Coping with cartels

Gönenç Gürkaynak and **Ayşe Güner** of **ELIG, Attorneys-at-Law** offer an insight into cartels including legislation and enforcement under Turkish competition law

The statutory basis for cartel prohibition under Turkish law is the Law on the Protection of Competition No. 4054 dated December 13 1994 (Competition Law). The applicable provision for cartel-specific cases is article 4 of the Competition Law, which is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). In particular, article 4 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part of that market. Furthermore, similar to article 101(1), article 4 does not provide a definition of 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

Additional legislation applicable in cartel-specific cases includes (i) the Regulation on Fines to Apply in Case of Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position (Regulation on Fines), (ii) the Regulation on Active Cooperation for Discovery of Cartels (Leniency Regulation) and, (iii) the Guidelines on the Explanation of the Regulation on Active Cooperation for Discovery of Cartels (Leniency Guidelines). Article 3 provides that cartels are agreements restricting competition and/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. That said, article 3 of the Leniency Regulation which also defines cartels, is identical to article 3 of the Regulation on Fines. As well as setting out the definition of a cartel, the Regulation on Fines also provides detailed guidelines regarding the calculation of monetary fines in cases of antitrust violations. Moreover, the Leniency Regulation, which was put into force on February 15 2009, sets out the main principles regarding immunity and leniency mechanisms. Finally, the Leniency Guideline, which was published on April 19 2013, aims to reduce uncertainty when interpreting and putting into practice the provisions of the Leniency Regulation, as well as provide undertakings with guidance to enable them to benefit from the leniency program more efficiently.

> **A cartel matter is primarily adjudicated by the board**

Developments in legislation

The long-awaited amendments to the Competition Law became a popular topic when the Turkish parliament announced that the draft Proposal for the Amendment of the Competition Law (Draft Law) and the draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation) had been officially added to the drafts and proposals list. The Prime Ministry sent the Draft Law and the Draft Regulation to the presidency of the Turkish parliament on January 23 and January 17 2014, respectively. Since parliamentary elections will take place in Turkey in the summer of 2015, there are more pressing topics on the agenda, such as draft legislation on national security, so these proposals are unlikely to be referred to the Turkish parliament's general assembly before the second half of 2015. The proposals will enter into force if the Turkish parliament approves them.

One of the aspects that the Draft Law would introduce is the *de minimis* rule, which enables the Turkish Competition Board (Board) to ignore certain cases that do not exceed a certain market share and/or turnover threshold. The Draft Law also introduces three tools that are to be used in ending investigations prematurely, already adopted in other jurisdictions but new to the Turkish Competition Law. The first of these is the settlement procedure, which enables the Board to settle with the investigated parties that admit their infringements before the investigation report is served to them. The second is the commitment procedure, which allows the Board to accept reasonable commitments submitted by the parties during preliminary or direct investigations, and to decide not to launch an investigation or to end an existing one. The Board will provide the details of these new procedures by secondary legislation. Thirdly, the Board may decide to end an investigation, wholly or partially, before the investigation report is served to the parties, if it is convinced by the case handlers' recommendations that the parties did not violate the law.

The Draft Regulation, on the other hand, refers to the calculation method set out under Communique 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board for administrative monetary fines, which would result in the explicit recognition of the parental liability principle. Namely, Communique 2010/4 considers not only the Turkish turnover of the investigated legal entity, but the Turkish turnover of the entire group, which includes the investigated legal entity, when calculating the turnover. Unlike the Regulation on Fines, according to which the base fine is determined on the basis of the total turnover, the Draft Regulation provides that 'the turnover generated in the relevant market which is directly or indirectly related to the respective competition law infringement' should be taken into consideration. The upper limit of the administrative monetary fines to be determined by the Board is 10% of the overall turnover generated by the undertaking in the financial year preceding the decision (or if this is not possible to calculate, generated by the end of the financial year closest to the date of the decision). The Draft Regulation also brings a number of new aggravating and mitigating factors to the Competition Law and obliges the Board to reduce the fines when mitigating factors exist.

Cartel enforcement

Procedure

The Board is entitled to launch a preliminary or direct investigation into an alleged cartel activity *ex officio* or in response to a complaint, if it finds the notice or complaint to be serious and sufficient. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified of the preliminary investigation. Dawn raids (unannounced onsite inspections) and other investigatory tools (for example, formal information request letters) are used during this preliminary investigation stage. The preliminary report of the experts of the Turkish Competition Authority (Authority) is submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board then decides within 10 days as to whether to launch a formal investigation. If the

ELİG

Attorneys at Law

INTEGRITY
EFFICIENCY
COMMITMENT

ELİG is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations.

