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The International Comparative Legal Guide to:

Cartels & Leniency 2014

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A practical cross-border insight into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The statutory basis for cartel prohibition is the Law on Protection of Competition no. 4054, dated 13 December 1994 ("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 free market economy. The Turkish cartel regime is "administrative" and "civil" in nature, not criminal. The Competition Law applies to individuals and companies alike, if and to what extent they act as an undertaking within the meaning of the Competition Law. (Please refer to question 1.5 for the definition of "undertaking".)

1.2 What are the specific substantive provisions for the cartel prohibition?

The applicable provision for cartel-specific cases is Article 4 of the Competition Law, which lays down the basic principles of cartel regulation. The provision is akin to and closely modeled to Article 101 (1) of the EC Treaty. It 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 thereof. Similar to Article 101 (1) of the EC Treaty, the provision does not bring a definition of "cartel". It rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity. Unlike the EC Treaty, however, Article 4 does not refer to "appreciable effect" or "substantial part of a market" and thereby excludes any *de minimis* exception as of yet. Therefore, for an infringement to exist, the restrictive effect need not be "appreciable" or "affecting a substantial part of a market". The practice of the Competition Board ("Board") to date has not recognised any *de minimis* exceptions to Article 4 enforcement either, though the enforcement trends and proposed changes to the legislation are increasingly focusing on *de minimis* defences and exceptions.

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

As is the case with Article 101 (1) of the EC Treaty, Article 4 brings a non-exhaustive list of restrictive agreements. It prohibits in particular agreements which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- share markets or sources of supply;
- limit or control production, output or demand in the market;
- place competitors at a competitive disadvantage or involve exclusionary practices such as boycotts;
- aside from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and
- make the conclusion of contracts, in a manner contrary to customary commercial practices, subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list is non-exhaustive and is intended to generate further examples of restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements which benefit from a block exemption and/or an individual exemption issued by the Board. To the extent not covered by the protective cloaks brought by the respective block exemption rules or individual exemptions, vertical agreements are also caught by the prohibition laid down in Article 4.

The block exemption rules currently applicable are: (i) the Block Exemption Communiqué no. 2002/2 on Vertical Agreements; (ii) the Block Exemption Communiqué no. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) the Block Exemption Communiqué no. 2003/2 on R&D Agreements; (iv) the Block Exemption Communiqué no. 2008/3 for the Insurance Sector; and (v) the Block Exemption Communiqué no. 2008/2 on Technology Transfer Agreements, which are all modeled on their respective equivalents in the EC. Restrictive agreements that do not benefit from: (i) the block exemption under the relevant communiqué; or (ii) 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 *per se* illegal.

The Turkish antitrust regime also condemns concerted practices, and the Competition Authority easily shifts the burden of proof in connection with concerted practice allegations, through a mechanism called "the presumption of concerted practice". The definition of concerted practice in Turkey does not fall far from the definition used in the EC law of competition. A concerted practice

is defined as a form of coordination between undertakings which, without having reached the stage where a so-called agreement has been properly concluded, knowingly substitutes practical co-operation between them for the risks of competition. Therefore, this is a form of co-ordination, without a formal "agreement" or "decision", by which two or more companies come to an understanding to avoid competing with each other. The co-ordination need not be in writing. It is sufficient if the parties have expressed their joint intention to behave in a particular way, perhaps in a meeting, via a telephone call or through an exchange of letters. The special challenges posed by the proof standard concerning concerted practices are addressed under question 9.2.

1.3 Who enforces the cartel prohibition?

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy. It consists of the Board, Presidency and Service Departments. Four divisions with sector-specific work distribution handle competition law enforcement work through approximately 120 case handlers. A research department assists the four technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Board is responsible for, *inter alia*, investigating and condemning cartel activity. The Board consists of seven independent members. The Presidency handles the administrative works of the Competition Authority.

