THE CARTELS AND LENIENCY REVIEW

ELEVENTH EDITION

Editors
John D Buretta and John Terzaken

THE LAWREVIEWS

© 2022 Law Business Research Ltd

THE CARTELS AND LENIENCY REVIEW

ELEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in Janurary 2023
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
John D Buretta and John Terzaken

THE LAWREVIEWS

© 2022 Law Business Research Ltd

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2023 Law Business Research Ltd
www.thelawreviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at January 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to info@thelawreviews.co.uk.
Enquiries concerning editorial content should be directed to the Content Director,
Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-146-1

© 2022 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANDERSON MŌRI & TOMOTSUNE

BORDEN LADNER GERVAIS LLP

CRAVATH, SWAINE & MOORE LLP

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

ESTUDIO BECCAR VARELA

FANGDA PARTNERS

FRESHFIELDS BRUCKHAUS DERINGER

GENOA LAW FIRM

HALDANES

HAMMAD & AL-MEHDAR

JSA

LEE AND LI, ATTORNEYS-AT-LAW

LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK

LINKLATERS C WIŚNIEWSKI I WSPÓLNICY

MINTERELLISONRUDDWATTS

POTAMITISVEKRIS

SIMPSON THACHER & BARTLETT LLP

SLAUGHTER AND MAY

SU KHAN ASSOCIATES, CORPORATE AND LEGAL CONSULTANTS

TASSOS PAPADOPOULOS & ASSOCIATES LLC

URÍA MENÉNDEZ

WALDER WYSS LTD

© 2022 Law Business Research Ltd

CONTENTS

© 2022 Law Business Research Ltd

© 2022 Law Business Research Ltd

PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 23 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource for the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as considering the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced,

© 2022 Law Business Research Ltd

and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the 11th edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

John D Buretta
Cravath, Swaine & Moore LLP
New York

John Terzaken
Simpson Thacher & Bartlett LLP
Washington, DC

January 2023

© 2022 Law Business Research Ltd

Chapter 21

TURKEY

Gönenç Gürkaynak[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The relevant legislation on cartel regulation in Turkey is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). In 2020, the Competition Law was subject to essential amendments that were passed by the Grand National Assembly of Turkey (the Turkish Parliament) on 16 June 2020 and entered into force on 24 June 2020 (the Amendment Law) upon 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 government to take appropriate measures and actions to secure a free market economy. The Competition Law is similar to European Union law and the Amendment Law seeks to add the experience of more than 20 years of enforcement by the Turkish Competition Authority (the Authority) to the Competition Law and bring it closer to European Union law.

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 is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not set out a definition of the term 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Although the Competition Law does not specifically address the definition of a cartel, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (the Regulation on Fines) defines cartels as: 'agreements restricting competition or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotas, and bid-rigging'.[2]

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, recognising the broad discretionary power of the Competition Board (the Board).

1 Gönenç Gürkaynak is the founding partner at ELIG Gürkaynak Attorneys-at-Law.

2 Regulation on Fines, Article 3.

© 2022 Law Business Research Ltd

Article 4 sets out a non-exhaustive list of restrictive agreements that is, to a large extent, the same as Article 101(1) of the TFEU. In particular, it prohibits agreements that:

a directly or indirectly fix purchase or selling prices or any other trading conditions;

b share markets or sources of supply;

c limit or control production, output or demand in the market;

d place competitors at a competitive disadvantage or involve exclusionary practices, such as boycotts;

e apply dissimilar conditions to equivalent transactions with other trading parties (except for exclusive dealing); and

f conclude contracts in a manner contrary to customary commercial practice subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In this context, Communiqué No. 2021/3 defines 'clear and hardcore 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 these effects:*
>
> *1) Price-fixing among competing undertakings, allocation customers, suppliers, regions or trade channels, restriction of supply amounts or imposing of quotas, collusive bidding in tenders, sharing competitively sensitive information, including future prices, output or sales amounts;*
>
> *2) 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 hardcore violations is provided in Communiqué No. 2021/2.

