IN-DEPTH

Cartels And Leniency

TÜRKIYE

Cartels and Leniency

EDITION 12

Contributing Editors

Romina Polley and **Julian Alexander Sanner**

Cleary Gottlieb Steen & Hamilton LLP

In-Depth: Cartels and Leniency (formerly The Cartels and Leniency Review) provides a practical overview of the laws and policies aimed at combating cartel activity across key jurisdictions worldwide. It addresses major emerging and unsettled issues surrounding unlawful agreements with competitors, and analyses recent enforcement trends and regulatory changes – offering valuable insights to practitioners and corporates alike.

Generated: March 27, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Türkiye

Gönenç Gürkaynak
ELIG Gürkaynak Attorneys-at-Law

Summary

INTRODUCTION
YEAR IN REVIEW
ENFORCEMENT POLICIES AND GUIDANCE
COOPERATION WITH OTHER JURISDICTIONS
JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS
LENIENCY PROGRAMMES
PENALTIES
'DAY ONE' RESPONSE
PRIVATE ENFORCEMENT
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

This chapter details Türkiye's cartel legislation, exploring the powers vested in the Turkish Competition Authority (the Authority) and the approach outlined in Communiqué No. 2021/3, which identifies 'clear and hard-core violations'. Furthermore, the jurisdictional landscape is examined, highlighting the effects theory and the Authority's jurisdictional scope, allowing the Turkish Competition Board (the Board) to address cartel conduct with global implications.

The chapter also provides information about the Regulation on Active Cooperation for Detecting Cartels (the Leniency Regulation), which came into effect in December 2023 and elucidates its role in incentivising cartel parties to proactively disclose valuable information. Detailed discussions herein cover the scope, the application process and the obligations of leniency applicants, with a focus on the Board's dedication to augmenting clarity and emphasising the Authority's commitment to enhancing clarity and reducing uncertainty.

The concluding section provides an outlook on recent cartel enforcement highlights, showcasing key decisions in 2023, and emphasises the Board's commitment to combating anticompetitive practices.

This chapter details Türkiye's cartel legislation, exploring the powers vested in the Turkish Competition Authority (the Authority) and the approach outlined in Communiqué No. 2021/3, which identifies 'clear and hard-core violations'. Furthermore, the jurisdictional landscape is examined, highlighting the effects theory and the Authority's jurisdictional scope, allowing the Turkish Competition Board (the Board) to address cartel conduct with global implications.

The chapter also provides information about the Regulation on Active Cooperation for Detecting Cartels (the Leniency Regulation), which came into effect in December 2023 and elucidates its role in incentivising cartel parties to proactively disclose valuable information. Detailed discussions herein cover the scope, the application process and the obligations of leniency applicants, with a focus on the Board's dedication to augmenting clarity and emphasising the Authority's commitment to enhancing clarity and reducing uncertainty.

The concluding section provides an outlook on recent cartel enforcement highlights, showcasing key decisions in 2023, and emphasises the Board's commitment to combating anticompetitive practices.

Year in review

In 2023, the Authority focused on various sectors, initiating inquiries in cement, construction chemicals, fast-moving consumer goods (FMCG) and digital markets.

Since the earthquake that occurred in Turkiye, the Authority has started to scrutinise the market for cement and construction chemicals to prevent anticompetitive activities and encourage cooperative competition during reconstruction. The Board published an FMCG sector inquiry, which revealed a concentration increase at the retailer level, prompting concerns about potential unfair practices driven by buyer power. Additionally, the Board focused three inquiries specifically centred on digital markets, involving a

study highlighting distinctions from traditional markets, and a sector inquiry into mobile ecosystems was initiated along with a preliminary report on the online advertising sector. Furthermore, the Authority signed a Cooperation Protocol with the Personal Data Protection Authority, intending to synchronise competition and data protection measures, and alleviate apprehensions arising from data-driven technologies, thereby bolstering consumer control over personal data.

Legislatively, the Leniency Regulation was published in the Official Gazette and came into effect on 16 December 2023. It replaced the former leniency regulation, which had been enforced since 15 February 2009. Ongoing considerations for legislative measures in digital markets, including obligations for significant market players, are under way.

Key abuse of dominance investigations in digital markets involved Meta's data combining practices and an inquiry into automated pricing mechanisms on major online platforms.[2] The Board has adopted a higher standard of proof for resale price maintenance violations in recent decisions.[3]

The Authority has also focused on the labour market by initiating investigations to assess whether undertakings violated competition law by entering gentlemen's agreements not to recruit each other's employees, which concluded with an administrative monetary fine being imposed on the investigated parties.

