

# Cartel Regulation

*Contributing editor*  
A Neil Campbell



2016

GETTING THE  
DEAL THROUGH

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Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015  
No photocopying without a CLA licence.  
First published 2001  
Sixteenth edition  
ISSN 1473-3420

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Editor's Foreword</b>	<b>7</b>	<b>India</b>	<b>103</b>
A Neil Campbell McMillan LLP		Suchitra Chitale C&C Partners (Chitale & Chitale)	
<b>Global Overview</b>	<b>8</b>	<b>Indonesia</b>	<b>108</b>
Peter K Huston, Ken Daly and Lei Li Sidley Austin LLP		HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Anastasia P R Daniyati Assegaf Hamzah & Partners	
<b>Australia</b>	<b>11</b>	<b>Israel</b>	<b>114</b>
Michael Corrigan and Ian Reynolds Clayton Utz		Eytan Epstein, Tamar Dolev-Green and Eti Portook Epstein, Knoller, Chomsky, Osnat, Gilat, Tenenboim & Co Law Offices	
<b>Austria</b>	<b>19</b>	<b>Italy</b>	<b>122</b>
Astrid Ablasser-Neuherber and Florian Neumayr bvp Hügel Rechtsanwälte		Rino Caiazzo and Francesca Costantini Caiazzo Donnini Pappalardo & Associati	
<b>Brazil</b>	<b>25</b>	<b>Japan</b>	<b>130</b>
Mauro Grinberg, Leonor Cordovil and Ricardo Motta Grinberg e Cordovil Advogados		Eriko Watanabe Nagashima Ohno & Tsunematsu	
<b>Canada</b>	<b>31</b>	<b>Korea</b>	<b>136</b>
A Neil Campbell, Casey W Halladay and Guy Pinsonnault McMillan LLP		Hoil Yoon, Sinsung (Sean) Yun and Kenneth T Kim Yoon & Yang LLC	
<b>China</b>	<b>40</b>	<b>Lithuania</b>	<b>144</b>
Susan Ning and Hazel Yin King & Wood Mallesons		Giedrius Kolesnikovas and Michail Parchimovic Motieka & Audzevičius	
<b>Cyprus</b>	<b>48</b>	<b>Macedonia</b>	<b>152</b>
Pantelis Christofides L Papaphilippou & Co LLC Advocates & Legal Consultants		Tatjana Popovski Buloski and Metodija Velkov Polenak Law Firm	
<b>Ecuador</b>	<b>54</b>	<b>Malaysia</b>	<b>159</b>
Daniel Robalino-Orellana, Alberto Brown and José Urizar Ferrere Abogados		Sharon Tan Suyin Zaid Ibrahim & Co	
<b>European Union</b>	<b>59</b>	<b>Malta</b>	<b>166</b>
Anna Lyle-Smythe and Murray Reeve Slaughter and May Hans-Jörg Niemeyer and Hannah Ehlers Hengeler Mueller		Mark Refalo Refalo & Zammit Pace Advocates	
<b>Finland</b>	<b>69</b>	<b>Mexico</b>	<b>171</b>
Mikael Wahlbeck, Antti Järvinen and Katja Jaakkola Hannes Snellman Attorneys Ltd		Rafael Valdés-Abascal and José Ángel Santiago-Ábreo Valdes Abascal Abogados SC	
<b>France</b>	<b>75</b>	<b>Netherlands</b>	<b>177</b>
Pauline de Lanza and Juliette Hochart Latournerie Wolfrom Avocats		Jolling K de Pree and Stefan Molin De Brauw Blackstone Westbroek NV	
<b>Germany</b>	<b>83</b>	<b>Nigeria</b>	<b>185</b>
Thorsten Mäger and Alf-Henrik Bischke Hengeler Mueller		Babatunde Irukera and Ikem Isiekwena SimmonsCooper Partners	
<b>Hong Kong</b>	<b>90</b>	<b>Norway</b>	<b>190</b>
Natalie Yeung Slaughter and May		Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA	
<b>Hungary</b>	<b>95</b>	<b>Portugal</b>	<b>196</b>
Levente Szabó KLART Szabó Legal		Mário Marques Mendes and Alexandra Dias Henriques Gómez-Acebo & Pombo	