The Competition Law authorises the Board to regulate, through communiqués, certain matters under the Competition Law; for example, Communiqué No. 2010/2 on Oral Hearings Before the Board regulates the conduct of procedures by the Board, and Communiqué No. 2012/2 on the Application Procedure for Infringements of Competition regulates the procedures and principles related to applications to the Authority on infringements of Articles 4, 6 or 7 of the Competition Law.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels (the Leniency Regulation), entered into force on 15 February 2009. Moreover, the Regulation on Fines sets out detailed guidelines as to the calculation of monetary penalties applicable in the case of an antitrust violation.

The Board published the Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels on 19 April 2013. This Guideline was prepared to provide certainty in interpretations, to reduce uncertainty in practice and, as a requirement of the transparency principle, to provide guidance for undertakings to enable them to benefit from the leniency programme more efficiently.

© 2022 Law Business Research Ltd

II COOPERATION WITH OTHER JURISDICTIONS

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

There are also a number of bilateral cooperation agreements on cartel enforcement matters between the Authority and the competition agencies of other jurisdictions (e.g., Albania, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Egypt, Mongolia, Portugal, Romania, Russia, Serbia, South Korea and Ukraine). The Authority also has close ties with the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the World Trade Organization, the International Competition Network and the World Bank.

The research department of the Authority conducts periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition then assesses the results of its research and submits its recommendations to the Board. A cooperation protocol was signed on 14 October 2009 between the Authority and the Public Procurement Authority to foster a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Authority's actions.

Nevertheless, the interplay between jurisdictions does not materially affect the way the Board handles cartel investigations. The principle of comity is not included as an explicit provision in the Turkish Competition Law. Cartel conduct (whether Turkish or non-Turkish) that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on non-Turkish markets.

There is no regulation under the Competition Law on restricting or supporting international cooperation regarding extradition or extraterritorial discovery. Nevertheless, like many other competition authorities, the Authority faces various issues in which international cooperation is required. In this respect, there have been various decisions[3] for which the Authority has requested cooperation on dawn raids, information exchange, and notifications and collection of monetary penalties from the competition authorities in other jurisdictions via the Ministry of Foreign Affairs and the Ministry of Justice. However, the Authority has been unsuccessful in these requests.

3 The Authority's *Elektrik Turbini* Decision No. 04-43/538-133 dated 24 June 2004, *Ithal Komur* Decision No. 06-55/712-202 dated 25 July 2006, *Ithal Komur II* Decision No. 06-62/848-241 dated 11 September 2006, *Cam Ambalaj* Decision No. 07-17/155-50 dated 28 February 2007 and *Condor Flugdienst* Decision No. 11-54/1431-507 dated 27 October 2011.

© 2022 Law Business Research Ltd

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Turkey is an 'effects theory' jurisdiction in which the main concern is whether the cartel activity has affected the Turkish markets, 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 has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, unless there is an effect on Turkish markets.[4] The Board has yet to enforce monetary or other sanctions against firms located outside Turkey and without any presence in Turkey, mostly because of enforcement handicaps (such as difficulties of formal service). The specific circumstances surrounding indirect sales have not been tried under Turkish cartel rules. Article 2 of the Competition Law could potentially support an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside Turkey does not in and of itself produce effects in Turkey.

The underlying basis of the Board's jurisdiction is found in Article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent that they have an effect on a Turkish market, regardless of where the conduct takes place.

The Competition Law applies both to undertakings and associations of undertakings. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Therefore, the Competition Law applies to individuals and corporations alike if they act as an undertaking.

The Amendment Law introduced the *de minimis* principle under Article 41 of the Competition Law, with the aim of steering the direction of the application of the Law, and public resources, towards more significant violations. The secondary legislation providing details on the process and procedure related to application of the *de minimis* principle, Communiqué No. 2021/3, came into force on 16 March 2021. Overall, the *de minimis* principle applies to the following categories of agreements, which are deemed not to significantly restrict competition in the market: (1) agreements signed between competing undertakings where the total market share of the parties to the agreement does not exceed 10 per cent in any of the relevant markets affected by the agreement, and (2) agreements signed between non-competing undertakings where the market share of each of the parties does not exceed 15 per cent in any of the relevant markets affected by the agreement. Moreover, the *de minimis* principle is not applicable to clear and hardcore violations. In other words, cartels do not benefit from the *de minimis* principle.

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of Article 4. Nevertheless, there are sector-specific antitrust exemptions. The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board.