Commitment and settlement applications were actively evaluated in 2023, with six commitment-related decisions and 22 settlement-related decisions published during the year.[4] Leniency-related reasoned decisions included reductions for Beypazar and K n-k,[5] which are explained in detail later in this chapter.

Procedurally, the Board applied the legal principle of *ne bis in idem* and penalised false information provision.[6] Notably, the Constitutional Court's decision affected on-site inspections, potentially requiring warrants for uncooperative undertakings.[7] The Board issued 26 reasoned decisions imposing fines for hindering on-site inspections, reflecting its commitment to effective enforcement.

In 2023, the Authority focused on various sectors, initiating inquiries in cement, construction chemicals, fast-moving consumer goods (FMCG) and digital markets.

Since the earthquake that occurred in Turkiye, the Authority has started to scrutinise the market for cement and construction chemicals to prevent anticompetitive activities and encourage cooperative competition during reconstruction. The Board published an FMCG sector inquiry, which revealed a concentration increase at the retailer level, prompting concerns about potential unfair practices driven by buyer power. Additionally, the Board focused three inquiries specifically centred on digital markets, involving a study highlighting distinctions from traditional markets, and a sector inquiry into mobile ecosystems was initiated along with a preliminary report on the online advertising sector. Furthermore, the Authority signed a Cooperation Protocol with the Personal Data Protection Authority, intending to synchronise competition and data protection measures, and alleviate apprehensions arising from data-driven technologies, thereby bolstering consumer control over personal data.

Legislatively, the Leniency Regulation was published in the Official Gazette and came into effect on 16 December 2023. It replaced the former leniency regulation, which had been

enforced since 15 February 2009. Ongoing considerations for legislative measures in digital markets, including obligations for significant market players, are under way.

Key abuse of dominance investigations in digital markets involved Meta's data combining practices and an inquiry into automated pricing mechanisms on major online platforms.[2] The Board has adopted a higher standard of proof for resale price maintenance violations in recent decisions.[3]

The Authority has also focused on the labour market by initiating investigations to assess whether undertakings violated competition law by entering gentlemen's agreements not to recruit each other's employees, which concluded with an administrative monetary fine being imposed on the investigated parties.

Commitment and settlement applications were actively evaluated in 2023, with six commitment-related decisions and 22 settlement-related decisions published during the year.[4] Leniency-related reasoned decisions included reductions for Beypazar and K n-k,[5] which are explained in detail later in this chapter.

Procedurally, the Board applied the legal principle of *ne bis in idem* and penalised false information provision.[6] Notably, the Constitutional Court's decision affected on-site inspections, potentially requiring warrants for uncooperative undertakings.[7] The Board issued 26 reasoned decisions imposing fines for hindering on-site inspections, reflecting its commitment to effective enforcement.

Enforcement policies and guidance

The relevant legislation on cartel regulation in Türkiye 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 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 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'.[8]

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 Board.

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:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. share markets or sources of supply;
3. limit or control production, output or demand in the market;
4. place competitors at a competitive disadvantage or involve exclusionary practices, such as boycotts;
5. apply dissimilar conditions to equivalent transactions with other trading parties (except for exclusive dealing); and
6. 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.

Owing to the implementation of the Leniency Regulation in 2023, the Board intends to expeditiously release an updated Guideline on the Regulation for Active Cooperation in the Detection of Cartels, replacing the version issued on 19 April 2013. This Guideline aims to offer clarity in interpretations, minimise uncertainty in practice and fulfil the transparency

principle by providing clear guidance to undertakings for more efficient utilisation of the leniency programme.

The relevant legislation on cartel regulation in Türkiye 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 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 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'.[8]

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 Board.

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:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. share markets or sources of supply;
3. limit or control production, output or demand in the market;
4. place competitors at a competitive disadvantage or involve exclusionary practices, such as boycotts;
5. apply dissimilar conditions to equivalent transactions with other trading parties (except for exclusive dealing); and
6. 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.

Owing to the implementation of the Leniency Regulation in 2023, the Board intends to expeditiously release an updated Guideline on the Regulation for Active Cooperation in the Detection of Cartels, replacing the version issued on 19 April 2013. This Guideline aims to offer clarity in interpretations, minimise uncertainty in practice and fulfil the transparency principle by providing clear guidance to undertakings for more efficient utilisation of the leniency programme.

Cooperation with other jurisdictions

Article 43 of Decision No. 1/95 of the EC-Türkiye 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 Türkiye. The provision grants reciprocal rights and obligations to the parties (the European Union and Türkiye) 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, 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 regarding 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 Türkiye 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[9] 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.