ELİG, Attorneys-at-Law
Çitlenbik Sokak No.12, Yıldız Mahallesi,
Beşiktaş, 34349, Istanbul, Turkey
Tel: +90 212 327 1724 **Fax:** +90 212 327 1725
www.elig.com

Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended once for an additional period of up to six months.

Within the scope of the investigation process, the investigated undertakings have a right to submit three written defences. The written phase of investigation involving claim or defence exchange will close with the submission of the third written defence. Before the end of the investigation period, an oral hearing may be held either upon request of the parties or upon the Board's *ex officio* decision. Finally, the Board renders its decision within 15 days from the oral hearing. If an oral hearing is not held during the investigation process, the Board renders its decision within 30 days after the investigation ends. It usually takes around two to three months from the announcement of the final decision for the Board to serve a reasoned decision on the counterpart.

Fines

In the case of a proven cartel activity, the undertakings concerned will be individually liable for fines of up to 10% of their turnover generated in Turkey in the financial year preceding the date of the decision to impose a fine (if this is not calculable, the turnover generated in the financial year nearest to the date that the decision to impose a fine is made will be taken into account). In determining the magnitude of the monetary fine, the Competition Law refers to the factors indicated in article 17 of the Law on Minor Offences to be taken into consideration by the Board, such as, the level of responsibility; the amount of possible damage in the relevant market; the market power of the undertakings within the relevant market; the duration and recurrence of the infringement; the co-operation or leading role of the undertakings in the infringement; and, the financial power of the undertakings and compliance with their commitments.

In parallel, the Regulation on Fines determines the basic level, which in the case of cartels is between 2% and 4% of the undertaking's turnover in the financial year preceding the date of the decision to impose a fine (if this is not calculable, the turnover for the financial year nearest to the date of the decision is used). Subsequently, aggravating and mitigating factors are taken into account. The Regulation on Fines also applies to managers or employees who had a determining effect on the violation (such as, participating in cartel meetings and making decisions that would involve the company in cartel activity) and provides for certain reductions in their favour.

Other sanctions

In addition to the monetary sanctions, the Board is authorised to take all necessary measures to terminate the restrictive agreement, remove all *de facto* and legal consequences of every action that has been taken unlawfully, and take all other necessary measures to restore the level of competition and status that existed before the infringement. Furthermore, such a restrictive agreement will be deemed as legally invalid and unenforceable with all its legal consequences. Similarly, in cases where there is a possibility of serious and irreparable damages, the Competition Law authorises the Board to take interim measures until the final resolution on the matter is given.

Criminal sanctions

All the above-mentioned sanctions provided under the Competition Law are administrative in nature. Nevertheless, in some cases the matter has to be referred to a public prosecutor after the competition law investigation is completed. That said, only two forms of cartel activity, namely bid-rigging activity and illegal price manipulation (ie, manipulation through misinformation or other fraudulent means), are criminally prosecutable under sections 235 and 237, respectively, of the Turkish Criminal Code.

Private enforcement

A cartel matter is primarily adjudicated by the Board, nevertheless enforcement can be supplemented by private lawsuits in the form of damages actions. In private lawsuits, cartel cases are adjudicated before courts. Maybe the most distinctive feature of the Turkish competition law regime is the provision of treble damages for lawsuits. In particular, article 57 *et seq* of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees.

Developments in cartel enforcement

The developments in cartel enforcement in Turkey could be demonstrated through an overview of the most notable cartel cases that the Board has examined in recent years. At this point, it is interesting to note that in some of the cases, the Board was reluctant to identify the infringement as a cartel and preferred identifying it as a concerted practice instead. We can only speculate on the reasons for this, however, it could be because of the magnitude of the cases at hand and the risk of having to impose astronomical fines as a result.

(i) *Cases where the board avoided identifying the infringements as a cartel*

In the Hyundai dealers case (December 16 2013, 13-70/952-403), the Board launched an investigation to determine whether 21 Hyundai dealers violated article 4 through an agreement to fix prices and sale conditions of new Hyundai cars. Although one of the investigated dealers submitted a leniency application, the Board did not consider the submission appropriate. The Board viewed it as a mitigating factor under the Regulation on Fines because the conduct in question did not amount to a cartel, which is the only violation for which leniency is available. The Hyundai dealers were subjected to an administrative fine for the violation of article 4 by jointly determining the sale prices of vehicles and accessories, as well as sales conditions. The Board granted a reduction of 25% of the fine imposed on the applicant dealer due to the applicant's active cooperation.

