

Competition - Turkey

Competition Authority publishes leniency guidelines

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Introduction

On February 15 2009 the Regulation on Active Cooperation for Discovery of Cartels was published in the *Official Gazette* and entered into force. Following the introduction of the regulation, a set of guidelines has recently been prepared that aims to:

- provide certainty in interpretation;
- reduce uncertainty in practice; and
- provide guidance for undertakings so that applicants can benefit from the leniency programme more efficiently, as a requirement of the transparency principle.

The guidelines were published on April 19 2013 and contain comments and explanations concerning the regulation.

Scope of regulation

As cartels are by their nature secret, compared to other competition law violations, in order to encourage the exposure of cartel activity and to aid in its investigation, it is beneficial for the Competition Authority to be able to grant immunity from fines or a reduction in fines to active cooperators. In this regard, Paragraph 7 of the guidelines indicates that in cases which are not clearly regulated by the regulation (Article 7), or at least which require an interpretation, the authority should generally reach a conclusion that is favourable to those who cooperate.

Furthermore, executives or employees of the applicant undertakings who actively cooperate and disclose the undertaking's violation in order to seek a reduction in fines can also benefit from the exemption or reduction governed by the regulation, even if the application was made by the undertaking. Paragraph 8 of the guidelines provides that former or present executives or employees who may be subject to the fines may choose to apply independently, provided that they can offer sufficient justification for such action (eg, being unable to persuade the undertaking to apply for a leniency application). Paragraph 12 of the guidelines highlights that the regulation has started a three-way race between:

- undertakings;
- their executives and employees; and
- undertakings and their executives and employees acting in concert.

Each is hoping to be the first to apply and to benefit from the regulation.

Waiver or reduction of fines

Regarding immunity from fines, Paragraphs 14 and following of the guidelines indicate that Articles 4 (which relates to immunity from fines granted to undertakings and their executives or employees) and 7 (which relates to an executive or employee's application independent from the undertaking) set forth four alternative conditions for which the existence of one such condition rules out the others.

Paragraphs 20 and following provide that the probability of receiving immunity from

finer is higher for applications made before initiation of the preliminary investigation. Acceptance of an application after initiation of the preliminary investigation will depend on whether the board has evidence indicating that Article 4 of the Law on the Protection of Competition (4054) has been violated. In other words, in contrast to applications made before initiation of the preliminary investigation, the authority has discretion as to whether it will accept applications made at this stage. If the authority already possesses evidence justifying the conclusion that Article 4 of the law has been violated, the application will instead be handled as a request for reduction of the fine.

Paragraph 26 of the guidelines provides that the wording in Articles 6 and 9 of the regulation (ie, "the documents and information containing products affected by the cartel, duration of the cartel, parties to the cartel, dates, locations, attendees of meetings in connection to the cartel") does not imply an obligation to submit evidence that will add significant value to the case when compared to the information which is already known by the authority. Once the conditions of Articles 6 and 9 have been met, a reduction in the fine will be granted automatically.

Conditions

Paragraph 33 of the guidelines stipulates that undertakings cannot benefit from the regulation if they apply collectively. If this were the case, when cartel members realised that the cartel was about to disperse, they could apply to the leniency programme as a group, thereby both receiving the benefit from the cartel behaviour and enjoying immunity from fines (or receiving only low fines). This would risk encouraging cartel activity.

Paragraph 33 of the guidelines provides examples of documents that can be used as evidence. Paragraph 34 provides that the expression 'possessed' also covers newly possessed documents and information required during the investigation. However, no obligation that cannot easily be fulfilled will be imposed on the undertakings.

Paragraph 36 of the guidelines provides that there is an obligation not to keep information and documents confidential and not to destroy such information. Paragraph 39 emphasises that this condition obliges the undertaking to provide to the authority any related documents in its possession and all documents that may be possessed in future; destroying these documents will violate Articles 6 and 9 of the regulation. If such documents are destroyed by employees or executives of the undertaking, the authority will assess whether such behaviour was a one-off occurrence. Whether the respective undertaking informed the authority immediately after it became aware of such behaviour and whether it took necessary precautions in order to prevent such behaviour occurring will be significant in determining whether this behaviour can be attributed to the undertaking.