4 See, for example, *The suppliers of rail freight forwarding services for block trains and cargo train services* No. 15-44/740-267 dated 16 December 2015, *Güneş Ekspres/Condor* No. 11-54/1431-507 dated 27 October 2011, *Imported Coal* No. 10-57/1141-430 dated 2 September 2010, *Refrigerator Compressors* No. 09-31/668-156 dated 1 July 2009, *Sisecam/Yioula* No. 07-17/155-50 dated 28 February 2007 and *Gas Insulated Switchgears* No. 04-43/538-133 dated 24 June 2004.

© 2022 Law Business Research Ltd

The applicable block exemption rules are:

a Block Exemption Communiqué No. 2002/2 on Vertical Agreements;[5]

b Block Exemption Communiqué No. 2008/3 for the Insurance Sector;

c Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;

d Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;

e Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and

f Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector.

The Guidelines on Horizontal Cooperation are another significant secondary legislative instrument available to the Board, containing a general analysis of Articles 4 and 5 of the Competition Law and general competition law concerns on information exchanges, research and development agreements, joint production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. These are all modelled on their respective equivalents in the European Union.

Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or 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 illegal per se.

The antitrust regime also condemns concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called the presumption of concerted practice. A concerted practice is a form of coordination without a formal agreement or decision whereby two or more companies come to an understanding to avoid competing with each other. The coordination need not be in writing. It is sufficient that the parties have expressed their joint intention to behave in a particular way; for example, in a meeting, a telephone call or an exchange of letters.

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 justified decision of the Board. According to 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 the request of the plaintiff, the court may, with reasoned justification, decide to stay the execution of the decision if execution is likely to cause serious and irreparable damage and the decision is highly likely to be against the law (i.e., there is a prima facie case to this effect).

Judicial review by the Ankara administrative courts usually takes between 12 and 24 months. Administrative (and private) litigation cases are subject to judicial review before the regional courts (established in 2016), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (or the Court of Cassation for private cases).

A regional court will go through a case file and investigate it on both procedural and substantive grounds and then make a decision on the merits of the case. The regional court's decision will be considered final but will, in exceptional circumstances, be subject to review

5 Note that the market-share thresholds were amended on 5 November 2021, by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué No. 2002/2 on Vertical Agreements.

© 2022 Law Business Research Ltd

by the Council of State, as set out in Article 46 of the Administrative Procedure Law, in which case the decision of the regional court will not be considered final and the Council of State may decide to uphold or reverse that 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. As the regional courts are newly established, there is as yet insufficient experience of how long it takes for a regional court to finalise its review of a file. Accordingly, the Council of State's review period (for a regional court's decision) within the new system should also be tested before providing an estimated time period. Court decisions in private suits are appealable before the Court of Cassation. The appeal process in private suits is governed by the general procedural laws and usually takes between 24 and 30 months.

IV LENIENCY PROGRAMMES

The leniency programme is available to cartel members.[6] The Leniency Regulation does not apply to other forms of antitrust infringement. Section 3 of the Leniency Regulation provides for a definition of cartel that encompasses price-fixing; customer, supplier or market sharing; restricting output or placing quotas; and bid-rigging.

A cartel member may apply for leniency up to the point that the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine.

Pursuant to the Leniency Regulation, the following conditions must be met before a cartel member can benefit from immunity or fine reduction.

The applicant must submit:

a information on the products affected by the cartel;
b information on the duration of the cartel;
c the names of the cartelists;
d the dates, locations and participants of the cartel meetings; and
e other information or documents about the cartel activity.

The required information may be submitted verbally.

Additionally:

a the applicant must avoid concealing or destroying information or documents on the cartel activity;
b unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel;

6 The Board levied administrative monetary fines in an investigation into 13 financial institutions or banks active in Turkey's corporate and commercial banking markets (28 November 2017, 17–39/636–276). Even though the investigation (launched following a leniency application) concluded that Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU), ING Bank AŞ and Royal Bank of Scotland Istanbul violated Article 4 of the Competition Law by engaging in competition-restricting information exchange practices (and not cartel practices), BTMU was still granted full immunity within the scope of the leniency programme.

© 2022 Law Business Research Ltd

c unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served; and
d the applicant must continue to actively cooperate with the Authority until the final decision on the case has been rendered.

