# The Cartels and Leniency Review

Third Edition

Editor
Christine A Varney

Law Business Research

# The Cartels and Leniency Review

The Cartels and Leniency Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Cartels and Leniency Review - Edition 3
(published in January 2015 – editor Christine Varney).

For further information please email
Nick.Barette@lbresearch.com

# The Cartels and Leniency Review

Third Edition

Editor
Christine A Varney

Law Business Research Ltd

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITORS
Caroline Rawson and Matthew Hopkins

SUBEDITOR
Charlotte Stretch

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk


ISBN 978-1-909830-35-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

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

A&L GOODBODY

ALLEN & OVERY LLP

ANDERSON MŌRI & TOMOTSUNE

ANTITRUST ADVISORY LLC

BREDIN PRAT

COMPETITION COMMISSION OF MAURITIUS

CORRS CHAMBERS WESTGARTH

CRAVATH, SWAINE & MOORE LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

DAVIES WARD PHILLIPS & VINEBERG LLP

DE BRAUW BLACKSTONE WESTBROEK

ELIG, ATTORNEYS-AT-LAW

FATUR LAW FIRM

G ELIAS & CO

GLEISS LUTZ

J SAGAR ASSOCIATES

KING & WOOD MALLESONS

KINSTELLAR SPARL

KLART SZABÓ LEGAL

KOUTALIDIS LAW FIRM

LEE AND LI, ATTORNEYS-AT-LAW

LINKLATERS LLP

MANNHEIMER SWARTLING

NCTM

NIEDERER KRAFT & FREY LTD

PAPADOPOULOS, LYCOURGOS & CO LLC

PINHEIRO NETO ADVOGADOS

POSAVEC, RAŠICA & LISZT

RÆDER, ATTORNEYS-AT-LAW

SLAUGHTER AND MAY

URÍA MENÉNDEZ

WIESNER & ASOCIADOS ABOGADOS

YULCHON LLC

# CONTENTS

# EDITOR'S PREFACE

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

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

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 34 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

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

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

**Christine A Varney**
Cravath, Swaine & Moore LLP
New York
January 2015

# Chapter 33

# TURKEY

*Gönenç Gürkaynak*[1]

## I ENFORCEMENT POLICIES AND GUIDANCE

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). 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 of the Competition Law 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 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising the broad discretionary power of the Competition Board (the Board).

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

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

*b* share markets or sources of supply;

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

1 Gönenç Gürkaynak is a managing partner at ELIG, Attorneys-at-Law.

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

*e* apart from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and

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

The list is intended to generate further examples of restrictive agreements.

The Competition Law authorises the Board to regulate, through communiqués, certain matters under Competition Law, such as:

*a* Communiqué No. 2010/2 on Oral Hearings Before the Competition Board, which regulates the procedures under which oral hearings are held before the Board; and

*b* Communiqué No. 2012/2 on the Application Procedure for Infringements of Competition, which regulates the procedures and principles related to the applications to the Turkish Competition Authority (TCA) on infringement of Articles 4, 6 or 7 of the Competition Law.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels (the Leniency Regulation), entered into force on 15 February 2009. Moreover, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) was recently enacted by the TCA. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation.

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

The President of the TCA for 2012 also characterised the cartel enforcement regime under Turkish competition law as follows:

> *Obviously, the most important efficiency criterion with the highest priority is to prevent infringements of competition. […] In other words, it is to prevent unjust enrichment, behaviour restricting the customers' freedom of choice, practices hindering the cheaper production and consumption of higher quality goods and services, in short practices which hinder the efficient use of resources. If we can talk about measurable positive developments in relation to reaching those goals, about a discernible or relative competence in that area, we can say that the Competition Board has been efficient.*

## II COOPERATION WITH OTHER JURISDICTIONS

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

There are also a number of bilateral cooperation agreements between the TCA and the competition agencies of other jurisdictions (e.g., Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The TCA also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

The research department of the TCA makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order to assess their results, and submits its recommendations to the Board. A cooperation protocol was signed on 14 October 2009 between the TCA and the Turkish Public Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Nevertheless, the interplay between jurisdictions does not materially affect the handling of the Board in cartel investigations.