Under Paragraphs 40 and 41 of the guidelines, on the condition that a leniency applicant ceases to be party to the cartel, the authority may request that it continue to remain in the cartel until onsite inspections have been completed. In this case, the applicant must inform the Cartel and On-Site Inspection Support Unit of all communications with other cartel members.

Articles 6 and 9 of the regulation provide that unless stated otherwise by the authorised division, leniency applications will be kept confidential until the investigation report has been served. The guidelines explain that this is to avoid the possibility of spoliation of evidence through disclosure to cartel members before the investigation has been completed. Additionally, the guidelines provide the option for the undertakings to provide information to other competition authorities or institutions, organisations and auditors, on the condition that the investigation's confidentiality will not be harmed. Paragraph 44 of the guidelines states that if the confidentiality principle is not complied with, the board will evaluate the situation on a case-by-case basis, based on the criteria of whether the person at issue is a high-level manager and whether the board was notified promptly after the breach.

Paragraph 46 of the guidelines governs the obligation under the regulation for undertakings to cooperate with the board between completion of the investigation and issue of the final decision. Under the obligation to cooperate, if an undertaking obtains new information and documents, it must:

- submit such documents to the authority;
- answer requests of the board regarding the explanation of such information or documents; and
- grant the board the opportunity to utilise the testimony of former managers and employees.

Furthermore, if participation in a cartel is initially denied, the undertaking must avoid providing explanations that conflict with the information and documents submitted during the application.

The regulation provides that if the applicant coerced other undertakings that are party to

the cartel to participate in the violation, it cannot benefit from immunity, but may still receive a reduction in fines. Furthermore, Paragraph 48 of the guidelines provides that actions that lead to coercion will count as a violation (eg, physical violence or serious economic pressure, such as a mass boycott, or strong evidence proving such threats). However, according to the guidelines, there is no coercion where an applicant:

- has the largest market share in the market;
- leads the cartel alone or with other companies;
- threatens to enter into a price war if other parties do not participate in the cartel;
- reduces prices in order to minimise profit; or
- punishes undertakings that do not comply with the agreement.

Procedure

The guidelines cover, in parallel with the regulation, the procedural aspects of applying to the Cartel and On-site Investigation Support Unit. They provide information on timelines and details on oral submission, how to find out the result of the application in a short time and the final decision to be given after completion of the investigation. Each issue is dealt with in a sub-section and in-depth guidance is given.

Timeframes

The guidelines detail the time period within which applicants must provide the necessary information and documents as requested under the regulation. Paragraph 57 states that, in principle, every person that requests such time should be granted it; however, if the request is made at a very late stage of the investigation, then it may not be possible to grant the full period. In the subsequent paragraphs, the guidelines set forth that the time given will be evaluated on a case-by-case basis; in any case, the granted time cannot exceed one month. However, if appropriate reasons exist (eg, there are thousands of files to be viewed or too many employees to be interviewed), the anticipated time may be extended in line with requests from the relevant parties.

Oral submission

The guidelines provide that in cases where information regarding a cartel is provided orally, such information must be converted into written format by the authorised persons. Furthermore, on receiving confirmation from the information provider, such information will be recorded electronically. Under Paragraph 66 of the guidelines, after the information that is provided orally has been converted into written format, kept as internal correspondence of the board and accepted as evidence by the authorised persons, the parties subject to an investigation may view such correspondence after service of the investigation report, but cannot make a copy.

Completion of investigation

After completion of the investigation and the defence stages, if the board decides that a cartel exists, the fines that will be implemented under the regulation will be calculated and applied. Under Paragraph 73 of the guidelines, the board may conclude in its final decision (given after completion of the investigation) that the acts that are subject to the investigation do not constitute a cartel. If the board decides that such acts infringe Article 4 of Law 4054, and a fine should therefore be imposed, the fine will be calculated within the scope of Article 16 of the Law on Administrative Monetary Fines.

Additional reduction

Paragraph 81 of the guidelines provides that if an applicant is not eligible for immunity in relation to a given market, but makes the first leniency application in relation to a cartel in a different market, it can receive immunity in relation to the second market and a reduction in fines in relation to the first market.

For further information on this topic please contact [Gonenc Gürkaynak](#) at ELIG by telephone (+90 212 327 17 24), fax (+90 212 327 17 25) or email (gonenc.gurkaynak@elig.com).

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