The European Antitrust Review

2014

Published by Global Competition Review
in association with

Art De Lex Law Firm
Asters
Baker Botts
bpv Braun Partners
bpv Hügel Rechtsanwälte
Bruun & Hjejle
Buntscheck Rechtsanwaltsgesellschaft mbH
Burges Salmon LLP
Čechová & Partners
Distefano Law Office
DLA Piper
DLA Piper Spain
Dryllerakis & Associates
Eisenberger & Herzog
ELIG Attorneys at Law
Epstein, Chomsky, Osnat & Co & Gilat Knoller & Co Law Offices
Gide Loyrette Nouel
Gide Loyrette Nouel AARPI
Herbert Smith Freehills LLP
Homburger
Karanović & Nikolić
Kastell Advokatbyrå AB
Kavčič, Rogl & Bračun
Kirkland & Ellis International LLP
Krogerus Attorneys Ltd
Lademann & Associates GmbH
Latham & Watkins
Law Office Pepeljugoski
Macfarlanes LLP
Magenta
Motieka & Audzevičius
Popovici Nitu & Asociatii
Quinn Emanuel Urquhart & Sullivan LLP
Shearman & Sterling LLP
SJ Berwin
Stibbe
Studio Legale Monaco & Associati
Taylor Wessing
Vasil Kisil & Partners
Vieira de Almeida & Associados
Wikborg Rein

GCR
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

Turkey: Cartels

Gönenç Gürkaynak and Öznur İnanılır
ELIG Attorneys at Law

The statutory basis for cartel prohibition is the Law on Protection of Competition No. 4054, dated 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 to secure free market economy. The Turkish cartel regime by nature applies 'administrative' and 'civil' (not criminal) law. 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.

Substantive provisions for 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 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 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 TFEU, the provision does not give 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 TFEU, 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 agreement that 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 TFEU, article 4 brings a non-exhaustive list 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:

- the Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- the Block Exemption Communiqué No. 2003/2 on R&D Agreements;
- the Block Exemption Communiqué No. 2008/3 for the Insurance Sector; and
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements.

These are all modelled on their respective equivalents in the EU. Restrictive agreements that do not benefit from either the block exemption under the relevant communiqué, or individual exemption issued by the Board, are covered 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. 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 competition law. 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 cooperation between them for the risks of competition. Therefore, this 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 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.

Enforcement

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. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 120 case handlers. The other service units comprises of the department of decisions, economic analyses and research department, information management department, external relations, training and competition advocacy department, strategy development, regulation and budget department and cartel on-the-spot inspections support division. 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.

Proceedings

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 should be the Board remain silent on the matter for 60 days. The Board will decide 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 and other investigatory tools (eg, 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 10 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.

Once the notice has been formally served, the investigated undertakings have 30 days to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once this is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (this is the second written defence). The investigation committee will then have 15 days to prepare an additional opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When this reply is served on the Competition Authority, the investigation process will be completed (ie, 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 between 30 and 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 15 days from the hearing, if an oral hearing is held; otherwise, the decision is rendered 30 days from the completion of the investigation process. 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.

Effect theory

Turkey is one of the 'effect theory' jurisdictions where what matters is the effect a cartel activity has produced 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 refrained from declining jurisdiction over non-Turkish cartels or cartel members (see, eg, *Sisecam/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).

Powers of investigation

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 fine. While the mere wording of the Competition Law provides for employees to be compelled to provide verbal testimony, 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 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 (ie, that which is written on the deed of authorisation).

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).

Sanctions

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. The current minimum fine is 14,651 Turkish lira.

After 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 level of fault and the amount of possible damage in the relevant market; the market power of the undertaking within the relevant market; the duration and recurrence of the infringement; cooperation or driving role of the undertaking in the infringement; financial power of the undertaking; and compliance with the commitments in determining the magnitude of the 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 applies 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 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 no 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 (ie, manipulation through misinformation or other fraudulent means) may also be condemned by up to two years of imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

The above-mentioned sanctions 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.

Leniency programme

The Competition Law has recently undergone significant amendments, 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 (the Regulation on Leniency) was put into force on 15 February 2009. Further, the Guideline on Explanation of the Regulation on Active Cooperation for Discovery of Cartels was published in April 2013.

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.

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 applications by the cartelist itself, if there are any. 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 above.

Appeal process

As per Law no. 6352 which took effect on 5 July 2012, the administrative sanction decisions of the Competition Board can be submitted for judicial review before the administrative courts in Ankara 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 the execution of the decision is likely to cause serious and irreparable damages; and if the decision is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Administrative Court usually takes about 24 to 30 months. If the challenged decision is annulled in full or in part, the Administrative Court remands it to the Board for review and reconsideration.

Decisions of courts in private suits 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.

Damages 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 entitle 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.

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.

Legislative developments

The most recent change with respect to the Turkish cartel regime was the publication of Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels was published in April 2013.