In any case where an application containing limited information is accepted, further information needs to be submitted subsequently. Although it provides no detailed principles for the marker system, pursuant to Section 6 of the Leniency Regulation a document showing the date and time of the application and a request for time to prepare the requested information and evidence (if such a request is pertinent) will be given to the applicant by the assigned unit.

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 is not in possession of any evidence indicating a cartel infringement. Employees or managers of the first applicant will also be totally immune; however, the applicant must not have been the ringleader. If the applicant has forced any other cartel members to participate in the cartel, a reduction in the fine of only 33 to 50 per cent is available for the firm and between 33 and 100 per cent for the employees or managers.

In addition to this, the applicant must:

a end its involvement in the infringement;
b provide the Authority with all relevant information on the infringement (e.g., dates and locations of meetings, the products affected, the companies and individuals implicated);
c not conceal or destroy any information; and
d continue to cooperate with the Authority after applying for leniency and to the extent necessary.

The second firm to file an appropriately prepared application will receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant who actively cooperate with the Authority will benefit from a fine reduction of between 33 and 100 per cent.

The third applicant will receive a reduction of between 25 and 33 per cent. Employees or managers of the third applicant who actively cooperate with the Authority will benefit from a reduction of 25 to 100 per cent.

Finally, subsequent applicants will receive a reduction of between 16 and 25 per cent. Employees or managers of subsequent applicants will benefit from a reduction of between 16 and 100 per cent.

The current employees of a cartel member also benefit from the same level of leniency or immunity that is granted to the entity. There are, as yet, no precedents about the status of former employees. Apart from this, according to the Leniency Regulation, a manager or employee of a cartel member may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications (if any) by the cartel member itself. Depending on the application order, there may be total immunity from, or a reduction of, a fine imposed on the manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartel members.

© 2022 Law Business Research Ltd

In addition, according to the Regulation on Fines, cooperation by a party is one of the mitigating factors that the Board can consider while determining the amount of the fine to be imposed, in which case, if mitigating circumstances are established by the violator, the fine would be reduced by between 25 and 60 per cent.

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.

V PENALTIES

The sanctions that may 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. Cartel conduct will not result in imprisonment of the individuals implicated. That said, there have been cases in which the matter was referred to a public prosecutor before and after the investigation under the Competition Law was complete. On that note, bid-rigging activity may be criminally prosecutable under Section 235 et seq. of the 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 judicial monetary penalty under Section 237 of the Criminal Code.

In cases of proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of the turnover generated in Turkey in the financial year prior to the date of the fining decision (or, 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 or members of the executive bodies of the undertakings or associations of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or 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 following when determining the magnitude of the monetary penalty:

a the level of fault and the amount of possible damage in the relevant market;
b the market power of the undertakings within the relevant market;
c the duration and recurrence of the infringement;
d the cooperation or driving role of the undertakings in the infringement; and
e the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity[7] and abuse of dominance[8] but does not cover illegal concentrations.[9] According to the Regulation, fines are calculated by first determining the basic level, which, in the case of cartels, is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (or, if this is not calculable, the turnover for the financial year nearest to the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines applies also

7 Article 4.
8 Article 6.
9 Article 7.

© 2022 Law Business Research Ltd

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.

In addition to the monetary sanction, restrictive agreements may be deemed legally invalid and unenforceable with all their 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 competition and end the infringement. Overall, the Board may order the cessation of practices and the adoption of remedies to restore the status quo, without imposing an administrative fine. Additionally, in cases where there is a possibility of serious and irreparable damage, the Competition Law authorises the Board to take interim measures until the final resolution on the matter is issued.

The Amendment Law introduced a commitment and settlement mechanism under Article 43 of the Competition Law, in an effort to see investigation processes concluded in a timely manner. As noted above, the Authority published Communiqué No. 2021/2, the secondary legislation providing details of the commitment mechanism, in March 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 restrictive agreements and abuse of dominance. The commitment mechanism is not applicable to those clear and hardcore violations listed earlier.

In contrast, the settlement mechanism is applicable to clear and hardcore violations. Under the settlement mechanism, the Board may, *ex officio* or upon a party's request, initiate a settlement procedure. Parties that admit to competition infringement until the official notification of the investigation report may benefit from a reduction of the administrative monetary fine by up to 25 per cent. The Authority published the Settlement Regulation on 15 July 2021.

