Volume 3 • Issue 3

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Cover: iStock.com/carterdayne

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910

ISSN: 2056-9025

ABA Section of International Law
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Strategic Research Sponsor of the ABA Section of International Law

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

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

market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the second annual issue focusing on the global cartel markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence.

Getting the Deal Through
London
May 2016

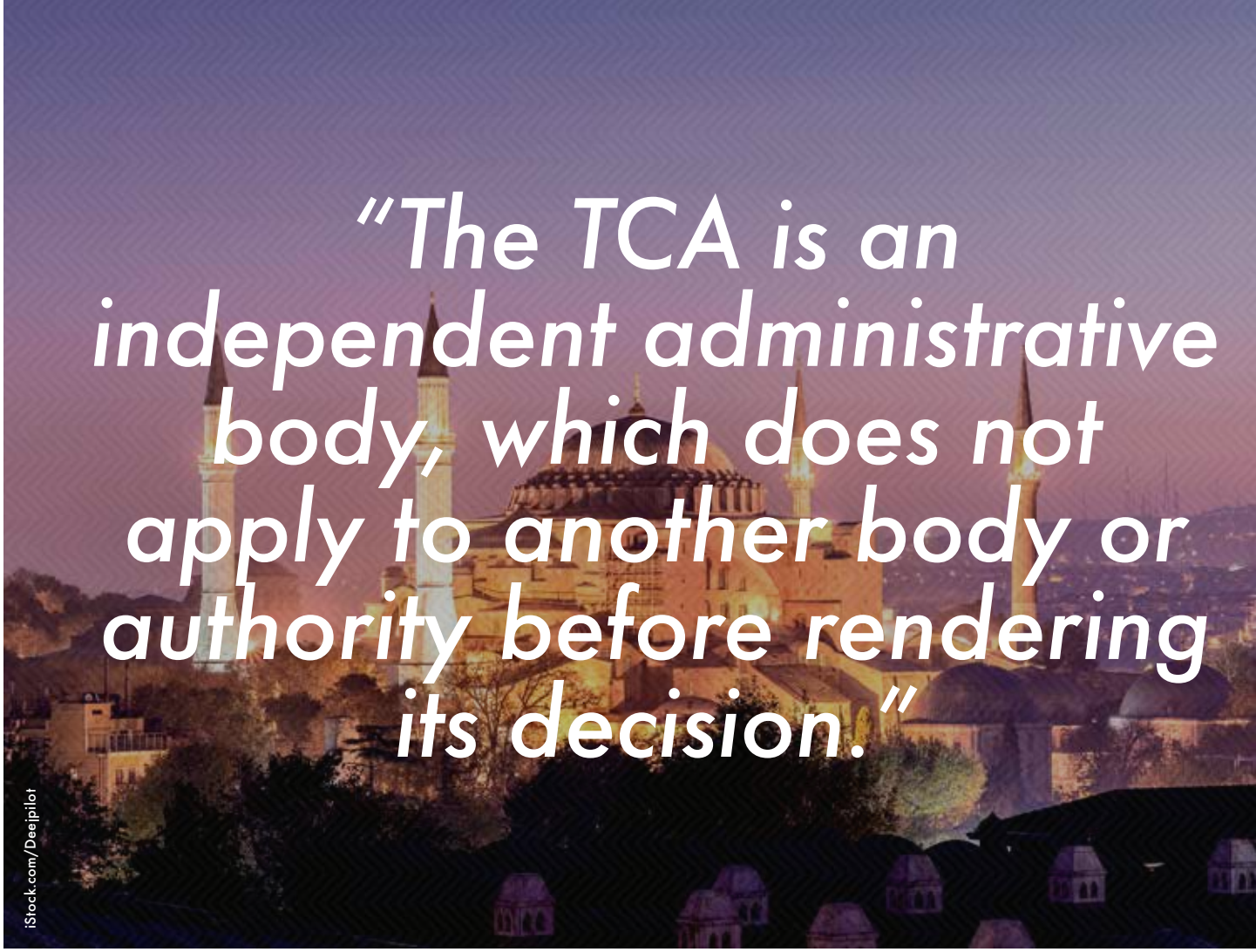
In this issue

Gönenç Gürkaynak

CARTELS IN TURKEY

Gönenç Gürkaynak is the managing partner of ELIG, Attorneys-at-Law. He holds an LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York and England and Wales (he is currently a non-practising solicitor). Gönenç heads the competition and regulatory department of ELIG. He has unparalleled experience in all matters of Turkish Competition Act counselling, with over 18 years' experience dating from the establishment of the Turkish Competition Authority. Before founding ELIG more than 10 years ago, Gönenç worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Gönenç frequently speaks at conferences and symposia on competition law matters. He teaches undergraduate and graduate level courses at two universities, and gives lectures at other universities in Turkey. He has had many international and local articles published in English and in Turkish, and is the author of a book published by the Turkish Competition Authority.