<b>Singapore</b>	<b>205</b>	<b>Turkey</b>	<b>240</b>
Lim Chong Kin and Scott Clements Drew & Napier LLC		Gönenç Gürkaynak and K Korhan Yıldırım ELIG, Attorneys-at-Law	
<b>Spain</b>	<b>212</b>	<b>Ukraine</b>	<b>248</b>
Juan Jiménez-Laiglesia, Alfonso Ois, Jorge Masía, Joaquin Hervada and Rafael Maldonado DLA Piper Spain		Timur Bondaryev and Natalia Ivanytska Arzinger	
<b>Sweden</b>	<b>219</b>	<b>United Kingdom</b>	<b>253</b>
Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling		Lisa Wright and Vassilena Karadakova Slaughter and May	
<b>Switzerland</b>	<b>227</b>	<b>United States</b>	<b>265</b>
Marcel Meinhardt, Benoît Merkt and Astrid Waser Lenz & Staehelin		Martin M Toto White & Case LLP	
<b>Taiwan</b>	<b>234</b>	<b>Quick Reference Tables</b>	<b>275</b>
Mark Ohlson, Anthony Lo and Fran Wang Yangming Partners			

# Turkey

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## Legislation and institutions

### 1 Relevant legislation

#### What is the relevant legislation?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

### 2 Relevant institutions

#### Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The national authority for investigating cartel matters in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 145 case handlers. A research department, a leniency unit, a decisions unit, an information-management unit, an external-relations unit and a strategy development unit assist the five 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.

### 3 Changes

#### Have there been any recent changes, or proposals for change, to the regime?

After a long wait on the sidelines, the Prime Ministry finally sent the Draft Law on Protection of Competition to the Presidency of the Turkish Parliament on 23 January 2014. The Draft Law is designed to introduce new concepts to the Turkish competition cartel regime such as the *de minimis* defence and the settlement procedure. Legislative discussions and consultations on the Draft Law are still ongoing at the Law Commission levels.

The Turkish Competition Authority announced for public consultation the Draft Regulation on Administrative Monetary Fines. The Draft Regulation is set to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines). Consultations on the Draft Regulation are still ongoing. The most significant changes the Draft Regulation will bring are as follows:

- the base fine to be determined based on ‘the turnover generated in the relevant market, which is directly or indirectly related to the respective competition law infringement’;
- the impact and the duration of the infringement will also be taken into account in calculating the base fine;

- the Competition Board will take into account factors such as the concerned undertaking’s market power, the infringement’s nature and the actual or potential damages of the infringement, as well as the geographical scope of the violation;
- the three aggravating factors are (i) being the leader or the initiator of the infringement, (ii) coercion, (iii) non-compliance to commitments previously made to the Competition Board and recidivism; which increase the base fine by half or one-fold;
- the Competition Board is obliged to reduce the fine when mitigation factors exist, without any discretion;
- the Competition Board has the discretion to increase the fines in certain cases, with the intent to ensure deterrence; and
- where the administrative fine would compromise the ability of maintaining the respective undertaking’s economic activities, the Board can reduce the fine upon request.

Finally, the following key legislative texts have been announced and enacted between 2013 and 2015:

- Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices, enacted on 7 April 2014;
- Guidelines on Exclusionary Abusive Conducts by Companies in Dominant Positions, enacted on 29 January 2014;
- Block Exemption Communiqué on Specialization Agreements (Communiqué No: 2013/3), entered into force on 26 July 2013;
- Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, enacted on 26 March 2013;
- Guidelines on Active Cooperation for the Exposure of Cartels, enacted on 17 April 2013;
- Guidelines on the Protection of Horizontal Agreements in line with articles 4 and 5 of the Competition Law Act No. 4054, enacted on 30 April 2013;
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on the Assessment of Non-horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on Cases Considered as Merger and Acquisition and Concept of Control, enacted on 16 July 2013; and
- Guidelines on General Principles of Exemption, enacted on 28 November 2013.

