The Cartels and Leniency Review

Fifth Edition

Editors
Christine A Varney and John Terzaken

Law Business Research

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EDITORS' PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 30 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the fifth edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

Christine A Varney
Cravath, Swaine & Moore LLP
New York

John Terzaken
Allen & Overy LLP
Washington, DC

January 2017

Chapter 29

TURKEY

Gönenç Gürkaynak[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (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.

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.

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 the broad discretionary power of the Competition Board (the Board).

Article 4 sets out a non-exhaustive list of restrictive agreements that is, to a large extent, the same as Article 101(1) TFEU. In particular, it prohibits agreements that:

a directly or indirectly fix purchase or selling prices or any other trading conditions;
b share markets or sources of supply;
c limit or control production, output or demand in the market;
d place competitors at a competitive disadvantage or involve exclusionary practices such as boycotts;

1 Gönenç Gürkaynak is the managing partner at ELIG, Attorneys-at-Law.

e apart from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and
f conclude contracts in a manner contrary to customary commercial practice, subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

The list is intended to generate further examples of restrictive agreements.

The Competition Law authorises the Board to regulate, through communiqués, certain matters under Competition Law, such as Communiqué No. 2010/2 on Oral Hearings Before the Competition Board, which regulates the procedures under which oral hearings are held before the Board; and Communiqué No. 2012/2 on the Application Procedure for Infringements of Competition, which regulates the procedures and principles related to the applications to the Turkish Competition Authority (TCA) on infringement of Articles 4, 6 or 7 of the Competition Law.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels (the Leniency Regulation), entered into force on 15 February 2009. Moreover, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation.

The Board published the Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels (the Leniency Guideline) on 19 April 2013. The Leniency Guideline was prepared to provide certainty in interpretations, to reduce uncertainty in practice and, as a requirement of the transparency principle, to provide guidance for undertakings to enable them to benefit from the leniency programme more efficiently.

II COOPERATION WITH OTHER JURISDICTIONS

Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the TCA to notify and request the European Commission (Directorate-General for Competition) to apply relevant measures if the Board believes that cartels organised in 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 that the Board apply necessary measures to restore competition in the relevant markets.

There are also a number of bilateral cooperation agreements between the TCA and the competition agencies of other jurisdictions (e.g., Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The TCA also has close ties with the Organisation of Economic Co-operation and Development, the United Nations Conference on Trade and Development, the World Trade Organization, the International Competition Network and the World Bank.

The research department of the TCA 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. A cooperation protocol was signed on 14 October 2009 between the TCA and the Turkish Public

Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority's actions.

Nevertheless, the interplay between jurisdictions does not materially affect the handling of the Board in cartel investigations. The principle of comity is not included as an explicit provision in the Competition Law. Cartel conduct (whether Turkish or non-Turkish) that was investigated elsewhere in the world can be prosecuted in Turkey even if it has had an effect on non-Turkish markets.

There is no regulation under the Competition Law on restricting or supporting international cooperation regarding extradition or extraterritorial discovery. Nevertheless, in the same way as many other competition authorities, the TCA faces various issues where international cooperation is required. In this respect, there have been various decisions[2] of the TCA in which the TCA has requested cooperation on dawn raids, information exchange, notifications and collection of monetary fines from the competition authorities in other jurisdictions via the Ministry of Foreign affairs and the Ministry of Justice. The TCA has, however, been unsuccessful in these requests.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Turkey is an 'effects theory' jurisdiction where the main concern 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, unless there is an effect on Turkish markets.[3] The Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly because of enforcement handicaps (such as difficulties of formal service). The specific circumstances surrounding indirect sales have not been tried under Turkish cartel rules. Article 2 of the Competition Law could potentially support an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside Turkey does not in and of itself produce effects in Turkey.

The underlying basis of the Board's jurisdiction is found in Article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent that they have an effect on a Turkish market, regardless of where the conduct takes place.

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2 The TCA's Elektrik Turbini decision No. 04-43/538-133 dated 24 June 2004; Ithal Komur decision No. 06-55/712-202 dated 25 July 2006; Ithal Komur II decision No. 06-62/848-241 dated 11 September 2006; Cam Ambalaj decision No. 07-17/155-50 dated 28 February 2007; and Condor Flugdienst decision No. 11-54/1431-507 dated 27 October 2011.

3 See, for example, Sisecam/Yioula No. 07-17/155-50 dated 28 February 2007; Gas Insulated Switchgears No. 04-43/538-133 dated 24 June 2004; and Refrigerator Compressors No. 09-31/668-156 dated 1 July 2009.

The Competition Law applies both 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.

Unlike the TFEU, the Competition Law 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.

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 Article 4. Nevertheless, there are sector-specific antitrust exemptions. 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:

a Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
b Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
c Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
d Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
e Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and
f Block Exemption Communiqué No. 2016/5 on Research and Development Agreements.