Öznur İnanılır is a partner at the competition and regulatory department of ELIG. She graduated from Başkent University, Faculty of Law in 2005 and obtained her LLM degree in European Law from London Metropolitan University in 2008. She is a member of Istanbul Bar and has extensive experience in all areas of competition law, in particular compliance to competition law rules, cartel agreements, abuse of dominance and merger control. She has represented various multinational and national companies before the Turkish Competition Authority.



GTDT: What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Gönenç Gürkaynak & Öznur İnanılır: The Turkish Competition Authority (TCA) places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under the Law on Protection of Competition No. 4054 of 13 December 1994 (Competition Law) has nonetheless been repeatedly underlined by the president of the TCA.

The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. 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). 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 set out a definition of 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

There are no industry-specific offences or defences that lead to a particular scrutiny. Competition Law applies to all industries, without exception. Cement, ready mix, bread yeast, consumer electronics products including personal computers and game consoles, booking and retail technology superstores, jewellery, aluminium and PVC technologies, driving schools and bakery industries have recently been under investigation for cartel and concerted practice allegations.

GTDT: What do recent investigations in your jurisdiction teach us?

GG & Öİ: The Turkish Competition Board (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) and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the TCA's experts will be submitted to the Board within 30 days after the 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. Dawn raids and other investigatory tools are also resorted to during the investigation process.

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 TCA. 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 to the TCA, 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 days 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 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 must be filed before the Ankara administrative courts 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 counterpart.

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 to be applied in such case is 17,700 Turkish liras for 2016. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, a refusal to grant the staff of the TCA 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).

"Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity."

GTDT: How is the leniency system developing, and which factors should clients consider before applying for leniency?

GG & Öİ: Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the TCA does not possess any evidence implicating a cartel infringement. Employees or managers of the first applicant will also be totally immune; the applicant must, however, not have been the coercer. If the applicant has forced any other cartel members to participate in the cartel, it may only qualify for a reduction in fine of between 33 per cent and 50 per cent for the firm and between 33 per cent and 100 per cent for the employees or managers.

There is a marker system for leniency applications: the TCA can grant a grace period to applicants to submit the necessary information and evidence to complete their applications. There is also no legal obstacle to submitting a leniency application orally. In such a case, the submitted information should be put into writing by the administrative staff of the TCA and confirmed by the relevant applicant or its representatives. Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately. Barring criminally-prosecutable acts such as bid-rigging in public tenders, there is no criminal sanction against employees for antitrust infringements in practice.

The Board may impose a turnover-based monetary 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

Öznur İnanılır

account) on the applicant or applicants in cases where incorrect or misleading information is provided (see above for further information).

Until recently, some TCA case-handlers were inclined to use a stringent test for 'useful contribution' and 'added value' when proposing administrative monetary fines against applicants for allegedly failing to fulfil such requirements. The Board ultimately did not subscribe to this view. For example, in the *3M* decision (12-46/1409-461; 27 September 2012), the case-handlers recommended to the Board that the applicant be stripped off its already-granted leniency status because the applicant was alleged to have not provided all documents that it could have found, as further evidence was discovered during a later on-site inspection. The case did not result in any fines in the end, and did not lead to a precedent where the Board subscribed to the very narrowing approach of the particular set of case-handlers dealing with that case. Recent indications in practice suggest that the Board is now inclined to adopt a welcoming approach towards applicants to encourage further leniency applications.

GTDT: Tell us about the authority's most important decisions over the year. What made them so significant?

GG & Öİ: The year 2015 has witnessed a significant decline in the number of Board decisions related to anticompetitive practices. None of the investigations conducted in 2015 that related to allegations of agreements or concerted practices (article 4 of Law No. 4054) resulted in a monetary fine.

As of early 2016, the Board has interrupted the lack of monetary fine imposition as observed in 2015 and imposed a total fine of approximately 70.9 million liras to six Turkish cement producers (corresponding with 3 per cent to 4.5 per cent of the 2014 annual turnover of each of the participants) for having conducted territorial allocation and price increases (16-02/44-14; 14 January 2016). The cement sector being the traditional sector where infringements of competition laws are frequently observed, the TCA still pursues the sector inquiry that was launched in 2014.

Additionally, in 2015, the Third Administrative Court in Ankara rendered a suspension of execution decision E2015/101 (13 July 2015) regarding the Board's *Diye* decision (14-51/900-410; 12 December 2014). In its *Diye Danışmanlık Eğitim ve Medya Hizmetleri Ticaret AŞ* (*Diye)* decision, the Board analysed the allegations that (i) Diye abused its dominant position in the market for media auditing services by facilitating the establishment of a cartel in the market for television channels' advertisement space; and (ii) the undertakings receiving media auditing services from Diye are engaging in a 'buying cartel' concerning the prices for advertising

spaces. The Board concluded that there was no document proving an anticompetitive agreement among media barometer users; however, the system would still raise competitive concerns. Therefore, the Board did not initiate a fully fledged investigation and found it sufficient to assign the presidency to deliver its opinion pursuant to article 9/3 of Law No. 4054 to Diye and undertakings receiving Media Barometer services, indicating that the relevant undertakings should stop the relevant activities, otherwise further action will be taken pursuant to Law No. 4054.