As a key legislative development, the Turkish Competition Board published Communiqué No. 2012/3 on the Amendment of Communique no. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board on 3 January 2013. With its entry into force as of 1 February 2013 it has amended the jurisdictional thresholds. Further to that, the Turkish Competition Authority has recently published the Guideline on the Remedies that would be Permitted by the Turkish Competition Authority in the Mergers and Acquisitions on 16 June 2011, the Leniency Guidelines on 19 April 2013 and the Draft Guidelines on General Conditions of Exemption on 17 May 2013.

In addition to that, the Competition Authority has launched several draft guidelines for public consultation, namely: the Draft Guideline on the Assessment of Horizontal Mergers and Acquisitions and the Draft Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions, the Draft Guidelines on Mergers and Acquisitions Transactions and the Concept of Control, and the Draft Guidelines on General Conditions of Exemption for public consultation.

Recent cases

In the *Condor* decision dated 27 October 2011 and numbered 1431-507, the Competition Board launched an investigation against Güneş Ekspres Havacılık AS and Condor Flugdienst GmbH on the grounds that they restricted competition regarding flights between Germany and Turkey through various agreements. The Competition Board decided that Güneş Ekspres Havacılık AŞ and Condor Flugdienst GmbH restricted competition within the meaning of article 4 of the Competition Law by price fixing within the scope of the executed distribution agreements. However, Güneş Ekspres Havacılık AŞ did not face any fines due to its leniency application, whereas Condor Flugdienst GmbH was imposed a fine of 733,016.80 Turkish lira corresponding to 1.5 per cent of its annual gross revenue generated during the previous year.In light of the *Condor* decision above, in another recent *Condor* decision dated 25 April 2012 and numbered 12-22/578-171, it was claimed that Sunexpress tickets were being sold at cheaper prices on the Condor website and by Condor airways' agencies compared to the Sunexpress online reservation system. Additionally, it was claimed that Sunexpress' anti-competitive actions were ongoing and therefore the leniency application in 2009 misinformed the Board. The Board decided that there was insufficient evidence to decide if the Board was misinformed and if Sunexpress' anti-competitive actions are ongoing.

In the *3M* decision dated 27 September 2012 and numbered 12-46/1409-461, it was alleged that several undertakings existing in the traffic marking materials market have violated article 4 of the Competition Law through collusive behaviour in public procurements. 3M made a leniency application in this case; however, the Board has decided that there is insufficient evidence of the violation of article 4 of the Competition Law.

Another recent case (16 May 2012; 2-24/711-199) is where the Board discussed leniency concerns in the *sodium sulphate* case. It is understood from the short-form decision of the Board concerning the sodium sulphate, crystal sodium sulphate and raw salt market that one of the undertakings which were under investigation, Sodaş Sodyum Sanayi AŞ, made a leniency application and received a reduction of one-third of the fine to be imposed. In addition, the general manager of the same undertaking also applied for leniency and received a reduction of fine in the amount of 50 per cent.In the Competition Board's *Banking Industry* decision dated 8 March 2013 and numbered 13-13/198-100, it was alleged that twelve banks violated article 4 of the Competition Board by engaging in an agreement and/or a concerted practice in the markets for deposit, credit cards and credit services. The Board decided to impose a total administrative monetary fine of 1.12 billion Turkish lira for the undertakings subject to investigation.

Gönenç Gürkaynak
ELIG Attorneys at Law

Gönenç Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York and England & Wales (currently a non-practising Solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 13 associates. He has unparalleled experience in Turkish competition law counseling issues with over 13 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 10 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court, and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics. Prior to joining ELIG as a partner more than eight years ago, he worked at the Istanbul, New York and Brussels offices of White & Case LLP for more than eight years. Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He teaches undergraduate and graduate level courses at three universities, and gives lectures in other universities in Turkey.

Öznur İnanılır
ELIG Attorneys at Law

Öznur Inanılır graduated from Baskent University, Faculty of Law in 2005 and obtained her LLM degree in European Law from London Metropolitan University, UK, in 2008. Being admitted to the Ankara Bar, Öznur İnanılır has been working as an associate at ELİG Attorneys at Law since 2008. She works in the competition law department and is gaining valuable experience over a multitude of areas in the field of competition law, including, and in particular, compliance to competition law rules, mergers and acquisitions and cartel investigations conducted by the Turkish Competition Board. She has represented various multinational and national companies before the Turkish Competition Authority in their mergers and acquisitions filings and cartel investigations concerning various sectors.

Çitlenbik Sokak No. 12
Yıldız Mahallesi
Besiktas
34349 Istanbul
Turkey
Tel: +90 212 327 17 24
Fax: +90 212 327 17 25

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

Öznur İnanılır
oznur.inanilir@elig.com

www.elig.com

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 very 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 a 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 eight appeals at the High State Council; together with approximately 37 antitrust education seminars provided to the employees of clients.


ABA Section of International Law
Your Gateway to International Practice
Strategic research partners of the ABA International section
THE QUEEN'S AWARDS FOR ENTERPRISE: 2012
INTERNATIONAL BAR ASSOCIATION
The Official Research Partner of the International Bar Association
Law
Business
Research