### 4 Substantive law

#### What is the substantive law on cartels in the jurisdiction?

Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (ex article 81(1) of the EC Treaty). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not bring a definition of ‘cartel’. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Unlike the TFEU, article 4 does not refer to ‘appreciable effect’ or ‘substantial part of a market’ and thereby excludes any *de minimis* exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on *de minimis* defences and exceptions.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on circumstances. 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 of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU. The list includes examples such as price fixing, market allocation and refusal to deal agreements. 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. Certain other types of competitor agreements such as vertical agreements and purchasing cartels are generally subject to a competitive effects test.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are:

- 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;
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; and
- the Block Exemption Communiqué No. 2013/2 on Specialisation Agreements.

These are all modelled on their respective equivalents in the EU.

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

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 special challenges posed by the proof standard concerning concerted practices are addressed in question 13.

## Application of the law and jurisdictional reach

### 5 Industry-specific provisions

**Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?**

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Due to the 'presumption of concerted practice' (see question 13), oligopoly markets for the supply of homogenous products (eg, cement, bread yeast, ready-mixed concrete) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (over 28 investigations in the cement and ready-mixed concrete markets in 17 years of enforcement history) leads to an industry-specific offence would be debatable.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. The Turkish competition law does not provide any specific exceptions to government-sanctioned activities or regulated conduct. There are, however, examples where the Competition Board took the state action defence into account (see, eg, *Paper Recycling*, 8 July 2013, 13-42/538-238; *Waste Accumulator*, 4 October 2012, 12-48/1415-476; *Pharmaceuticals*,

2 March 2012, 12-09/290-91; *Et-Balık Kurumu*, 16 June 2011, 11-37/785-248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99-12/91-33; *Esgaz*, 9 August 2012, 12-41/1171-384).

### 6 Application of the law

**Does the law apply to individuals or corporations or both?**

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

### 7 Extraterritoriality

**Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?**

Turkey is one of the 'effect theory' jurisdictions where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there has been an effect on the Turkish markets (see, for example, *Sisecam/Yioula*, 28 February 2007; 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004; 04-43/538-133; *Refrigerator Compressor*, 1 July 2009; 09-31/668-156). 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 or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a colourable argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

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

## Investigations

### 8 Steps in an investigation

**What are the typical steps in an investigation?**

The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if 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. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced onsite inspections) (see question 9) 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. 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, once only, for an additional period of up to six months by the Board.

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. 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 are served on the Competition Authority, the investigation process will be completed (the written phase of investigation



involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. 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 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterparty.

## 9 Investigative powers of the authorities

### What investigative powers do the authorities have? Is court approval required to invoke these powers?

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 16,765 Turkish lira. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of the Competition Law also authorises the Board to conduct on-site investigations. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). It may also lead to the imposition of a fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision, for each day of the violation (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 Competition Law provides 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. Other than that, the Competition Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving 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 within a mutually agreed time. Computer records are fully examined by the experts of the Competition Authority, including but not limited to deleted items.

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

## International cooperation

### 10 Inter-agency cooperation

#### Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

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

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

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order to assess their results, and submits its recommendations to the Board. As an example, a cooperation protocol was signed on 14 October 2009 between the Turkish Competition Authority and the Turkish Public Procurement Authority in order to procure a healthy competition environment with regard to public tenders by cooperating and sharing information.

### 11 Interplay between jurisdictions

#### Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in your jurisdiction?

It is fair to say that the interplay between jurisdictions does not in practice materially affect the Board's handling of cartel investigations, including cross-border cases.

## Cartel proceedings

### 12 Adjudication

#### How is a cartel proceeding adjudicated or determined?

The Board can initiate an inspection about an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. Private suits against cartel members are tried 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.

### 13 Burden of proof

#### Which party has the burden of proof? What is the level of proof required?

The most important material issue specific to Turkey is the very low standard of proof adopted by the Board. The participation of an undertaking in a cartel activity requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Competition Law, and especially of the 'object or effect of which...' branch, the Board has established an extremely low standard of proof concerning cartel activity. The standard of proof is even lower as far as concerted practices are concerned; in practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an article 4 enforcement in cases where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in 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 ground to impose fines on the undertakings concerned. Therefore, the burden of proof is very easily switched and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

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 to the trouble of seeking 'plus factors' along with conscious parallelism if naked parallel behaviour is established.