Article 43 of Decision No. 1/95 of the EC-Türkiye 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 Türkiye. The provision grants reciprocal rights and obligations to the parties (the European Union and Türkiye) 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, 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 regarding 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 Türkiye 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[9] 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.

Jurisdictional limitations, affirmative defences and exemptions

Türkiye 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 applicants, where the cartel activity took place or whether the members have a subsidiary in Türkiye. The Board has refrained from declining jurisdiction over non-Turkish cartels, cartel facilitators or applicants in the past, unless there is an effect on Turkish markets.[10] The Board has yet to enforce monetary or other sanctions against firms located outside Türkiye and without any presence in Türkiye, 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 Türkiye does not in and of itself produce effects in Türkiye.

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 affect the 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, to steer 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 such as price-fixing, territory or customer sharing and restriction of supply. 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, including state-owned entities acting as undertakings under 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.

The applicable block exemption rules are:

1. Block Exemption Communiqué No. 2002/2 on Vertical Agreements;[11]
2. Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
3. Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
4. Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
5. Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and
6. 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. Several 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, 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 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 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 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 36 months.

Türkiye 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 applicants, where the cartel activity took place or whether the members have a subsidiary in Türkiye. The Board has refrained from declining jurisdiction over non-Turkish cartels, cartel facilitators or applicants in the past, unless there is an effect on Turkish markets.[10] The Board has yet to enforce monetary or other sanctions against firms located outside Türkiye and without any presence in Türkiye, 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 Türkiye does not in and of itself produce effects in Türkiye.

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 affect the 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, to steer 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 such as price-fixing, territory or customer sharing and restriction of supply. 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, including state-owned entities acting as undertakings under 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.

The applicable block exemption rules are:

1. Block Exemption Communiqué No. 2002/2 on Vertical Agreements;[11]
2. Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
3. Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
4. Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
5. Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and
6. 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. Several 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, 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 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 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 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 36 months.

Leniency programmes

Within the scope of the Leniency Regulation, the leniency programme is available to both cartel parties[12] and cartel facilitators,[13] expanding the scope of full immunity to the parties to a hub-and-spoke cartel or other cartel facilitators who are, in practice, held liable for administrative sanctions, by allowing them to also benefit from active cooperation and broadening the Authority's avenues for accepting leniency applications.

The Leniency Regulation mainly applies to cartel infringements defined in Article 3(c) of the Leniency Regulation encompassing price-fixing, customer, supplier or market sharing, restricting output or placing quotas and bid rigging. It introduces new clauses that provide the opportunity for applicants to receive an exemption or fine reduction under the leniency mechanism. This applies even if the applicant initially applies for leniency, believing it to be a cartel violation, but the Board later determines that the specific infringement does

not qualify as a cartel. The aim is to address the concerns of undertakings that may be hesitant to utilise the leniency programme owing to uncertainties about the nature of the infringement.

The Leniency Regulation foresees that a cartel party or cartel facilitator that submits the information and documents and meets the conditions mentioned below may apply for leniency within three months of receipt of an investigation notice. Moreover, the applicant acquiring additional information and documents subsequent to the initial application can submit these materials before the conclusion of the second written defence period. Depending on the application order, there may be total immunity from, or reduction of, a fine.

Pursuant to the Leniency Regulation, the applicant must submit the following before it can benefit from immunity or reduction of a fine:

1. information about the products affected by the cartel;
2. information about the geographical scope of the cartel;
3. information about the duration of the cartel;
4. the names or trade names and addresses of the cartel parties and facilitators;
5. the dates, locations and participants of the cartel meetings; and
6. other information or documents concerning the cartel activity.

The Leniency Regulation, aligned with EU legislation, introduces an additional requirement for fine reduction eligibility. Applicants must provide documents deemed to have value, defined as 'information and/or documents that will reinforce the Board's ability to prove the cartel, taking into account the evidence already held by the Board'. Within this requirement, the Authority aims to establish a clear distinction between the leniency procedure and the settlement procedure. Although the Leniency Regulation offers only a basic definition of the term 'document that holds value', it is anticipated that the forthcoming revised guidelines on leniency programmes will provide more comprehensive insights into determining which documents should be regarded as holding value. Additionally, if a leniency application from a particular undertaking is rejected because the documents submitted do not meet the criteria of 'documents that hold value', the information and documents provided by that undertaking will be excluded from the file's scope. Consequently, they will not be considered as a basis for the final decision made after the investigation.