It remains to be seen whether the board will continue applying this approach in the future

The case of 12 Turkish banks (March 8 2013, 13-13/198-100) is the most notable case in the history of the Board. Ultimately, the Board did not identify the case as a cartel, in contrast to its initial considerations. In this decision, it was alleged that 12 banks violated article 4 of the Competition Law by engaging in an agreement and/or a concerted practice in the markets for deposit, credit cards and credit services. The decision described the agreements/concerted practices applicable in credit, deposit and credit card services among all 12 banks as a single collusion between August 21 2007 (the date of the oldest evidence) and September 22 2011 (the date of the most recent evidence). The Board decided to impose a total administrative monetary fine of 1.1 billion Turkish Lira ($422.5 million). The fines imposed separately on each bank ranged from 0.3% to 1.5% of each bank's gross revenue generated in 2011.

The Condor case (October 27 2011, 11-54/1431-507) is another case in which the Board avoided identifying the infringement as a cartel, though it accepted the leniency application filed by one of the alleged infringers. In particular, the Authority launched an investigation against Güneş Express Havacılık (Güneş Express) and Condor Flugdienst (Condor) on the grounds that they restricted competition in relation to flights between Germany and Turkey through various agreements. The Board decided that the two companies restricted competition under article 4 of the Competition Law by price fixing within the scope of the executed distribution agreements. In the end, Güneş Express did not face any fines due to its leniency application filed in 2009. To reiterate, leniency applications are accepted only in cartel-specific cases, and yet the Board accepted the leniency application of Güneş Express without eventually defining the infringement as a cartel.

(ii) *Granting full immunity to leniency applicants*

The case of Yeast Cartel (October 22 2014, 14-42/783-346) culminated in a notable decision as the Board had no precedent of granting full immunity to

the applications made following the initiation of the preliminary investigation and the dawn raids conducted. To elaborate, the Board launched an investigation against four fresh yeast producers to determine whether they had violated article 4 of the Competition Law through colluding to set prices for fresh bread yeast. After the investigation was concluded, the Board imposed a total fine of approximately 14 million Turkish Lira on three undertakings. The fourth undertaking, Mauri Maya, obtained full immunity, though it submitted its application for leniency after the preliminary investigation was initiated and following the dawn raids conducted at the premises of the undertakings. This way, the Board considered the value and sufficient content of Mauri Maya's leniency application.

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

(iii) *High standards for cooperation in the leniency procedure*

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

In the 3M case (September 27 2012, 12-46/1409- 461) it can be said that the Board also sent a negative message to the business community that no benefit comes out of using the leniency program, in contrast to its general practice of encouraging leniency applications. More specifically, the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all the documents that could be discovered during a dawn raid. Unfortunately, the Board's reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. It remains to be seen whether the Board will continue applying this approach in the future or if the above cases were exceptional.

The Sodium Sulfate case (May 16 2012, 2-24/711-199) is also one worth mentioning because the Board imposed fines both on the cartelists and the persons having a determining effect on the violation but, eventually offered reductions on the fines after one cartelist and its general manager filed a leniency application. In its decision, the Board stated that the undertakings, Otuzbir Kimya and Sodaş Sodyum, fixed prices of sodium sulfate and shared customers between 2005 and 2011. Additionally, it stated that Alkim Alkali Kimya, Otuzbir Kimya and Sodaş Sodyum collectively determined prices of raw salt. The Board imposed a fine on Sodaş Sodyum equal to 3% of its annual gross income in the 2011 fiscal year and simultaneously, imposed a fine on Sodaş Sodyum's general manager, who was engaged actively in the infringement, equal to 3% of the administrative fine applied to Sodaş Sodyum. Sodaş Sodyum and its general manager filed applications for leniency and eventually received a reduction of one third and 50%, respectively, of the fines to be imposed.

Gönenç Gürkaynak
Managing partner, ELIG, Attorneys-at-Law

Istanbul, Turkey
T: +90 212 327 1724
F: +90 212 327 1725
E: gonenc.gurkaynak@elig.com
W: www.elig.com

About the author

Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a firm of 55 lawyers based in Istanbul, Turkey. He graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He received his LL.M. degree from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising Solicitor). Before founding ELIG in 2005, Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Gürkaynak heads the competition law and regulatory department of ELIG which currently consists of 26 lawyers. He has unparalleled experience in Turkish competition law counseling issues with over 18 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 100 articles in English and Turkish by various international and local publishers. He also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

Ayşe Güner
Senior associate, ELIG, Attorneys-at-Law

Istanbul, Turkey
T: +90 212 327 1724
F: +90 212 327 1725
E: ayse.guner@elig.com
W: www.elig.com

About the author

Ayşe Güner is a senior associate in the competition and regulatory department of ELIG. She has assisted Gönenç Gürkaynak with numerous complex matters requiring counselling under the Turkish Competition Act and related laws. Güner has also published many articles in collaboration with Gürkaynak, and she is particularly experienced in merger control matters.

She received her Juris Doctorate in 2008 from the Southern Methodist University Dedman School of Law in Dallas, Texas, and her LL.M. degree from Maastricht University, in the Netherlands. She is qualified in California.