Recent indications in practice also suggest that the Competition Authority officials are increasingly inclined to adopt a broadening interpretation of the definition of 'cartel'.

#### 14 Appeal process

##### What is the appeal process?

As per Law No. 6352, which entered into force as of 5 July 2012, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

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, at the request of the plaintiff the court, by providing its justifications, may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes about 12 to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the High State Court. The appeal period before the High State Court usually takes about 24 to 36 months.

#### Sanctions

##### 15 Criminal sanctions

##### What, if any, criminal sanctions are there for cartel activity?

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. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

##### 16 Civil and administrative sanctions

##### What civil or administrative sanctions are there for cartel activity?

In the case of a proven cartel activity, the undertakings concerned will 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 or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. 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 amount of possible damage in the relevant market, the market power of the undertakings within the relevant market,

the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings or the compliance with their commitments etc, in determining the magnitude of the monetary fine.

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 legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in case there is a possibility of serious and irreparable damages.

2014 and 2015 has witnessed various fining decisions on cartels. The Board imposed administrative monetary fines in no less than 10 cases (Yeast Producers, 30 March 2015, 14-42/738-346; *Kahramanmaraş Driving Schools*, 20 August 2014, 14-29/610-264; *Tokat Kırkkale Private Teaching Institutions*, 11 August 2014, 14-27/556-239; *Aegean Region Driving Schools*, 11 August 2014, 14-27/555-238; *Kırkkale Driving Schools*, 8 May 2014, *Aksaray Bakeries*, 16 April 2014, 14-15/287-120; 14-17/330-142; *Didim Bakeries*, 22 January 2014, 14-04/80-33; *Aksaray Driving Schools*, 12 February 2014, 14-06/127-56; *Hyundai Dealers*, 15 December 2013, 13-70/952-403; *Çorum Construction Inspection Firms*, 2 December 2013, 13-67/929-391; *Erzincan Ready-Mixed Concrete Investigation*, 17 September 2013, 13-54/755-315, and *Cement and Ready-Mixed Concrete*, 17 September 2013, 13-54/756-316). Having said that, a great majority of the investigations into cartel allegations did not result in monetary fines against defendants in 2015.

The highest administrative monetary fine ever imposed by the Board in a cartel case is 213,384,545.76 Turkish lira, which was imposed on the economic entity comprising Türkiye Garanti Bankası AŞ ve Garanti Ödeme Sistemleri AŞ and Garanti Konut Finansmanı Danışmanlık AŞ (*Banking Industry*, 8 March 2013, 13-13/198-100). This amount represented 1.5 per cent of Garanti's annual gross revenue for the year 2011. The case also represents the highest ever combined administrative monetary fine, which amounts to 1,116,957,468.76 Turkish lira.

Civil actions are still rare but increasing in practice.

##### 17 Sentencing guidelines

##### Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

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 amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, compliance with their commitments, etc, in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary 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 applies also to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

The Regulation on Fines is binding on the Competition Authority.



## 18 Debarment

### Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements? If so, what is the usual time period?

Bid riggers in government procurement tenders may face blacklisting (ie, debarment from government tenders) for up to two years under article 58 of the Public Tenders Law No. 4734. The blacklisting is decided by the relevant ministry implementing the tender contract or by the relevant ministry to which the contracting authority is subordinate or associated with. It is even a duty, not an option, for administrative authorities to apply for blacklisting in the case of bid rigging in government tenders.

Blacklisting is only applicable to bid rigging – it is not available in cases of other forms of cartel infringement.

## 19 Parallel proceedings

### Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Yes. The same conduct can trigger administrative or civil sanctions (or criminal sanctions in the case of bid rigging or other criminally prosecutable conduct) at the same time.

## Private rights of action

### 20 Private damage claims

#### Are private damage claims available? What level of damages and cost awards can be recovered?

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish obligation law regulates the joint creditors and prevents the debtor from the double recovery. All the creditors shall pursue a claim against the debtor and in that case, the debtor shall pay on the amount of their shares. However, in the event that the debtor make a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust-based private lawsuits are rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations.

Indirect purchaser claims have not yet been tested before the courts.