There is no regulation under the Competition Law on restricting or supporting international cooperation regarding extradition or extraterritorial discovery. Nevertheless, in the same way as many other competition authorities, the TCA also faces various issues where international cooperation is indeed required. In this respect, there have been various decisions[2] of the TCA in which the TCA has requested cooperation on dawn raids, information exchange, notifications and collection of monetary fines from the competition authorities in other jurisdictions via the Ministry of Foreign affairs and the Ministry of Justice. The TCA has, however, been unsuccessful in these requests.

## III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Turkey is an effects theory jurisdiction where the main concern is whether the cartel activity has produced effects on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Board has refrained from declining jurisdiction over non-Turkish cartels

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

or cartel members in the past, as long as there is an effect on the Turkish markets.[3] It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service). The specific circumstances surrounding indirect sales have not been tried under the Turkish cartel rules. Article 2 of the Competition Law would possibly support an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside Turkey does not in and of itself produce effects in Turkey.

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

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

Unlike the TFEU, the Competition Law does not refer to 'appreciable effect' or 'substantial part of a market', and thereby excludes any *de minimis* exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on *de minimis* defences and exceptions.

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

The applicable block exemption rules are:

*a* Block Exemption Communiqué No. 2002/2 on Vertical Agreements;

*b* Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;

*c* Block Exemption Communiqué No. 2003/2 on Research and Development Agreements;

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

*e* Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; and

*f* Block Exemption Communiqué No. 2013/3 on Specialisation Agreements.

The Board has also published a significant secondary legislation instrument, namely the Guidelines on Horizontal Cooperation, which contains a general analysis of Articles 4

3 See, for example, *Sisecam/Yioula* No. 07-17/155-50 dated 28 February 2007; *Gas Insulated Switchgears* No. 04-43/538-133 dated 24 June 2004; and *Refrigerator Compressors* No. 09-31/668-156 dated 1 July 2009.

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.

The above are all modelled on their respective equivalents in the EU.

Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in Article 4.

A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be illegal *per se*.

The Turkish antitrust regime also condemns concerted practices, and the TCA 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, by which 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. As per Article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff the court, by providing its justifications, may decide to stay the execution of the decision if its execution is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a *prima facie* case).

The judicial review period before the Ankara administrative courts usually takes between 24 and 30 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the High State Court. The appeal period before the High State Court also usually takes the same amount of time.

## IV LENIENCY PROGRAMMES

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

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

Pursuant to Leniency Regulation the following conditions must be met in order for a cartel member to benefit from immunity or fine reduction.

The applicant must submit:

*a* information on the products affected by the cartel;

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

The required information may be submitted verbally. Additionally:
*a* the applicant must avoid concealing or destroying information or documents on the cartel activity;
*b* unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel;
*c* unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served; and
*d* the applicant must continue to actively cooperate with the TCA until the final decision on the case has been rendered.

In any case where an application containing limited information is accepted, further information subsequently needs to be submitted. Although no detailed principles on the marker system are provided under the Leniency Regulation, pursuant to Section 6 of the relevant legislation, a document (showing the date and time of the application and request for time (if such a request is in question) to prepare the requested information and evidence) 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 it is made before the investigation report is officially served and the TCA is not in possession of any evidence implicating a cartel infringement. Employees or managers of the first applicant will also be totally immune; the applicant must, however, not have been the ringleader. If the applicant has forced any other cartel members to participate in the cartel, only a reduction in the fine is available of between 33 and 50 per cent for the firm and between 33 and 100 per cent for the employees or managers.

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

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

Furthermore, the third applicant will receive a 25 to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the TCA will benefit from a reduction of 25 per cent up to 100 per cent.

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

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

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

Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately, and there is no criminal sanction against employees for antitrust infringements in practice.

## V PENALTIES

The sanctions that may be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the Competition Law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under Section 235 et seq. of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a judicial monetary fine under Section 237 of the Turkish Criminal Code.