Following enactment of the Leniency Regulation, the expansion of the scope for the submission of information and documents now includes meetings conducted in a digital environment, along with the relevant information and documents produced during such interactions.

The required information may be submitted verbally. Additionally:

1. the applicant must avoid concealing or destroying information or documents on the cartel activity;
2. unless the Cartels and On-Site Inspections Support Unit decides otherwise, the applicant must stop taking part in the cartel;
3.

unless the Cartels and On-Site Inspections Support Unit instructs otherwise, the application must be kept confidential until the investigation report has been served; and

4. 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 Article 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 does not have 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 25 to 50 per cent is available for the firm and between 20 and 100 per cent for the employees or managers.

In addition to this, the applicant must:

1. end its involvement in the infringement;
2. 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);
3. not conceal or destroy any information; and
4. 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 20 and 40 per cent. Employees or managers of the second applicant who actively cooperate with the Authority will benefit from a fine reduction of between 20 and 100 per cent.

Finally, subsequent applicants will receive a reduction of between 15 and 30 per cent. Employees or managers of subsequent applicants will benefit from a reduction of between 15 and 100 per cent.

Current employees of an applicant also benefit from the same level of leniency or immunity as the applicant. There are no precedents regarding the status of former employees. Additionally, under the Leniency Regulation, a manager or employee of an applicant may also apply for leniency until the investigation report is officially served. This application would be independent from applications (if any) by the applicant 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 conditions for immunity or reduction are the same as those designated for the applicants.

Furthermore, under the Regulation on Fines, a party's cooperation is one of the mitigating factors that the Board can consider while determining the amount of the fine. If mitigating circumstances are established by the violator, the fine would be reduced by between 25 and 50 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.

Within the scope of the Leniency Regulation, the leniency programme is available to both cartel parties[12] and cartel facilitators,[13] expanding the scope of full immunity to the parties to a hub-and-spoke cartel or other cartel facilitators who are, in practice, held liable for administrative sanctions, by allowing them to also benefit from active cooperation and broadening the Authority's avenues for accepting leniency applications.

The Leniency Regulation mainly applies to cartel infringements defined in Article 3(c) of the Leniency Regulation encompassing price-fixing, customer, supplier or market sharing, restricting output or placing quotas and bid rigging. It introduces new clauses that provide the opportunity for applicants to receive an exemption or fine reduction under the leniency mechanism. This applies even if the applicant initially applies for leniency, believing it to be a cartel violation, but the Board later determines that the specific infringement does not qualify as a cartel. The aim is to address the concerns of undertakings that may be hesitant to utilise the leniency programme owing to uncertainties about the nature of the infringement.

The Leniency Regulation foresees that a cartel party or cartel facilitator that submits the information and documents and meets the conditions mentioned below may apply for leniency within three months of receipt of an investigation notice. Moreover, the applicant acquiring additional information and documents subsequent to the initial application can submit these materials before the conclusion of the second written defence period. Depending on the application order, there may be total immunity from, or reduction of, a fine.

Pursuant to the Leniency Regulation, the applicant must submit the following before it can benefit from immunity or reduction of a fine:

1. information about the products affected by the cartel;
2. information about the geographical scope of the cartel;
3. information about the duration of the cartel;
4. the names or trade names and addresses of the cartel parties and facilitators;
5. the dates, locations and participants of the cartel meetings; and
6. other information or documents concerning the cartel activity.

The Leniency Regulation, aligned with EU legislation, introduces an additional requirement for fine reduction eligibility. Applicants must provide documents deemed to have value, defined as 'information and/or documents that will reinforce the Board's ability to prove the cartel, taking into account the evidence already held by the Board'. Within this requirement, the Authority aims to establish a clear distinction between the leniency procedure and the

settlement procedure. Although the Leniency Regulation offers only a basic definition of the term 'document that holds value', it is anticipated that the forthcoming revised guidelines on leniency programmes will provide more comprehensive insights into determining which documents should be regarded as holding value. Additionally, if a leniency application from a particular undertaking is rejected because the documents submitted do not meet the criteria of 'documents that hold value', the information and documents provided by that undertaking will be excluded from the file's scope. Consequently, they will not be considered as a basis for the final decision made after the investigation.

Following enactment of the Leniency Regulation, the expansion of the scope for the submission of information and documents now includes meetings conducted in a digital environment, along with the relevant information and documents produced during such interactions.