A cartel matter is primarily adjudicated by the Board. Administrative enforcement is supplemented with private lawsuits as well. In private suits, cartel members are adjudicated before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority, and build their own decision on that decision (see section 8 below for further background on private suits).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The Turkish cartel regime does not recognise *de minimis* exceptions and there is currently no threshold for opening an investigation into cartel conduct. The Board is entitled to launch an investigation into an alleged cartel activity *ex officio* or in response to a notice or complaint. A notice or complaint may be submitted verbally or through a petition. Recently, the Competition Authority included an online system in which the complaints may be submitted by the online form in the official website of the Competition Authority. In the case of a notice or complaint, the Board rejects the notice or complaint, if it deems it not to be serious. Any notice or complaint is deemed rejected in case the Board remains silent for 60 days. The Board decides to conduct a pre-investigation, if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. At this preliminary stage, unless there is a dawn-raid, the undertakings concerned are not notified that they are under investigation. Dawn-raids (unannounced on-site inspections) (see section 2 below) and other investigatory tools (e.g. formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within ten days whether to launch a formal investigation or not. If the 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 by the Board only once, for an additional period of up to six months.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (first written defence). Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence (additional opinion). The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion is served on the Competition Authority, the investigation process will be completed (i.e. the written phase of investigation involving the claim/defence exchange will close, with the submission of the third written defence). An oral hearing may be held upon request by the parties. The Board may also *ex officio* decide to hold an oral hearing. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué no. 2010/2 on Oral Hearings before the Competition Board. The Board will render its final decision within: (i) 15 calendar days from the hearing, if an oral hearing is held; or (ii) 30 calendar days from the completion of the investigation process, if no oral hearing is held. It usually takes around two to three months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterpart.

1.5 Are there any sector-specific offences or exemptions?

There are no industry-specific offences or defences in the Turkish jurisdiction. The Competition Law applies to all industries, without exception. To the extent they act as an undertaking within the meaning of the Competition Law (i.e. a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services), state-owned entities also fall within the scope of application of Article 4. Due to the "presumption of concerted practice" (further addressed under question 9.2), oligopoly markets for the supply of homogenous products (e.g. cement, bread yeast, etc.) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (over 15 investigations in the cement and ready-mixed concrete markets in ten years of enforcement history) leads to an industry specific offence would be debatable. There are some sector-specific block exemptions (such as the block exemption in the motor vehicle sector and the block exemption regulations in the insurance sector).

1.6 Is cartel conduct outside Turkey covered by the prohibition?

Turkey is one of the "effect theory" jurisdictions where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of: (i) the nationality of the cartel members; (ii) where the cartel activity took place; or (iii) whether the members have a subsidiary in Turkey. The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members (see e.g. Şişecam/Yioula 28 February 2007; 07-17/155-50; Gas Insulated Swithchgear 24 June 2004; 04-43/538-133; Refrigerator Compressor, 1 July 2009; 09-31/668-156) in the past,

so long as there is an effect in the Turkish markets. It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service to foreign entities).

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes	No
Carry out an unannounced search of residential premises	Yes*	No
■ Right to 'image' computer hard drives using forensic IT tools	Yes	No
■ Right to retain original documents	No	No
■ Right to require an explanation of documents or information supplied	Yes	No
■ Right to secure premises overnight (e.g. by seal)	Yes	No

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The Competition Law provides a vast authority to the Competition Authority on dawn-raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn-raid, which would also result in a monetary fine. While the mere wording of the Competition Law allows verbal testimony to be compelled of employees, case handlers do allow delaying an answer so 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 Competition Authority, including but not limited to the deleted items.

Officials conducting an on-site investigation need to 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 which do not fall within the scope of the investigation (i.e. that which is written on the deed of authorisation).

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are not.

2.4 Are there any other significant powers of investigation?

No, there are not.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The sole category of people participating in on-site inspections is the staff of the Competition Authority only. The staff has no duty to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to come but may impose certain conditions (e.g. to seal file cabinets and/or to disrupt e-mail communications).

2.6 Is in-house legal advice protected by the rules of privilege?

After years of not respecting attorney-client privilege, the Board finally seems to be developing a more sensitive and prudent approach to the issue. Before Sanofi Aventis (20 April 2009, 09-16/374-88) and CNR/NTSR (13 October 2009, 09-46/1154-290), legal professional privilege was an extremely under-developed area of Turkish procedural law. The indications in practice suggested that the Board recognised no room for undertakings to even exercise their right not to disclose information covered by any form of legal professional privilege during a dawn-raid or when responding to a formal request for information and therefore, the Board had long denied any privilege doctrine or other forms of protection to the confidentiality of advice given by or correspondences with an outside lawyer, let alone in-house legal advice. However, the Board finally seems to be developing a more sensitive and prudent approach to the issue.