In cases of proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their turnover generated in Turkey in the financial year prior to the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association 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. Following the recent amendments, the new version of 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 in determining the magnitude of the monetary fine:

*a* the level of fault and amount of possible damage in the relevant market;

*b* the market power of the undertakings within the relevant market;
*c* the duration and recurrence of the infringement;
*d* the cooperation or driving role of the undertakings in the infringement; and
*e* the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity and abuse of dominance, but does not cover illegal concentrations. According to the Regulation on Fines, fines are calculated by first determining the basic level, which, in the case of cartels, is between 2 per cent and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (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 that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

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

Therefore, in brief, the Board is authorised to take all necessary measures to:

*a* terminate the restrictive agreement;
*b* remove all factual and legal consequences of every action that has been taken unlawfully; and
*c* take all other necessary measures to restore the level of competition and status as existed before the infringement.

The Board does not enter into plea-bargaining arrangements, and mutual agreements (which must take the form of an administrative contract) on other liability matters have not been tested in Turkey.

Besides the aforementioned leniency programme, Article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the status quo, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established by a diligent review of the relevant implicated businesses to identify all the problems, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject only to an Article 9 warning, the Board at least found a mitigating factor in the fact that the entity immediately took measures to cease any wrongdoing and to remedy the situation where possible.

Additionally, the participation of an undertaking in cartel activities requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation,

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

## VI 'DAY ONE' RESPONSE

Article 15 of the Competition Law authorises the Board to conduct dawn raids. Accordingly, the Board is entitled to:

*a* examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
*b* request undertakings and trade associations to provide written or verbal explanations on specific topics;
*c* conduct on-site investigations with regard to any asset of an undertaking; and
*d* fully examine computer records, including but not limited to deleted items.

Refusal to grant the staff of the TCA 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 (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 is 15,226 Turkish lira. It 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 (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) for each day of the violation.

The Competition Law therefore provides broad authority to the TCA on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. While the specific wording of the Law allows verbal testimony to be compelled of employees, case handlers do allow delaying of an answer as long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the TCA, including, but not limited to, deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (which is written on the deed of authorisation).

The Board may also request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (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 is 15,226 Turkish lira. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

## VII PRIVATE ENFORCEMENT

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

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq. of the Competition Law entitle 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. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the TCA and then build their own decision on that decision.

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. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

Moreover, as previously mentioned, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara.

## VIII CURRENT DEVELOPMENTS

The three most recent developments regarding Turkish competition law are the Draft Proposal for the Amendment of the Competition Law (Draft Law), the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation) and the publishing of Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices.

The Draft Regulation was brought to public opinion on 17 January 2014. Briefly, the Draft Regulation refers to the new calculation method for administrative monetary fines, which would result in the explicit recognition of the parental liability principle. The upper limit of the administrative monetary fines is 10 per cent of the overall turnover determined by the Board and generated by the undertaking in the financial year preceding the decision. The Draft Regulation also brings new aggravating and mitigating factors. Additionally, the Draft Regulation obliges the Board to reduce the fine when mitigating factors exist. The content of the Draft Regulation seems to be heavily inspired by the European Commission's Guidelines on the method of setting fines imposed under Article 23(2)(a) of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation).

The Draft Law was submitted to the Grand National Assembly of Turkish Republic on 23 January 2014. The Draft Law introduces *de minimis* rule, which enables the Board to ignore certain cases that do not exceed a certain market share and/or turnover threshold, and brings the EU's SIEC (significant impediment of effective competition) test to the Turkish control regime in place of the current dominance test. It also contains settlement provisions for certain cases, which is intended to be used by case handlers allowing them to advise the Board in instances where the parties subject to the investigation did not commit violations. In those cases, the Board can decide to wholly or partially end an investigation.

The TCA published its Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices (the Guidelines) to avoid uncertainties concerning the application of Article 6 of the Competition Law providing that 'any abuse on the part of one or more undertakings, individually or through agreements or joint practices with third parties, of a dominant position in a market for goods or services within the whole or part of the country is unlawful or prohibited.'