In its first-ever settlement decision, the Competition Board announced on its official website that its investigation against Türk Philips Ticaret AŞ (Philips Turkey), Dünya Dış Ticaret Ltd Şti, Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg Don İnş San Tic AŞ, Nit-Set Ev Aletleri Paz San ve Tic Ltd Şti and GİPA Dayanıklı Tüketim Mamülleri Tic AŞ, based on the allegation that Philips Turkey violated Article 4 of the Competition Law by way of determining its dealer's resale prices, was concluded with a settlement decision for each investigated party through the Board's decision.[10]

In another important decision where both settlement and commitment mechanisms were implemented, the Board had initiated a full-fledged investigation against Singer sewing machines on 4 March 2020 with its decision numbered 21-11/147-M. In the investigation, the Authority assessed that the dealership agreements Singer had with its resellers included a non-compete clause that was exceeding the time limit set by the legislation (i.e., five years), alongside resale price maintenance practices. During the investigation, Singer applied to both settlement and commitment mechanisms. While Singer submitted its commitments addressing the deletion of the non-compete clause, it also applied before the Authority for conclusion of the investigation through settlement mechanism by accepting its resale price maintenance violation.

In a more recent decision, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları AŞ (Şişecam) and Şişecam Çevre

10 Decision No. 21-37/524-258 (5 August 2021).

© 2022 Law Business Research Ltd

Sistemleri AŞ (Çevre Sistemleri) to remedy the competition concerns relating to abuse of dominance in the glass production market. This decision marks the first time where the Board approved the commitments submitted in the preliminary investigation stage, since the Amendment Law was enacted.[11]

Additionally, the participation of an undertaking in cartel activities requires proof that there was such cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. In broadening its interpretation of the Competition Law, and in particular the rationale as to the 'object or effect of which', the Board has established an extremely low standard of proof concerning cartel activity. The standard of proof is even lower for concerted practices; in practice, if parallel behaviour is established, a concerted practice might readily be inferred, and the undertakings concerned might be required to prove that the parallelism is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an Article 4 enforcement if price changes in the market, the supply and demand equilibrium or fields of activity of enterprises bear a resemblance to those in markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that conscious parallelism is rebuttable evidence of forbidden behaviour and constitutes sufficient grounds to impose fines on the undertakings concerned. The burden of proof is very easily swapped, and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice but has economic and rational reasons behind it.

VI 'DAY ONE' RESPONSE

Article 15 of the Competition Law authorises the Board to conduct dawn raids. The Amendment Law introduced changes to Article 15 that expand the scope of the Board's authority during dawn raids and, indeed, match the recent practice of the case handlers.

Accordingly, the Board is entitled to:

a examine and make copies of all information and documents in companies' physical records as well as those in electronic space and IT systems (including but not limited to any deleted items);

b request written or verbal explanations on specific topics; and

c conduct on-site investigations with regard to any asset of an undertaking.

In addition to the powers conferred by the Amendment Law, the Guidelines on the Examination of Digital Data during On-Site Inspections were adopted on 8 October 2020, enabling the Authority to examine mobile devices (such as mobile phones and tablets), unless it has been determined that the devices are 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 assess its intended purpose.

Refusal to grant the staff of the Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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 for 2022 is 47,409 Turkish lira. A refusal may also lead to the imposition

11 Decision No. 21-51/712-354 (21 October 2021).

© 2022 Law Business Research Ltd

of a periodic daily fine rate of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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) for each day of the violation.

The Competition Law therefore provides broad 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. While the specific wording of the Law allows verbal testimony to be compelled of employees, case handlers do allow a delay in giving an answer as long as this is quickly followed up by written correspondence. Therefore, in practice, employees can avoid providing answers on issues about which they are uncertain, provided that a written response is submitted within a mutually agreed timeline. Computer records are fully examined by the experts of the Authority, including, but not limited to, deleted items.

Officials conducting an on-site investigation must 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 that do not fall within the scope of the investigation (which is written on the deed of authorisation). The Board 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 the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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.

VII PRIVATE ENFORCEMENT

A cartel matter is primarily adjudicated by the Board. Enforcement is also supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts.