### 21 Class actions

#### Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts.

Turkish procedural law allows group actions under article 113 of the Turkish Procedure Law No. 6100. Associations and other legal entities may initiate a group action to 'protect the interest of their members', 'to determine their members' rights', and 'to remove the illegal situation or prevent any future breach'. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The verdict shall encompass all individuals within the group.

## Cooperating parties

### 22 Immunity

#### Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Regulation on Active Cooperation for Discovery of Cartels (Regulation on Leniency) was enacted on 15 February 2009. The Regulation on Leniency sets out the main principles of immunity and leniency mechanisms. In parallel to the Regulation on Leniency, the Board published the Guidelines

on Explanation of the Regulation on Active Cooperation for Discovery of Cartels on April 2013.

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

A cartel member may apply for leniency until the investigation report is officially served on it. Depending on the timing of the application, the applicant may benefit from full immunity or fine reduction.

The first one to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from full immunity. Employees or managers of the first applicant can also benefit from the full immunity granted to the applicant firm. However, there are several conditions an applicant must meet to receive full immunity from all charges. One of them is not to be the coercer of the reported cartel. If this is the case (ie, if the applicant has forced the other cartel members to participate in the cartel), the applicant firm and its employees may only receive a reduction of between 33 and 100 per cent. The other conditions are as follows:

- the applicant shall submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings;
- the applicant shall not conceal or destroy information or evidence related to the alleged cartel;
- the applicant shall end its involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated;
- the applicant shall keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit; and
- the applicant shall maintain active cooperation until the Board takes the final decision after the investigation is completed.

### 23 Subsequent cooperating parties

#### Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Regulation on Leniency provides for the possibility of a reduction of the fine for 'second-in' and subsequent leniency applicants. Also, the Competition Authority may consider the parties' active cooperation after the immunity application as a mitigating factor as per the provisions of Regulation on Fines.

### 24 Going in second

#### What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

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

The third applicant would receive a 25 to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Competition Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

There is no amnesty plus or immunity plus option.

### 25 Approaching the authorities

#### Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As stated in question 22, a cartel member may apply for leniency until the investigation report is officially served. Although the Regulation on

Leniency does not provide detailed principles on the 'marker system', the Competition Authority can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, duration of the cartel and names of the parties. A document (showing the date and time of the application and request for time to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report would not benefit from conditional immunity. Still, such applications may benefit from fine reductions.

## 26 Cooperation

**What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?**

The applicant must submit: 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 or documents about the cartel activity. The required information may be submitted verbally. A marker is also available. Admission of actual price effect is not a required element of leniency application. The applicant must avoid concealing or destroying the information or documents concerning 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. The applicant must also convey any new documents to the Authority as soon as they are discovered; cooperate with the Authority on additional information requests; and avoid statements contradictory to the documents submitted as part of the leniency application.

These ground rules apply to subsequent cooperating parties as well.

Indications in practice show that the Authority was, until recently, inclined to adopt an extremely high standard regarding what constitutes 'necessary documents and information for a successful leniency application' and the 'minimum set of documents that a company is required to submit'. In *3M* (27 September 2012; 12-46/1409-461), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

Recently, however, the Board eased the tensions a little and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the reasoned decision of the fresh yeast producers investigation was released (14-42/738-346). The decision is the first of its kind to be entered by the Board where it granted full immunity, based on Article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was afforded to a submission made after the initiation of the preliminary investigation and dawn raids. It serves as a landmark case as it is the first instance where the Board granted immunity after dawn raids. The Board justified its unprecedented application by claiming that substantive evidence and added value was brought in through the leniency application. The case is therefore expected to result in an increase in number of leniency applications in Turkey in the near future.

## 27 Confidentiality

**What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?**

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or the employees or managers of the

undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is applicable to subsequent cooperating parties as well.

## 28 Settlements

**Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?**

The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. When enacted, the new Draft Law is expected to introduce a form of settlement procedure.

## 29 Corporate defendant and employees

**When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?**

The current employees of a cartel entity also benefit from the same level of leniency or immunity that is granted to the entity. There are no precedents about the status of former employees as yet.

Apart from this, according to the Regulation on Leniency a manager or employee of a cartel entity may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartelists.