On the other hand, the suspension of execution decision showed that the media barometer system does not violate article 4 of Law No. 4054; therefore, Diye is in compliance with the law. In light of this recent development, the customers may continue to freely receive the media barometer services so long as a new judicial decision is not rendered or an administrative status is not established. The Third Administrative Court's decision also indicates that the damages incurred by Diye due to ceasing its activities pertaining to the media barometer system have no legal ground.

GTDT: What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

GG & Öİ: The TCA is an independent administrative body, which does not apply to another body or authority before rendering its decision. However, the existence of a leniency application or immunity or reduction from fines would not preclude third parties from suing the violators to seek compensation for their damages. Similar to the US antitrust enforcement, one of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Articles 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. That way, administrative enforcement is supplemented with private lawsuits. 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. Instead, they wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the 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 to stay the execution of the decision if its execution is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, the showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes between 24 and 30 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 also usually takes the same amount of time.

GTDT: How is private cartel enforcement developing in your jurisdiction?

GG & Öİ: There is no private cartel enforcement in the Turkish competition law regime.

The existence of a leniency application or immunity or reduction from fines would not preclude third parties from suing the violators to seek compensation for their damages (see above for further information).

GTDT: What developments do you see in antitrust compliance? What features should a state-of-the-art compliance system have to be most effective?

GG & Öİ: In 2011, the TCA published the Competition Law Compliance Programme (Compliance Programme). The Compliance Programme is a set of rules or an intra-company regulatory mechanism that enables undertakings or associations of undertakings to inspect, control and monitor themselves internally in order to comply with the competition law. In other words, the Competition Law Compliance Programme includes procedures and methods that (i) suggest certain measures in order for undertakings or associations of undertakings to refrain from the actions and decisions violating the competition law; and (ii) indicate how to apply these measures internally.

GTDT: Does an effective compliance programme also need to include monitoring and testing? If so, what form should that take?

GG & Öİ: Competition compliance programmes are designed to reduce the risk of anticompetitive behaviours of companies. The Compliance Programme states that a regular assessment and monitoring mechanism is essential for the success of the compliance programme. Since each company operates in different markets with different market conditions, the TCA does not set forth a specific monitoring mechanism requirement. However, it would be appropriate to briefly test the knowledge of employees about

THE INSIDE TRACK

What do you find most interesting about cartel cases?

Following the parties' leniency application, in early 2014 the Turkish Competition Board initiated an investigation concerning several undertakings – including the Deutsche Bahn group of companies – operating in the market for rail freight forwarder services on allegations of an article 4 violation through customer allocations agreements within the framework of Balkan Train and Soptrain cooperation. At the end of the lengthy in-depth investigation, the Board concluded that the customer protection agreements have not produced effects on the Turkish markets within the meaning of article 2 of Law No. 4054 and therefore, the allegations in question do not fall within the scope of Law No. 4054 on Protection of Competition through its decision of 16 December 2015. The Board's relevant decision is interesting because of the analysis of effects on international agreements in Turkey.

What has been the most notable change to this practice area in recent years? What has triggered this change?

The TCA's welcoming approach to leniency applications has been a notable change in recent years (see above for further information). A recent and significant Competition Board decision where the Board granted full immunity is the Yeast decision (14-42/738-346; 22 November 2014). The Board launched an investigation against four fresh yeast producers to determine whether they had violated article 4 of the Competition Law. The fourth undertaking, Mauri Maya, obtained full immunity. This case is a very good candidate for becoming a benchmark precedent concerning the Board's approach towards to leniency applications. The Board implicitly invited more leniency applications, even for the cases where a pre-investigation was already initiated, and even dawn-raids were conducted in the premises of the undertakings and signaled that so long as the leniency application has sufficient content and added value for the investigation, the timing of the application does not constitute an obstacle to granting full immunity.

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the act, the policy of the undertaking and the procedures related to the compliance programme, and to monitor the activities of the employees on a given date or without notice for controlling actual or potential infringements. In addition, notification of actual or potential infringements to senior management and determining the problem-solving mechanisms require a regular assessment system to be developed. Moreover, the Compliance Programme suggests that if the undertaking's size permits that, and if it has the opportunity, it should have a specific department or a consultant for competition policy. According to the Compliance Programme, the company official or the consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. Therefore an effective compliance programme with all essential monitoring mechanism would minimise the risk of competition infringement.

GTDT: What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

GG & Öİ: The TCA issued the Draft Competition Law (Draft Law) and the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation) in 2013. One of the most interesting things about the Draft Law is the introduction of settlement procedures through its article 10, which enables the Board to settle with the parties subject to investigation that admit their infringements before the investigation report is served to them. However, the Draft Law is now null and void as it was not ratified during the last legislative term of the Turkish parliament. It is yet to be seen whether the new Turkish parliament or the government will renew the Draft Law.

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