Sanayi ve Ticaret AŞ ("***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:

- Tramola and İstanbullines, equivalent to 4% of their annual gross income;
- İDN and İDO, equivalent to 0.8% of their annual gross income; and
- Kale Nakliyat, equivalent to 1.6% of its annual gross income (the Board did not grant full immunity to the leniency applicant).

One of the Board's most important decisions concerning leniency applications rendered back in 2017 is the Corporate Loans decision (28 November 2017, 17-39/636-276). The Board launched an investigation against 13 financial institutions, including local and international banks active in the corporate and commercial banking markets in Turkey

with respect to whether they have violated Article 4 of the Competition Law by way of exchanging competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. The Bank of Tokyo-Mitsubishi UFJ Turkey A.Ş. ("***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 A.Ş. ("***ING***") and the Royal Bank of Scotland Plc. Merkezi Edinburgh İstanbul Merkez Şubesi ("***RBS***") violated Article 4 of the Competition Law. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amount of TRY 21.1 million (approximately EUR 1.4 million as of 26 January 2022) and TRY 66,400 (approximately EUR 4,356 as of 26 January 2022), respectively, over their annual turnover in the financial year of 2016. However, the Board resolved that BTMU should not have an administrative monetary fine imposed pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.

The other leniency application concerned the mechanical engineering sector (14 December 2017, 7-41/640-279) within the Burdur region. The case largely rested on the allegation that mechanical engineers in the Burdur region pooled their revenue and shared it on the basis of predetermined percentages. One of the defendants applied for leniency and was granted immunity.

One of the Board's notable decisions where it granted full immunity is the Yeast Cartel case (14-42/783-346, 22 October 2014). The Board launched an investigation against four fresh yeast producers to determine whether they had violated Article 4 of the Competition Law through colluding to set prices for fresh bread yeast. It resolved that the investigated companies violated Article 4 and imposed administrative monetary fines on three of the undertakings, with a total amount of TRY 14 million (approximately EUR 918,611 as of 26 January 2021). The fourth undertaking, Mauri Maya, obtained full immunity, though it submitted its application for leniency after the preliminary investigation was initiated and following the dawn raids conducted at the premises of the undertakings. The Board considered the value and sufficient content of Mauri Maya's leniency application.

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

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

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

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

Administrative settlement of cases

The Amendment Law introduces a commitment and settlement mechanism under Article 43 of the Competition Law with an effort to end investigation processes in an appropriate manner. Furthermore, the Board enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position, published on 16 March 2021, as well as the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021.

The commitment mechanism allows parties to voluntarily offer commitments during a preliminary investigation or fully-fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6. 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. The parties are allowed to submit commitments until three months following the official service of the investigation notice. Commitment mechanism is not applicable to "hard core" violations including price fixing, territory or customer sharing and restriction of supply. In other words, the commitment mechanism is not applicable to cartels.

However, the settlement mechanism is applicable to "hard core" violations; in other words, cartels. Under the settlement mechanism, the Board may, *ex officio* or upon the parties' request, initiate a settlement procedure. As per the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, parties that admit to competition infringement until the official notification of the investigation report may benefit from a reduction of the administrative monetary fine ranging from 10% to 25%. The parties may not bring a dispute on the settled matters and the administrative monetary fine once an investigation finalises with a settlement.

Third-party complaints

A notice or complaint may be submitted verbally or through a petition. The Competition Authority has an online system in which complaints may be submitted by the online form on the official website of the Competition Authority, as well as through the e-Government system. In the case of a notice or complaint, the Board rejects the notice or complaint if it deems the complaint not to be serious. The Board will decide to conduct a pre-investigation if it finds the notice or complaint to be serious.

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

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

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

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

Civil penalties and sanctions

In case of a proven cartel activity, the companies concerned may be subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

Employees and managers of the undertakings or association of undertakings that had a determining effect on the creation of the violation can also be fined up to 5% of the fine imposed on the undertaking or association of undertaking. The current minimum fine is set as TRY 47,409 for 2022 (approximately EUR 3,110 as of 26 January 2022).

The Competition Law makes reference to Article 17 of Law on Misdemeanours to require the Board to take into consideration factors such as: (i) the level of fault and the amount of possible damage in the relevant market; (ii) the market power of the undertaking within the relevant market; (iii) the duration and recurrence of the infringement; (iv) cooperation or driving role of the undertaking in the infringement; (v) the financial power of the undertaking; and (vi) compliance with the commitments in determining the magnitude of the fine. In line with this, the Competition Authority enacted the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance

("***Regulation on Fines***"). The Regulation on Fines provides detailed guidelines regarding the calculation of monetary fines applicable in cases of antitrust violations. The Regulation on Fines applies both to cartel activity (Article 4) and abuse of dominance (Article 6), but illegal concentrations (Article 7) are not covered by the Regulation on Fines.

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

The Regulation on Fines also applies to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

In addition to the monetary sanction, restrictive agreements may be deemed as legally invalid and unenforceable with all its legal consequences. Under Article 9, the Amendment Law stipulates that besides an Article 7 violation, in determination of Article 4 and 6 infringements, the Board may order behavioural as well as structural remedies to re-establish the competition and end the infringement. Overall, the Board may order an end to certain practices, or the adoption of remedies to restore the *status quo* without imposing an administrative fine. Additionally, the Competition Law authorises the Board to take interim measures until the final resolution on the matter, in case there is a possibility for serious and irreparable damages.

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

Right of appeal against civil liability and penalties

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

After the recent legislative changes, administrative litigation cases (as well as private litigation cases) are subject to judicial review before the newly established regional courts, creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the Court of Appeals for private cases). The regional courts will (i) go through the case file both on procedural and substantive grounds, and (ii) investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered final in nature. The decision of the regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In such cases, the decision of the regional court will not be considered as a final decision and the Council of State may decide to uphold or reverse the regional court's decision. If the decision is reversed by the Council of State, it will be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State's decision.