The required information may be submitted verbally. Additionally:

1. the applicant must avoid concealing or destroying information or documents on the cartel activity;
2. unless the Cartels and On-Site Inspections Support Unit decides otherwise, the applicant must stop taking part in the cartel;
3. unless the Cartels and On-Site Inspections Support Unit instructs otherwise, the application must be kept confidential until the investigation report has been served; and
4. 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 Article 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 does not have 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 25 to 50 per cent is available for the firm and between 20 and 100 per cent for the employees or managers.

In addition to this, the applicant must:

1. end its involvement in the infringement;
2. 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);
3. not conceal or destroy any information; and

4. 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 20 and 40 per cent. Employees or managers of the second applicant who actively cooperate with the Authority will benefit from a fine reduction of between 20 and 100 per cent.

Finally, subsequent applicants will receive a reduction of between 15 and 30 per cent. Employees or managers of subsequent applicants will benefit from a reduction of between 15 and 100 per cent.

Current employees of an applicant also benefit from the same level of leniency or immunity as the applicant. There are no precedents regarding the status of former employees. Additionally, under the Leniency Regulation, a manager or employee of an applicant may also apply for leniency until the investigation report is officially served. This application would be independent from applications (if any) by the applicant 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 conditions for immunity or reduction are the same as those designated for the applicants.

Furthermore, under the Regulation on Fines, a party's cooperation is one of the mitigating factors that the Board can consider while determining the amount of the fine. If mitigating circumstances are established by the violator, the fine would be reduced by between 25 and 50 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.

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., 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 Türkiye in the financial year before the date of the fining decision (or, if 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:

1. the level of fault and the amount of possible damage in the relevant market;
2. the market power of the undertakings within the relevant market;
3. the duration and recurrence of the infringement;
4. the cooperation or driving role of the undertakings in the infringement; and
5. the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity[14] and abuse of dominance[15] but does not cover illegal concentrations.[16] According to the Regulation on Fines, fines are calculated by first determining the basic level that, 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 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 Article 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, to see investigation processes concluded promptly. 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 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 applies 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.

The Board's *Kınık Maden Suları AŞ* (K n k)[17] and *Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret AŞ* (Beypazar)[18] decisions constitute

the first combined application of the settlement and former leniency mechanisms. In these decisions, the Board indicated that Beypazar and K n k exchanged competitively sensitive information in terms of commercial decisions regarding pricing and thus engaged in a cartel. Both parties applied for settlement and leniency. The Board accepted the applications and reduced the administrative fines imposed on K n k and Beypazar by 35 per cent and 30 per cent, respectively, for opting in to the leniency mechanism. Moreover, the Board reduced the administrative fines imposed on both parties by 25 per cent, given their settlement with the Authority, enabling K n k and Beypazar to benefit from a reduction in fines of 60 per cent and 55 per cent, respectively.

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 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.

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., 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 Türkiye in the financial year before the date of the fining decision (or, if 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:

1. the level of fault and the amount of possible damage in the relevant market;

2. the market power of the undertakings within the relevant market;
3. the duration and recurrence of the infringement;
4. the cooperation or driving role of the undertakings in the infringement; and
5. the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity[14] and abuse of dominance[15] but does not cover illegal concentrations.[16] According to the Regulation on Fines, fines are calculated by first determining the basic level that, 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 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 Article 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, to see investigation processes concluded promptly. 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 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 applies 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.

The Board's *Kınık Maden Suları AŞ* (K n k)[17] and *Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret AŞ* (Beypazar)[18] decisions constitute the first combined application of the settlement and former leniency mechanisms. In these decisions, the Board indicated that Beypazar and K n k exchanged competitively sensitive information in terms of commercial decisions regarding pricing and thus engaged in a cartel. Both parties applied for settlement and leniency. The Board accepted the applications and reduced the administrative fines imposed on K n k and Beypazar by 35 per cent and 30 per cent, respectively, for opting in to the leniency mechanism. Moreover,

the Board reduced the administrative fines imposed on both parties by 25 per cent, given their settlement with the Authority, enabling K n k and Beypazar to benefit from a reduction in fines of 60 per cent and 55 per cent, respectively.

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 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.

'Day one' response

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

Accordingly, the Board is entitled to:

1. examine and make copies of all information and documents in companies' physical records as well as those held electronically and in IT systems (including but not limited to any deleted items);
2. request written or verbal explanations on specific topics; and
3. conduct on-site investigations regarding any asset of an undertaking.

The Guidelines on the Examination of Digital Data during On-Site Inspections, adopted on 8 October 2020, enable the Authority to examine mobile devices (such as mobile phones and tablets), unless the devices are solely for the personal use of a given employee. 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 was 47,409 Turkish lira. A refusal may also lead to the imposition 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 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 gives considerable agency to the Authority regarding 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 have 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.) concerning 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.