Following the decisions Sanofi Aventis (20 April 2009; 09-16/374-88) and CNR/NTSR (13 October 2009; 09-46/1154-290):

- In Sanofi Aventis, the Board indirectly recognised that the principles adopted by the Court of Justice of European Communities in *AM&S v. Commission* (Case. 155/79 *AM&S Europe v. Commission* [1982] ECR 1575) might apply to attorney-client privileged documents in Turkish enforcement in the future.
- In CNR/NTSR, the Board took even more major steps forward. It elaborated in detail the privilege rules applied in the EC and tacitly concluded that the same rules would apply in the Turkish antitrust enforcement.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

This is not applicable.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Board may 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 14,651 TL (around EUR 5,507 at the time of writing). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, refusing to grant the staff of the Competition Authority access to business premises may lead to the imposition of a daily-based periodic fine 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). The minimum fine to be applied in such case is also 14,651 TL (around EUR 5,507 at the time of writing).

Among all, the year 2011 became the year where the highest monetary fines ever were imposed in the Authority's history. According to the 2011 decision statistics of the Board, a total of 12,327.00 TL (around EUR 4,634.21 at the time of writing) on undertakings that provided incorrect or incomplete information and 859,517.99 TL (around EUR 323,127.06 at the time of writing) imposed on undertakings that obstructed onsite. Nevertheless in 2012, a total of 76,128.71 TL (around EUR 28,619.81 at the time of writing) was imposed as for the undertakings that provided incorrect or incomplete information and there was no fine for the undertakings that obstructed onsite.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In the case of a proven cartel activity, the companies concerned shall be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and/or managers of the undertakings/association of undertakings that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking/association of undertaking. After the recent amendments, the new version of the Competition Law makes reference to Article 17 of the Law on Minor Offenses to require the Board to take into consideration factors such as the level of fault and the amount of possible damage in the relevant market, the market power of the undertaking(s) within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertaking(s) in the infringement, financial power of the undertaking(s), compliance with the commitments, etc., in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) was recently enacted by the Turkish Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines also apply 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.

As for the highest monetary fines imposed by the Board as a result of a cartel investigation, two decisions stand out:

(i) The highest monetary fine imposed by the Board on a single company as a result of a cartel investigation was 213,384,545.76 TL (approx. EUR 80,219,754,045). This monetary fine was imposed by the Board on the economic entity composed of Türkiye Garanti Bankası A.Ş. ve Garanti Ödeme Sistemleri A.Ş. and Garanti Konut Finansmanı Danışmanlık A.Ş. ("Garanti") in its decision dated 8 March 2013 and numbered 13-13/198-100. This amount represented 1.5 per cent of Granati's annual gross revenue for the year 2011.

(ii) The highest monetary fine imposed by the Board for an entire case (i.e. total fine on all companies covered by the cartel conduct) as a result of a cartel investigation was 1,116,957,468.76 TL (approx. EUR 4,199,106,749.36) for the same case (Decision dated 8 March 2013 and numbered 13-13/198-100). The total fine was imposed on 12 undertakings active in banking sector.

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 necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed as 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 for serious and irreparable damages.

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability) but not criminal sanctions. That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation is complete. On that note, bid-rigging activity may be criminally prosecutable under Sections 235 *et seq*. of the Turkish Criminal Code. Illegal price manipulation (i.e. manipulation through disinformation or other fraudulent means) may also be condemned by up to two years imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. (See also section 8 for private suits, which may also become an exposure item against the defendant.)

3.2 What are the sanctions for individuals?

The sanctions specified in question 3.1 may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees and/or board members/executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Other than these, there is no sanction specific to individuals.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

No. Enforcement record indicates that the Board fined entities that had gone bankrupt before the fining decision without a reduction. However, Section 17 of the Law on Minor Offenses provides that

the fining administrative entity (i.e. the Board) may decide to collect the fine in four instalments (instead of one) over a period of one year, on the condition that the first instalment is paid in advance. Also, the Regulation on Fines provides that the Board may reduce the fine by 1/4 to 3/5, if the turnover that is linked to the violation represents a very small portion of the fined undertaking's entire turnover.

