

Turkey: A New Era in Turkish Antitrust Enforcement: Leniency Program And Regulation On Fine Calculation

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The Turkish Competition Authority Has Enacted the Expected Secondary Statutory Regulations on the Details of the Leniency Program and Monetary Fines

Now that the recently-enacted amendments to Law no. 4054 on the Protection of Competition ("Law No. 4054") have introduced a stricter and more deterrent fining regime, coupled with a leniency and immunity program for companies; the implementation steps for the new revised legislation are now being taken. Hot off the Turkish Official Journal, the regulation on "Active Cooperation for Discovery of Cartels" ("Regulation on Leniency") and the regulation on "Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance" ("Regulation on Fines") will undoubtedly have a booming effect among the competition law circles in Turkey.

What makes these regulations distinctively important is that they bring about important guidelines for companies as to their potential exposure in the case of an antitrust violation. The regulations also carry particular importance for companies that are currently under the threat of receiving monetary fines, since they also apply to all ongoing investigations where the main investigation report is yet to be served on the investigated undertaking(s).

I. The Regulation on Leniency

Until the recently enacted amendment to Article 16 of Law No. 4054, the Turkish competition legislation did not provide for an immunity regime or a leniency program. Although the old version of Article 16 of Law No. 4054 gave effect to the mitigation of fines, total immunity from fines was not possible because the law had set a minimum amount for fines for substantive infringements.

However, as opposed to the previous version of Article 16, sub-paragraphs 6 and 7 of the amended version of the relevant clause had been drawn up in a manner to give the Turkish Competition Board the right to grant total immunity to the undertakings that engaged in active co-operation with the Turkish Competition Board in cartel cases. The new version of the provision reads as follows:

"Taking into account the conduct, efficiency and timing of the cooperation and by providing explicit reasons, the Board may exempt the undertakings or association of undertakings or their managers or employees that actively cooperate with the Competition Authority in discovering an unlawful application from the application of the fines set forth in paragraphs 3 and 4 above or such fines could be mitigated accordingly.

The conditions for determining the amount of administrative monetary fines pursuant to this article, the conditions for immunity or mitigating factors and the rules and procedures for co-operation shall be governed by the regulations which shall be issued by the Competition Board. (Emphasis added)

As underlined, the last sub-paragraph of the amended version of Article 16 required the Competition Board to issue the relevant secondary legislation with a view to set out the main principles of immunity and leniency mechanisms as part of the ongoing trend of enriching the Turkish competition law legislation by issuing secondary legislation concerning various issues of competition law. Now enacted, the Regulation on Leniency serves this purpose.

The basics of the Regulation on Leniency can be summarized as follows:

(i) The leniency program is available for "cartelists". The regulation does not apply to other forms of antitrust infringement. Section 3 of the Regulation on Leniency provides for a definition of cartel, which encompasses price fixing, customer/supplier/market sharing, restricting output or placing quotas, and bid-rigging.

(ii) The Regulation on Leniency empowers the Competition Board to institute and delegate a subdivision in charge for leniency/immunity to deal with leniency applications/affairs ("Leniency Division").

(iii) 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:

- The first incumbent firm to file an appropriately-prepared application for leniency until the "investigation report" is officially served may benefit from total immunity. Employees/managers of the first applicant would also be totally immune. However, for there to be total immunity, the applicant must not be the "rig-leader". If this is the case, i.e. if the applicant has forced the other cartelists to participate in the cartel, there would be a mere reduction of 33-50% for the firm and 33-100% for the employees/managers.
- The second incumbent firm to file an appropriately-prepared application would receive a 33-50% reduction of the fine. Employees/managers of the second applicant that actively cooperate with the Competition Authority would benefit from a reduction of 33-100%.
- The third applicant would receive a 25-33% reduction. Employees/managers of the third applicant that actively cooperate with the Competition Authority would benefit from a reduction of 25% up to 100%.
- Subsequent applicants would receive a 16-25% reduction. Employees/managers of subsequent applicants would benefit from a reduction of 16% up to 100%.

(iv) The conditions for benefiting from the immunity/reduction are as follows:

- The applicant must submit (i) information on the products affected by the cartel, (ii) information on the duration of the cartel, (iii) names of the cartelists, (iv) dates, locations, and participants of the cartel meetings, and (v) other information/documents about the cartel activity. The required information may be submitted verbally.
- The applicant must avoid concealing/destroying the information/documents on the cartel activity.
- Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel.
- Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served.
- The applicant must continue to actively cooperate with the Competition Authority until the final decision on the case has been rendered.

(v) 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 reduction rates and conditions for immunity/reduction are the same as above.

II. The Regulation on Fines

Before this regulation, the Turkish legislation lacked clear sentencing guidelines as to the calculation/sentencing of the applicable monetary fines. The only reference point on this important issue was the new version of the statute, which made reference to Article 17 of the Law on Minor Offenses. This required the Competition Board to take into consideration factors such as the level of fault and 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.

The new Regulation on Fines now makes up what appears to be a "loophole" and provides for detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation.

The basics of the Regulation on Fines can be summarized as follows:

- i. The Regulation on Fines applies to both cartel activity and abuse of dominance. Nevertheless, illegal concentrations (i.e. non-cleared concentration as a result of which a dominant position is created or strengthened) are not covered by the Regulation on Fines.
- ii. Once the Competition Board has established an infringement, the first stage in calculating a fine involves determining the "basic level" which consists of the following rates/factors:
- iii.
 - a. For cartels, 2-4 percent 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).
 - b. For other violations, 3 per thousand – 3 percent 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).
- iv. While calculating the "basic level", the Competition Board will take into account factors such as the market power of the undertaking(s) within the relevant market, amplitude of actual or potential losses that result from the antitrust infringement, etc.
- v. For cases where the duration of the violation is from 1 year up to 5 years, the basic level would be increased by half. The increase would be up to 100% in cases where the violation has lasted for more than 5 years.
- vi. The basic level will be calculated separately for each independent infringement.
- vii. Once the basic level has been determined, the second stage involves increasing/decreasing the basic level by reference to mitigating/aggravating factors.
- viii. The aggravating factors and the corresponding fine increases can be summarized as follows:
- ix.
 - a. Recurrence of the infringement: the basic level would be increased by 50-100% for each recurrence.
 - b. Continuing with the cartel activity after the service of the investigation report: the basic level would be increased by 50-100%.
 - c. Failure to comply with conditions required by commitments given: the basic level would be increased by 50-100%.
 - d. Failure to cooperate in the case of an investigation: the basic level would be increased by up to 50%.
 - e. Forcing other undertakings to take part in the infringement and similar situations: the basic level would be increased by up to 25%.
- x. The mitigating circumstances include cooperation, incentives from/coerce by administrative authorities/rig-leaders, voluntary compensation to aggrieved parties, insignificance of the infringement next to the entire turnover of the incumbent etc. If mitigating circumstances are established by the violator, the fine would be decreased by 25-60%.
- xi. If the incumbent firm cannot benefit from the Regulation on Leniency, yet discloses another cartel to the Competition Authority, the fine would be decreased by 25%. If the violator(s) admits the infringement and actively cooperates with the Competition Authority, the fine would be decreased by 16-25%.
- xii. The Regulation on Fines applies also to the managers/employees that had a determining effect of the violation, and provides for certain reductions in favor of them.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.