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

Accordingly, the Board is entitled to:

1. examine and make copies of all information and documents in companies' physical records as well as those held electronically and in IT systems (including but not limited to any deleted items);
2. request written or verbal explanations on specific topics; and
3. conduct on-site investigations regarding any asset of an undertaking.

The Guidelines on the Examination of Digital Data during On-Site Inspections, adopted on 8 October 2020, enable the Authority to examine mobile devices (such as mobile phones and tablets), unless the devices are solely for the personal use of a given employee. 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 was 47,409 Turkish lira. A refusal may also lead to the imposition 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 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 gives considerable agency to the Authority regarding 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 have 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.) concerning 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.

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 business or property because 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.

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 business or property because 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.

Outlook and conclusions

According to the Authority's annual report for 2022, the Board finalised a total of 78 cases concerning competition law violations. Of these, 58 cases came under Article 4 of the Competition Law (anticompetitive agreements), six cases concerned both Articles4 and 6 (abuse of dominant position) and 38 cases concerned horizontal agreements. Overall, the Authority recorded increased Article 4 and cartel enforcement under horizontal agreement assessments. The Board imposed a total of 1,379,322,246 Turkish lira in monetary fines for Article 4 cases in 2022.

In respect of cartel enforcement activity, the Board, in its *FMCG II* decision,[19] determined that B M Birle ik Ma azalar A , Carrefour SA/Carrefour Sabanc Ticaret Merkezi A , Migros Ticaret A , ok Marketler Ticaret A and Yeni Ma azac l k A had contravened Article 4 of the Competition Law through agreements or concerted practices in respect of a hub-and-spoke cartel. This cartel was designed to establish the retail sale prices of various products offered by the aforementioned retailers. It entailed the coordination of prices and price increases through indirect contacts among these undertakings, facilitated by common suppliers. The exchange of competitively sensitive information, including future prices, price increase dates, seasonal activities and campaigns, occurred through these common suppliers. Furthermore, the undertakings intervened in prices and enforced price increases on retailers that had not yet raised their prices during a period of general market price increases, utilising suppliers to the detriment of customers. Strategies such as product-specific price reduction were employed to ensure compliance with collusion among undertakings in case competitor prices did not rise. Consequently, the Board decided that an administrative monetary fine should be imposed on these undertakings in accordance with Article 16 of the Competition Law; however, because an administrative fine had already been imposed on the relevant undertakings pursuant to the Board's *FMCG I* decision, following the general legal principle of *ne bis in idem*, the Board opted not to levy a new administrative monetary fine within the scope of the current investigation.

In the *Alanya Chamber of Electrical Engineers* decision,[20] the Board assessed whether a group of electrical engineers who are members of the Chamber of Electrical Engineers, District Representation in Alanya has violated Article 4 of Law No. 4054 by fixing minimum prices. The Board concluded that the electrical engineers, either personally or via the

companies they control have been engaged in a cartel. The investigation concluded by way of a settlement involving all the parties.

In terms of the Board's more recent decisions, in *Şişecam*,[21] it revised the commitments finalised with its first commitment decision. The Board had decided that i ecam, through its subsidiary Çevre Sistemleri, had abused its dominant position in the market for glass manufacturing by excluding its competitors in the upstream market for recycled glass, utilised its buyer power to narrow the margin between its competitors' input and output and aggravated their activities through restricting their supply of waste glass. Following the earthquake that took place in the Kahramanmara province and nearby cities, upon the application by i ecam for revision of the commitments, the Board has decided that 'there is a substantial alteration in any of the factors on which the decision was based' in the face of the repercussions of the earthquake and accepted that the commitment is to be revised. By way of the revision, i ecam committed to limit its procurement of unprocessed flat glass used in furnace-ready cullet from any undertaking that is outside the scope of i ecam's economic integration (from third parties operating domestically), for five years beginning from the service of the short decision, to an annual 15,000 tonnes.