3.4 What are the applicable limitation periods?

The Board's right to impose administrative monetary fines terminates upon the lapse of eight years from the date of infringement. In the event of a continuous infringement, the period starts running on the day on which the infringement has ceased or last repeated. Any action taken by the Board to investigate an alleged infringement cuts the five-year limitation period. The applicable periods of limitation in private suits (see section 8) are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of ten years from the event giving rise to the damage of the plaintiff. Prosecution of offences of a criminal nature (such as bid-rigging activity and illegal price manipulation) is subject to the generally applicable criminal statutes of limitation, which would depend on the gravity of the sentence imposable.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. This does not constitute advice on tax deductibility or the accounting/bookkeeping aspects of such payment.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Competition Law does not provide any specific rules regarding the liability of implicated employees for the legal costs and/or financial penalties imposed on the employer. On the other hand, much would depend on the internal contractual relationship between the employer and the implicated employee, as there is no roadblock against the employer claiming compensation from the implicated employee under the general principles of Turkish contracts or labour laws. This does not constitute tax advice.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Competition Law has recently undergone significant amendments, which were enacted in February 2008. The new legislation brings about a stricter and more deterrent fining regime, coupled with a leniency programme for companies.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels ("Regulation on Leniency") was put into force on 15 February 2009.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set. According to the Regulation on Leniency, the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringement. A definition of cartel is also provided in the Regulation on Leniency for this purpose. A cartelist may apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity or reduction includes both the undertakings and its employees/managers, with the exception of the "rig-leader" which can only benefit from a second degree reduction of fine. The conditions for benefiting from the immunity/reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees/managers can apply for leniency.

Additionally, the Authority very recently published the Guidelines on Clarification of Regulation on Leniency on 19 April 2013. The perspective of the Competition Board stands parallel with the perspective of the European Commission since the leniency applications are quite minimal; however, it is not yet possible to say that the Turkish competition law regulation have caught up with EU regulation concerning leniency procedures and review.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Although no detailed principles on the "marker system" are provided under the Regulation on Leniency, pursuant to 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.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

There is no legal obstacle over conducting a leniency application orally. This Regulation on Leniency provides that information required for making a leniency application (information on the products affected by the cartel, information on the duration of the cartel, names of the cartelists, dates, locations, and participants of the cartel meetings, and other information/documents about the cartel activity) might be submitted verbally. However, it should be noted that in such a case, the submitted information should be put into writing by the administrative staff of the Turkish Competition Authority and confirmed by the relevant applicant or its representatives.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or employees/managers of the undertaking) must keep the application confidential until the end of the investigation, unless it is otherwise requested by the assigned unit.

Articles 6 and 9 of the Regulation on Leniency provide that unless stated otherwise by the authorised division, the principle is to keep leniency applications confidential until the service of the investigation report. Nevertheless, to the extent the confidentiality of the investigation will not be harmed, the applicant undertakings could provide information to other competition authorities or institutions, organisations and auditors. Apart from such disclosure, the active cooperation should not be proceeded between the process

of completion of the investigation and the conveyance of the final decision are governed. As per paragraph 44 of the Guideline, if the employees or personnel of the applicant undertaking disclose the leniency application to the other undertakings and breach the confidentiality principle, the Board will evaluate the situation on a case-by-case basis based on the criteria whether the person at issue is a high level manager or the Board was notified promptly after the breach or not.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Pursuant to the principles set forth under Regulation on Leniency, the active (continuous) cooperation shall be maintained until the Board renders its final decision after the investigation is completed.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No principles are set forth with regard to the 'leniency plus' or 'penalty plus' concepts under the applicable legislation.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

A manager/employee of a cartelist may also apply for leniency until the "investigation report" is officially served. Such an application would be independent from – if any – applications by the cartelist itself. Depending on the application order, there may be total immunity from, or reduction of a fine for such manager/employee. The requirements for such individual application are the same as stipulated under question 4.1 above.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Board does not enter into plea bargain arrangements. A mutual agreement (which would have to take the form of an administrative contract) on other liability matters have not been tested in Turkey either.

7 Appeal Process

7.1 What is the appeal process?

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the High State Council by filing an appeal case within 60 days upon receipt by the parties of the justified (reasoned) 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 the stay of the execution if: (i) the execution of the decision is likely to cause serious and irreparable damages; and (ii) the decision is highly likely to be against the law (i.e. showing of a *prima facie* case).

The judicial review period before the High State Council usually takes about 24 to 30 months. If the challenged decision is annulled in full or in part, the High State Council remands it to the Board for review and re-consideration.

Decisions of courts in private suits (see section 8) are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually takes more than 18 months.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No. As stipulated under question 7.1 above, 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 the stay of the execution.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The High State Council does not cross-examine witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Articles 57 *et seq*. of the Competition Law entitles any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

8.2 Do your procedural rules allow for class-action or representative claims?

Turkish procedural law denies any class action or procedure. Class certification requests would not be granted by Turkish courts. While Article 25 of the Law no. 4077 on the Protection of Consumers allows class action by consumer organisations, these actions are limited to the violations of the Law no. 4077 on the Protection of Consumers, and do not extend to cover antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under Articles 57 *et seq*. of the Competition Law.