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq. of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. Owing 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, then build their own decision on that finding.

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. Antitrust-based private lawsuits are rare but increasing in practice.

© 2022 Law Business Research Ltd

VIII CURRENT DEVELOPMENTS

According to the Authority's annual report for 2021, the Board finalised a total of 74 cases concerning competition law violations. Of these, 44 cases came under Article 4 of the Competition Law (anticompetitive agreements) and 11 cases concerned both Article 4 and Article 6 (abuse of dominant position). The Board issued a total of 3,453,040,530 lira in monetary fines for Article 4 cases in 2021. The monetary fine total for Article 4 cases in 2021 was roughly two times that of 2020, while the total of monetary fines imposed in Article 6 cases decreased compared to the amount of fines imposed in 2020. In this regard, there has been an increase in the monetary fines that were levied under Article 4. Specifically, the Board imposed monetary fines totalling 687,288,455 lira in relation to horizontal anticompetitive arrangements in 2021, while the monetary fines for such arrangements in 2019 and 2020 were 164,392,558 lira and 60,030,330 lira, respectively.

In respect of cartel enforcement activity, the Board issued a reasoned decision that concluded imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their supplier, for their cartel arrangement.[12] The Board found that five chain markets, directly or indirectly, through their supplier, and their supplier:

a coordinated their prices or price transitions;
b shared competitively sensitive information;
c colluded on and heightened prices through retailers against the good of consumers; and
d observed and maintained the said collusion.

Thus, the Board decided that the relevant undertakings violated Article 4 of the Competition Law. In this respect, the Board imposed a total administrative monetary fine of over 2.6 billion lira on the undertakings. This was 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. In the same case, the Board also imposed the highest monetary fine that it imposed on a single company as a result of a cartel investigation, which was 958,129,194.39 lira. This monetary fine was imposed by the Board on BİM Birleşik Mağazalar AŞ (BİM).[13] This amount represented 1.8 per cent of BİM's annual gross revenue for the year 2020.

The Authority received one leniency application in 2021, which centred on the electronic sector and resulted in the full reduction of the administrative monetary fine in accordance with Article 5 of the Regulation on Leniency.

In the same year, in the *MDF* decision,[14] the Board concluded that AGT Ağaç Sanayi ve Ticaret AŞ, Çamsan Ordu Ağaç San ve Tic AŞ, Divapan Entegre Ağaç Panel San Tic AŞ, Gentaş Dekoratif Yüzeyler Sanayi ve Ticaret AŞ, Kastamonu Entegre Ağaç Sanayi ve Ticaret AŞ, Kronospan Orman Ürünleri San ve Tic AŞ, İntegre San ve Tic AŞ, Starwood Orman Ürünleri Sanayii AŞ, Teverpan MDF Levha Sanayii ve Ticaret AŞ, Yıldız Entegre Ağaç San ve Tic AŞ and Yıldız Sunta Orman Ürünleri İth İhr ve Tic AŞ, which are producers of medium-density fibreboards (MDF) and chipboards, were involved in a cartel agreement to fix the price increase timing and the percentages regarding MDF and chipboard products.

12 28 October 2021, 21-53/747-360.
13 28 October 2021, 21-53/747-360.
14 1 April 2021, 21-18/229-96.

© 2022 Law Business Research Ltd

In the relevant case, although the violation occurred in two different time periods (2014 and 2016–2017), the Board determined that a single base fine for both time periods should be applied with respect to the violation.

In another recent decision,[15] the Board conducted an investigation against Gedik Kaynak Sanayi ve Tic AŞ (Gedik), Kaynak Tekniği San ve Tic AŞ (Askaynak) under the control of Lincoln Electric Holdings, Inc, and Oerlikon Kaynak Elektrodları ve Sanayi AŞ (Oerlikon)/Magmaweld Uluslararası Tic AŞ (Magmaweld) under the control of Zaimoğlu Holding AŞ to decide whether these undertakings have violated the Article 4 of the Competition Law. The Board found that, in 2011: (1) the general managers of Gedik, Askaynak and Oerlikon/Magmaweld took joint decisions on product prices and sales methods; (2) they showed an effort to ensure implementation of these decisions by each undertaking; and (3) they warned those who do not comply with such decisions. Based on these findings, the Board decided that there was a cartel infringement in 2011 but did not impose an administrative fine on the investigated undertakings for their violation in 2011 as a result of the expiry of the eight-year statute of limitation. For the following periods from 2011 to 2019, the Board reached the conclusion that there is no sufficient finding to prove that the undertakings violated Article 4 of the Law No. 4054 by stating that (1) in the light of the economic analysis, the price changes did not show the effect of an infringement, and therefore, (2) the presumption of the concerted practice cannot be applied for the period of 2017–2019 as there are no indications of 'market behaviour that provides a presumption of communication'.