Furthermore, in its *Sunny* decision,[22] the Board chose not to launch a full investigation following a preliminary investigation into allegations against Sunny Elektronik Sanayi ve Ticaret A . The allegations included claims that Sunny prohibited its resellers' online sales, engaged in resale price maintenance and facilitated indirect information exchange among its resellers, specifically Carrefour SA/Carrefour Sabanc Ticaret Merkezi A , Migros Ticaret A and Yeni Ma azac l k A . Notably, this decision was made despite the Authority's case handlers recommending the initiation of a full investigation. The conclusion drawn from this analysis was that the specific case did not demonstrate any violation of such infringement. Consequently, the Board determined that there was no information or document indicating that Sunny, along with the mentioned resellers, was involved in a restrictive agreement that contravened Article 4 of the Competition Law. Additionally, in its *Eczacıbaşı* decision,[23] the Board concluded its investigation against Eczac ba Tüketim Ürünleri San ve Tic A with a settlement. The investigation focused on allegations surrounding Eczac ba 's involvement in a hub-and-spoke cartel, coordinating price increases of downstream retailers and fixing resale prices. It was determined that Eczac ba engaged in anticompetitive behaviour as a party to a hub-and-spoke cartel. The investigation concluded with a settlement text submitted by Eczac ba , resulting in a maximum 25 per cent reduction in the administrative fine. Consequently, an administrative fine of 17,525,798.63 Turkish lira was imposed for the hub-and-spoke cartel violation and 8,762,899.32 Turkish lira for the resale price maintenance violation.

According to the Authority's annual report for 2022, the Board finalised a total of 78 cases concerning competition law violations. Of these, 58 cases came under Article 4 of the Competition Law (anticompetitive agreements), six cases concerned both Articles4 and 6 (abuse of dominant position) and 38 cases concerned horizontal agreements. Overall, the Authority recorded increased Article 4 and cartel enforcement under horizontal agreement assessments. The Board imposed a total of 1,379,322,246 Turkish lira in monetary fines for Article 4 cases in 2022.

In respect of cartel enforcement activity, the Board, in its *FMCG II* decision,[19] determined that B M Birle ik Ma azalar A , Carrefour SA/Carrefour Sabanc Ticaret Merkezi A , Migros Ticaret A , ok Marketler Ticaret A and Yeni Ma azac l k A had contravened

Article 4 of the Competition Law through agreements or concerted practices in respect of a hub-and-spoke cartel. This cartel was designed to establish the retail sale prices of various products offered by the aforementioned retailers. It entailed the coordination of prices and price increases through indirect contacts among these undertakings, facilitated by common suppliers. The exchange of competitively sensitive information, including future prices, price increase dates, seasonal activities and campaigns, occurred through these common suppliers. Furthermore, the undertakings intervened in prices and enforced price increases on retailers that had not yet raised their prices during a period of general market price increases, utilising suppliers to the detriment of customers. Strategies such as product-specific price reduction were employed to ensure compliance with collusion among undertakings in case competitor prices did not rise. Consequently, the Board decided that an administrative monetary fine should be imposed on these undertakings in accordance with Article 16 of the Competition Law; however, because an administrative fine had already been imposed on the relevant undertakings pursuant to the Board's *FMCG I* decision, following the general legal principle of *ne bis in idem*, the Board opted not to levy a new administrative monetary fine within the scope of the current investigation.

In the *Alanya Chamber of Electrical Engineers* decision,[20] the Board assessed whether a group of electrical engineers who are members of the Chamber of Electrical Engineers, District Representation in Alanya has violated Article 4 of Law No. 4054 by fixing minimum prices. The Board concluded that the electrical engineers, either personally or via the companies they control have been engaged in a cartel. The investigation concluded by way of a settlement involving all the parties.

In terms of the Board's more recent decisions, in *Şişecam*,[21] it revised the commitments finalised with its first commitment decision. The Board had decided that i ecam, through its subsidiary Çevre Sistemleri, had abused its dominant position in the market for glass manufacturing by excluding its competitors in the upstream market for recycled glass, utilised its buyer power to narrow the margin between its competitors' input and output and aggravated their activities through restricting their supply of waste glass. Following the earthquake that took place in the Kahramanmara province and nearby cities, upon the application by i ecam for revision of the commitments, the Board has decided that 'there is a substantial alteration in any of the factors on which the decision was based' in the face of the repercussions of the earthquake and accepted that the commitment is to be revised. By way of the revision, i ecam committed to limit its procurement of unprocessed flat glass used in furnace-ready cullet from any undertaking that is outside the scope of i ecam's economic integration (from third parties operating domestically), for five years beginning from the service of the short decision, to an annual 15,000 tonnes.