8.3 What are the applicable limitation periods?

As noted above in question 3.4, the applicable periods of limitation in private suits are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of ten years from the event giving rise to the damage of the plaintiff.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Law no. 4054 and the judicial precedents do not specifically recognise "passing on" defences in civil damages claims. "Passing on" defences are yet to be tested in Turkish enforcement. However, this is still an area of controversy: a part of the doctrine suggests that passing on defences should be allowed, whereas some other scholarly writings defend that they should not be accepted. However, there is no roadblock under the general civil claims rules against a defendant to put forward a "passing on" defence in civil damages claims. Nevertheless, the issue requires a case-by-case analysis, as the admissibility of the defence depends on the position of the claimant and the nature of the claim.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Any person who shall be injured in his business or property by reason of a cartel activity is entitled to sue the violators for three times their damages, plus litigation costs and attorney fees. Other than this, there are no specific cost rules for cartel cases. The general cost rules for civil law claims apply also in cartel cases.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Antitrust-based private lawsuits are rare, but increasing in practice. The majority of the private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations. Civil damage claims have usually been settled among the parties involved, before the court rendering its judgment.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The most recent change with respect to the Turkish cartel regime in 2013 was the publication of secondary legislation; the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels to shed light unto the interpretation of the Leniency Regulation. Even though, the perspective of the Competition Board stands parallel with the perspective of the European Commission since the leniency applications are quite minimal, it is not yet possible to say that the Turkish competition law regulation catch up with EU regulation concerning leniency procedures and review.

Nevertheless, in 2010 secondary legislations on (i) right of access to case files and protection of trade secrets, and (ii) procedures of the oral hearings before the Board. Communiqué no. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets was enacted on 18 April 2010. It regulates the conditions under which investigated undertakings may have access to the investigation case file. It also lays down the principles and conditions of confidentiality with respect to trade secrets. Communiqué no. 2010/2 on Oral Hearings before the Competition Board was enacted on 24 April 2010. It regulates the procedures under which oral hearings are held before the Board.

Furthermore, the Competition Law is still expected to undergo significant modifications. The major proposed changes are:

- to bring the 'appreciable effect' test to an Article 4 enforcement and recognise *de minimis* exceptions and defences;
- to abandon the concept of 'negative clearance'; and
- to revise the applicable time limits for the investigation phase.

9.2 Please mention any other issues of particular interest in Turkey not covered by the above.

The most important material issue specific to Turkey is the very low proof standards adopted by the Board. The participation of an undertaking in cartel activity requires proof: (i) that there was such a cartel activity, or in the case of multilateral discussions or co-operation; and (ii) that the particular undertaking was a participant. With a broadening interpretation of the Competition Law, and especially the "object or effect of which …" the Turkish Competition 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 will readily be inferred and the undertakings concerned will 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 Competition 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 the 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. This is mostly due to the presumption of concerted practice introduced by the Competition Law, which reads as follows:

"*In cases where an agreement cannot be proven to exist, if price changes in the market, supply-demand equilibrium, or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted, such similarity shall constitute a presumption that the relevant enterprises are engaged in concerted practice.*

Any party may absolve itself of responsibility by proving no engagement in concerted practice, provided such proof depends on economic and rational facts."

Therefore, the burden of proof is very easily switched and it becomes incumbent upon the enterprises to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

Unlike the EC, where the undisputed acceptance is that tacit collusion does not constitute a violation of competition, the Competition Law does not give weight to the doctrine known as "conscious parallelism and plus factors". In practice, the Competition Board does not go into the trouble of seeking "plus factors" along with conscious parallelism if naked parallel behaviour is established.

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ELIG aims at providing its clients with high-quality legal service in an efficient and business-minded manner. All members of the **ELIG** team are fluent in English.

ELIG represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. The firm also collaborates with many international law firms on Turkish competition law matters.

In addition to an unparalleled experience in merger control issues, **ELIG** has vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. We have in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. Furthermore, in addition to a significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well equipped to represent clients before the High State Council, both on the merits of a case, and for injunctive relief. **ELIG** also advises clients on a day-to-day basis concerning business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising, and toll manufacturing.

In 2012, **ELIG** was involved in more than 45 clearances of merger notifications, more than 17 defence projects in investigations, and over 8 appeals at the High State Council; together with approximately 37 antitrust education seminars provided to the employees of clients.

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