Criminal sanctions

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

Cooperation with other antitrust agencies

Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Competition Authority to notify and request the European Commission to apply relevant measures if the Board believes that cartels organised in the EU adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the EU and Turkey), and therefore the European Commission has the authority to request that the Board apply relevant measures to restore competition in the relevant markets.

There are also a number of bilateral cooperation agreements between the Competition Authority and the competition agencies in Albania, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Egypt, the EU, the Russian Federation, Serbia, South Korea and Ukraine, among others. These cooperation agreements are signed and implemented for various purposes, such as:

- Enhancing cooperation in applying competition law rules to increase the efficiency of product and service markets.
- Exchanging documents and information on certain topics between authorities.
- Improving cooperation and facilitating the exchange of information between the authorities with respect to competition law enforcement and policy.

The Competition Authority also faces various issues where international cooperation is required. In this respect, there have been various decisions in which the Competition Authority has requested cooperation on dawn raids, information exchange, notifications and collection of monetary fines from the competition authorities in other jurisdictions via the Ministry of Foreign Affairs and the Ministry of Justice. The Competition Authority has, however, been unsuccessful in these requests.

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition to assess their results, and submits its recommendations to the Board. A cooperation protocol was signed on 14 October 2009 between the Competition Authority and the Turkish Public Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. On 2 November 2011, a cooperation protocol was signed with the Turkish Information and Communication Technologies Authority in order to establish, develop and maintain competition in the electronic communication sector, and on 28 January 2015, a cooperation protocol was signed with the Turkish Energy Market Regulatory Authority in order to establish, develop and maintain a free and healthy competition environment in the energy markets. However, the interplay between jurisdictions does not materially affect the handling of the Board in cartel investigations. The principle of comity is not an explicit provision of the Competition Law. A cartel conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it had an effect on Turkish markets.

Cross-border issues

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

Developments in private enforcement of antitrust laws

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

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

Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Authority, and build their own decision on that decision. Turkish procedural law denies any class action or procedure. Class certification requests would not be granted by Turkish courts. While Article 25

of Law No. 4077 on the Protection of Consumers allows for class actions by consumer organisations, these actions are only limited to violations of Law No. 4077 on the Protection of Consumers, and do not extend to cover antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private lawsuits provided under Articles 57 *et seq.* of the Competition Law.

Reform proposals

The Amendment Law introduces certain significant substantive and procedural changes to Competition Law. As elaborated in the previous sections, the Amendment Law introduces new provisions related to the *de minimis* principle, on-site inspection powers, behavioural and structural remedies, and commitment and settlement mechanisms. Among other provisions, the Amendment Law replaces dominance test taken into consideration in merger control assessments under Article 7 with the "significant impediment of effective competition" (SIEC) test, clarifies the self-assessment procedure applied to individual exemption cases under Article 5 and also grants the Authority 15 more days for preparation of its additional opinion in response to the undertakings' second written defence in a fully-fledged investigation under Article 45. Since the introduction of the Amendment Law, the majority of the newly introduced mechanisms and investigation methods were clarified via the enactment of secondary legislation. The Competition Authority published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media and information systems during on-site inspections.

Moreover, the Competition Authority published the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position on 15 July 2021, which set forth rules and procedures concerning the settlement process for undertakings which admit to the existence of a violation. Furthermore, the Authority published the Communiqué on the Commitments to be offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position on 16 March 2021, which set out principles and procedures in relation to commitments submitted by undertakings in order to eliminate competition problems. The Authority also published the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakıngs That Do Not Significantly Restrict Competition on 16 March 2021, which set out the principles regarding criteria to be used to identify the practices of the undertakings which can be excluded from the scope of the investigation.

Lastly, with the new amendment introduced by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No. 2021/4***"), which was promulgated in the Official Gazette dated 5 November 2021, No. 31650, the threshold regarding the supplier's market share of the market(s) for the contract goods has now been lowered to 30%. Pursuant to Communiqué No. 2021/4, a six-month transition period will be implemented to ensure compliance with the new market share threshold, which would prevent Article 4 of the Competition Law applying to vertical restraints that currently benefit from the block exemption, based on the 40% market share threshold. These vertical restraints will continue to be exempted until 5 May 2022, after which the parties may need to modify the agreement to comply with the new regulation. Accordingly, only agreements of undertakings that have market shares below 30% in the relevant product

markets qualify for the block exemption under Block Exemption Communiqué No. 2002/2 on Vertical Agreements. Thus, if the relevant market shares of the undertakings in question exceed the 30% threshold, the agreement automatically falls outside the scope of the block exemption rules. In that case, the relevant suppliers may not impose any kind of direct or indirect vertical restraints on buyers with respect to the goods or services covered by the agreements, unless an "individual exemption" is granted by a decision of the Board.

Gönenç Gürkaynak
Tel: +90 212 327 17 24 / Email: gonenc.gurkaynak@elig.com

Mr. Gönenç Gürkaynak is the 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 (currently a non-practising solicitor). 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 52 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.

Every year Mr. Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics. Mr. Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish with various international and local publishers.

Öznur İnanılır
Tel: +90 212 327 17 24 / Email: oznur.inanilir@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. 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 with 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 both English and Turkish, pertaining to her practice areas.

ELIG Gürkaynak Attorneys-at-Law

Çitlenbik Sokak No.12, Yıldız Mahallesi, Beşiktaş, 34349, İstanbul, Turkey
Tel: +90 212 327 17 24 / URL: www.gurkaynak.av.tr

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