The Board also decided that Novartis Sağlık Gıda ve Tarım Ür San ve Tic AŞ (Novartis) and Roche Müstahzarları San AŞ (Roche) violated Article 4 of the Competition Law in relation to the drugs Lucentis and Altuzan, both of which are used for the treatment of age-related macular degeneration eye diseases.[16] The Board determined that Novartis and Roche had agreed to shift market demand towards Lucentis in intraocular treatment and discourage the use of Altuzan by providing misleading information to administrative and judicial authorities, highlighting Altuzan's side effects and the risk of endophthalmitis. Ultimately, the Board determined that Novartis and Roche had been engaged in cartel activity and acquiring unlawful profits by seeking to shift demand towards the more expensive medication, Lucentis. The Board concluded that the actions of Novartis and Roche constituted a violation of Article 4 of the Competition Law and it imposed an administrative fine of 165,464,716.48 lira on Novartis and 112,972,552.65 lira on Roche.

The Gaziantep automobile expert-opinion decision was one of the most significant decisions regarding price-fixing arrangements rendered by the Board in 2020.[17] The decision concerned an investigation into automobile expertise service providers operating in the Gaziantep province of Turkey. The Board found concrete evidence of a horizontal cartel agreement to determine automobile expertise service price tariffs and refusal to provide services on Sundays or to provide services on Sundays according to a rotation schedule set *inter se*, and it therefore imposed a monetary fine on the undertakings concerned. One of the parties to the investigation was granted a reduction of the administrative monetary fine because it made a leniency application.

15 8 April 2021, 21-20/247-104.

16 21 January 2021, 21-04/52-21.

17 9 July 2020, 20-33/439-196.

© 2022 Law Business Research Ltd

In other cartel enforcement activity, the Board found that certain ready-mixed concrete producers operating in 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.[18] In this respect, the Board imposed an administrative monetary fine of 1.2 per cent of the annual gross income of the investigated parties.

In the investigation concerning the traffic signalling market, the Board concluded that nine of the 10 parties investigated violated Article 4 of the Competition Law by bid-rigging.[19] Among other practices, the Board essentially found that undertakings prepared offers and entered into bids based on a mutually reached consensus. As a result, all but one of the investigated undertakings had an administrative monetary fine of either 2 or 3 per cent of their annual gross income imposed by the Board. 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[20] and refusing to grant access to the Authority for 17 days.[21]

In another decision, the Board concluded that gas stations located in Burdur province violated Article 4 of the Competition Law by fixing prices.[22] 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, as the profit margins of the investigated undertakings were significantly low and imposition of a high fine would restrict the sustainability of their business.

Moreover, in a leniency case, initiated as a result of a leniency application by Arçelik Pazarlama AŞ (Arçelik) upon discovering that an Arçelik employee had shared insider information 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 knowledge of the senior management, so they did not meet the mutual agreement criteria and did not constitute concerted practice.[23]

18 19 March 2020, 20-15/215-107.
19 12 March 2020, 20-14/191-97.
20 21 June 2018, 18-20/356-176.
21 5 July 2018, 18-22/378-185.
22 9 January 2020, 20-03/28-12.
23 2 January 2020, 20-01/13-5.

© 2022 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

GÖNENÇ GÜRKAYNAK

ELIG Gürkaynak Attorneys-at-Law

Gönenç Gürkaynak is the founding partner at ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 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 LLM 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 53 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 25 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 more than 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 had published more than 200 articles in English and Turkish by various international and local publishers.

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
www.elig.com

© 2022 Law Business Research Ltd

ISBN 978-1-80449-146-1

© 2022 Law Business Research Ltd