## 30 Dealing with the enforcement agency

**What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?**

Since active cooperation is required from all applicant cartel members in order to maintain the leniency or immunity granted by the Board, extra effort should be spent to keep the Board informed to the maximum possible extent regarding the cartel that is subject to investigation.

Furthermore, it is also possible to conduct a leniency application orally. In these circumstances, the 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 cartel members, dates, locations and participants of the cartel meetings and other information or documents about the cartel's activity) may be submitted verbally. However, it should be noted that in such a case the submitted information should be put in writing by the administrative staff of the Turkish Competition Authority and confirmed by the relevant applicant or its representatives.

## 31 Policy assessments and reviews

**Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?**

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews. That said, the Turkish Competition Authority has recently published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels in April 2013.

## Defending a case

### 32 Representing employees

**May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?**

So long as there are no conflicts of interest, Turkish law does not prevent counsel from representing both the investigated corporation and its employees. That said, employees are hardly ever investigated separately,

### Update and trends

The year in review did not witness ground-breaking cartel cases or record fines for cartel activity. In fact, there is an easily detectable decline in the number of cartel cases. The total amount of monetary fines the Board imposed for cartel activity has plummeted (only 14,662,151 Turkish lira as opposed to 1,147,004,914 lira in the year before). Most of the fully fledged investigations did not result in monetary fines against the defendants.

The year was instead marked by the changes in the composition of the Board. Three members of the Board, including the President, completed their term in office in April 2015. The President of the Board Nurettin Kaldırım, Vice President Kenan Türk and member of the Board Murat Çetinkaya's incumbencies were terminated. As of 24 June 2015, Ömer Torlak will be serving as the new President of the Board, while Arslan Narin will be a new Vice President and Kenan Türk will be a new member of the Board.

The Diye Danışmanlık Eğitim ve Medya Hizmetleri decision (12.12.2014, 14-51/900-410) has been a leading development. In the case, the Board ordered the involved parties to cease and desist

observing the infringing activities but spared them from the fine. The Board delivered its opinion pursuant to article 9/3 of Law No. 4054 which is commonly called a 9/3 order. In the decision, references were made to the lack of evidence to show any oral or written agreement or mutual consensus between the buyers, and to the share of advertisers' advertisement expenses in the overall advertisement expenses. The Board's decision weighed whether (i) the cumulative effect that may occur as a result of an increase in the number of undertakings that participate in the system due to the nature of the information obtained by the advertisers within the scope of the service provided through the system under investigation, and (ii) certain competitive concerns could be raised in the relevant market in the medium and long term. As a result, the Board ordered an immediate halt of the activities in question.

As it currently stands, the parties have appealed the decision before the High State Court, which granted an injunction relief against the decision of the Board. The case and its narrative remain open to developments.

and there is no criminal sanction against employees for antitrust infringements in practice.

### 33 Multiple corporate defendants

**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

So long as there are no conflicts of interest, and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Turkey) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

### 34 Payment of penalties and legal costs

**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Yes. It is advisable to seek separate tax or bookkeeping advice before the corporation pays the legal costs or penalties imposed on its employee.

### 35 Taxes

**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Pursuant to article 11 of the Corporate Tax Law No. 5520, any administrative monetary fine is not considered as tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a

case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

There is a reduction mechanism for the administrative monetary fines. The relevant legislation on payment of administrative monetary fines allows the undertakings to discharge from liability by paying 75 per cent of the fine, provided that the payment is made before any appeal. The payment of such amount is without prejudice to a later appeal. The time frame in which to pay the 75 per cent portion terminates on the 30th calendar day from the service of the full reasoned decision.

### 36 International double jeopardy

**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

No. The Turkish Competition Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules (see question 8).

Overlapping liability for damages in other jurisdictions is not taken into account.

### 37 Getting the fine down

**What is the optimal way in which to get the fine down? Does the existence of a compliance programme affect the level of the fine?**

Aside from the newly introduced leniency programme, article 9 of the Competition Law, which generally entitles the Board to order

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

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13-49/711-300; *Industrial Gas*, 13-49/710-297).

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Executive Compensation &  
Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
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Cartel Regulation  
ISSN 1473-3420



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