The Guidelines provide a general overview on the abuse of dominance by explaining elements such as (1) dominant position, (2) relevant markets, (3) entry barriers, (4) buyer power, (5) abuse of dominance, and (6) reasonable grounds for unequal practices. Similar to the EU Commission's Guidance No. 2009/C 45/02, the Board is limited only to the exclusionary abuses and does not include any further information on exploitative and discriminatory abuses. It deals with discriminatory practices by explaining the most common practices in that category, such as (1) refusal to supply, (2) predatory pricing, (3) price/margin squeeze, (4) exclusivity or single brand agreements, (5) rebate systems, and (6) tying agreements.

Several important developments took place in 2013 with respect to the legislative architecture enforced by the TCA. The TCA published the Leniency Guideline in April 2013, while the Board released the Guideline on Horizontal Cooperation dated 30 April 2013 on the application of Articles 4 and 5 of the Competition Law to horizontal cooperation. The TCA also very recently published Block Exemption Communiqué on Specialisation Agreements No. 2013/3.

2013 also witnessed a very important cartel and leniency case. In its investigation concerning four undertakings operating in the market for fresh yeast,[4] the Board aimed at determining whether Dosu Maya Mayacılık A.Ş. (Dosu Maya), Mauri Maya San. ve Tic. A.Ş. (Mauri Maya), Öz Maya Sanayi A.Ş. (Öz Maya), and Pak Gıda Üretim ve Pazarlama A.Ş. (Pak Maya) violated Article 4 of the Competition Law through colluding to set sale prices fresh bread yeast. Additionally, Mauri Maya San. ve Tic. A.Ş., made a leniency application on 27 May 2013, in order to benefit from the Regulation on Active Cooperation for Detecting Cartels at the investigation phase.

As a result of the discussion by the Board on 21 October 2014, the Board resolved that four undertakings active in fresh yeast market violated Article 4 of the Competition Law through colluding in terms of the sale prices of fresh bread yeast. Therefore, pursuant to Article 16 of the Competition Law and the Regulation on Fines, the Board imposed an administrative monetary fine on Dosu Maya Mayacılık A.Ş., Öz Maya Sanayi A.Ş. and Pak Gıda Üretim ve Pazarlama A.Ş. Considering Mauri Maya's application within the scope of the Leniency Regulation and the quality, effectiveness and timing of its active cooperation, the Board decided not to impose an administrative monetary fine on Mauri Maya pursuant to Section 4/2 of the same Regulation.

In conclusion, the Board held that four undertakings violated Article 4 of the Competition Law through colluding in terms of the sale prices of fresh bread yeast and thus imposed:

*a* an administrative monetary fine equals to 1.8 per cent of Dosu Maya's annual turnover and amounts to 2,663,766.34 Turkish lira;

*b* an administrative monetary fine equals to 2.7 per cent of Öz Maya's annual turnover and amounts to 5,754,137.30 Turkish lira; and

*c* an administrative monetary fine equals to 1.8 per cent of Pak Maya's annual turnover and amounts to 5,631,716.90 Turkish lira.

The decision is subject to judicial review before Ankara Administrative Courts. The reasoned decision has not been published yet.

4 Board decision of 22 October 2014, No. 14-42/738-346.

## Appendix 1

# ABOUT THE AUTHORS

**GÖNENÇ GÜRKAYNAK**

*ELIG, Attorneys-at-Law*

Gönenç Gürkaynak holds an LLM degree from Harvard Law School, and is qualified in Istanbul, New York, and England and Wales (currently a non-practising solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 26 associates. He has unparalleled experience in Turkish competition law counselling issues with over 17 years of competition law experience, starting with the establishment of the Turkish Competition Authority. He files notifications to and obtains clearances from the Competition Authority in more than 45 notifications every year, has led defence teams in several written and oral defences before the Competition Authority, and has represented numerous multinational companies and large Turkish entities before the administrative courts and the High State Court on many appeals in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EU competition law topics. Prior to joining ELIG as a partner more than nine years ago, he worked at the Istanbul, New York and Brussels offices of White & Case LLP for more than eight years.

**ELIG, ATTORNEYS-AT-LAW**
Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
www.elig.com