Furthermore, in its *Sunny* decision,[22] the Board chose not to launch a full investigation following a preliminary investigation into allegations against Sunny Elektronik Sanayi ve Ticaret A . The allegations included claims that Sunny prohibited its resellers' online sales, engaged in resale price maintenance and facilitated indirect information exchange among its resellers, specifically Carrefour SA/Carrefour Sabanc Ticaret Merkezi A , Migros Ticaret A and Yeni Ma azac l k A . Notably, this decision was made despite the Authority's case handlers recommending the initiation of a full investigation. The conclusion drawn from this analysis was that the specific case did not demonstrate any violation of such infringement. Consequently, the Board determined that there was no information or document indicating that Sunny, along with the mentioned resellers, was involved in a restrictive agreement that contravened Article 4 of the Competition Law.

Additionally, in its *Eczacıbaşı* decision,[23] the Board concluded its investigation against Eczac ba Tüketim Ürünleri San ve Tic A with a settlement. The investigation focused on allegations surrounding Eczac ba 's involvement in a hub-and-spoke cartel, coordinating price increases of downstream retailers and fixing resale prices. It was determined that Eczac ba engaged in anticompetitive behaviour as a party to a hub-and-spoke cartel. The investigation concluded with a settlement text submitted by Eczac ba , resulting in a maximum 25 per cent reduction in the administrative fine. Consequently, an administrative fine of 17,525,798.63 Turkish lira was imposed for the hub-and-spoke cartel violation and 8,762,899.32 Turkish lira for the resale price maintenance violation.

Endnotes

1. Gönenç Gürkaynak is the founding partner at ELIG Gürkaynak Attorneys-at-Law. ^ Back to section
2. *Meta*, Decision 22-48/706-299, 20 October 2022. ^ Back to section
3. *BSH*, Decision 22-55/864-358, 15 December 2022; *Anavarza*, Decision 23-13/209-67, 9 March 2023. ^ Back to section
4. *Human Resources*, Decision 23-34/649-218, 26 July 2023. ^ Back to section
5. *Beypazari*, Decision 22-23/379-158, 18 May 2022; *Kinik*, Decision 22-17/283-128, 14 April 2022. ^ Back to section
6. *FMCG II*, Decision 22-55/863-357, 15 December 2022. ^ Back to section
7. Turkish Constitutional Court's decision, Application number 2019/40991, 23 April 2023. ^ Back to section
8. Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, Article 3. ^ Back to section
9. Turkish Competition Authority,*Elektrik Turbini*, Decision No. 04-43/538-133, 24 June 2004, *Ithal Komur*, Decision No. 06-55/712-202, 25 July 2006, *Ithal Komur II*, Decision No. 06-62/848-241, 11 September 2006, *Cam Ambalaj* ,Decision No. 07-17/155-50, 28 February 2007 and *Condor Flugdienst*, Decision No. 11-54/1431-507, 27 October 2011. ^ Back to section
10. See, for example,*The suppliers of rail freight forwarding services for block trains and cargo train services*, Decision No. 15-44/740-267, 16 December 2015; *Günes Ekspres/Condor*, Decision No. 11-54/1431-507, 27 October 2011; *Imported Coal* No. 10-57/1141-430, 2 September 2010; *Refrigerator Compressors*, Decision No. 09-31/668-156, 1 July 2009; *Sisecam/Yioula*, Decision No. 07-17/155-50, 28 February 2007; and *Gas Insulated Switchgears*, Decision No. 04-43/538-133, 24 June 2004. ^ Back to section

11 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. ^ Back to section

12 The newly introduced definition refers to 'undertakings operating in the same level of the market and being a party to the agreements and/or concerted practices listed in the Leniency Regulation'. ^ Back to section

13 The Leniency Regulation has introduced the following definition to elucidate the Authority's position regarding facilitators: 'Undertakings and associations of undertakings that mediate in the organization and/or maintenance of a cartel, facilitating such organization and/or maintenance through their activities, without conducting operations at the same level of the production or distribution chain as the parties to the cartels.' ^ Back to section

14 Article 4. ^ Back to section

15 Article 6. ^ Back to section

16 Article 7. ^ Back to section

17 Decision No. 22-17/283-128, 14 April 2022. ^ Back to section

18 Decision No. 22-23/379-158, 18 May 2022. ^ Back to section

19 Decision No. 22-55/863-357, 15 December 2022. ^ Back to section

20 Decision No. 22- 48/699-M, 20 October 2022. ^ Back to section

21 Decision No. 23-10/170-53, 23 February 2023. ^ Back to section

22 Decision No. 22-23/371-156, 18 May 2022. ^ Back to section

23 Decision No. 23-13/212-68, 9 March 2023. ^ Back to section

Gönenç Gürkaynak gonenc.gurkaynak@elig.com

ELIG Gürkaynak Attorneys-at-Law

Read more from this firm on Lexology