The Board has also published a significant secondary legislation instrument, namely the Guidelines on Horizontal Cooperation, which contain a general analysis of Articles 4 and 5 of the Competition Law, and general competition law concerns on information exchanges, research and development agreements, joint production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements.

The above 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.

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 illegal *per se*.

The antitrust regime also condemns concerted practices, and the TCA easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called the presumption of concerted practice. A concerted practice is a form of coordination without a formal agreement or decision by which two or more companies come to an understanding to avoid competing with each other. The coordination need not be in writing. It is sufficient that the parties have expressed their joint intention to behave in a particular way, for example in a meeting, a telephone call or an exchange of letters.

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 justified 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, showing of a *prima facie* case).

The judicial review period before the Ankara administrative courts usually takes between 12 and 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the High State Court.

After the recent legislative changes, administrative litigation cases will now be subject to judicial review before the newly established regional courts (appellate courts). The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature, but may be subject to the High State Court's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In this case, the decision of the regional court will not be considered as a final decision. In such a case, the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes into account the High State Court's decision. The appeal period before the High State Court usually takes from 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts from 24 to 30 months.

IV LENIENCY PROGRAMMES

The leniency programme is available for cartel members. The Leniency Regulation does not apply to other forms of antitrust infringement. Section 3 of the Leniency Regulation 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 up to the point that the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine.

Pursuant to the Leniency Regulation, the following conditions must be met in order for a cartel member to benefit from immunity or fine reduction.

The applicant must submit:

- *a* information on the products affected by the cartel;
- *b* information on the duration of the cartel;
- *c* the names of the cartelists;
- *d* the dates, locations and participants of the cartel meetings; and
- *e* other information or documents about the cartel activity.

The required information may be submitted verbally. Additionally:

- *a* the applicant must avoid concealing or destroying information or documents on the cartel activity;
- *b* unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel;

c unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served; and

d the applicant must continue to actively cooperate with the TCA until the final decision on the case has been rendered.

In any case where an application containing limited information is accepted, further information subsequently needs to be submitted. Although no detailed principles on the marker system are provided under the Leniency Regulation, pursuant to Section 6 of the Regulation, a document (showing the date and time of the application and request for time (if such a request is in question) to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

The first firm to file an appropriately prepared application for leniency may benefit from total immunity if it is made before the investigation report is officially served and the TCA is not in possession of 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 ringleader. If the applicant has forced any other cartel members to participate in the cartel, only a reduction in the fine is available of between 33 and 50 per cent for the firm and between 33 and 100 per cent for the employees or managers.

In addition to this, the applicant must:

a end its involvement in the infringement;

b provide the TCA with all relevant information on the infringement (e.g., meeting dates and locations, products affected, companies and individuals implicated);

c not conceal or destroy any information; and

d continue to cooperate with the TCA after applying for leniency and to the extent necessary.

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

Furthermore, the third applicant will receive a 25 to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the TCA will benefit from a 25 to 100 per cent reduction.

Finally, subsequent applicants will receive a 16 to 25 per cent reduction. Employees or managers of subsequent applicants will benefit from a 16 to 100 per cent reduction.

The current employees of a cartel member also benefit from the same level of leniency or immunity that is granted to the entity. There are, as yet, no precedents about the status of former employees. Apart from this, according to the Leniency Regulation, a manager or employee of a cartel member may also apply for leniency until the investigation report is officially served. Such an application would be independent from (if any) applications by the cartel member itself. Depending on the application order, there may be total immunity from, or a 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 cartel members.

In addition, according to the Regulation on Fines, cooperation of a party is one of the mitigating factors that the Board can consider while determining the amount of fine to be imposed. In such a case, if mitigating circumstances are established by the violator, the fine would be decreased by 25 to 60 per cent.

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.

V PENALTIES

The sanctions that may 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 of the individuals implicated. That said, there have been cases where the matter was referred to a public prosecutor before and after the investigation under the Competition Law was complete. On that note, bid-rigging activity may be criminally prosecutable under Section 235 et seq. of the Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a judicial monetary fine under Section 237 of the Criminal Code.

In cases of proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their turnover generated in Turkey in the financial year prior to 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 associations 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. 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 following, in determining the magnitude of the monetary fine:

a the level of fault and amount of possible damage in the relevant market;
b the market power of the undertakings within the relevant market;
c the duration and recurrence of the infringement;
d the cooperation or driving role of the undertakings in the infringement; and
e the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity and abuse of dominance, but does not cover illegal concentrations. 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 to 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.

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 measures necessary to restore the level of competition and status to that existing prior to the infringement. Furthermore, such a restrictive agreement will 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 cases where there is a possibility of serious and irreparable damages.

Therefore, in brief, the Board is authorised to take all necessary measures to terminate the restrictive agreement; remove all factual and legal consequences of every action that has been taken unlawfully; and take all other necessary measures to restore the level of competition and status that existed before the infringement.

The Board does not enter into plea-bargaining arrangements, and mutual agreements (which must take the form of an administrative contract) on other liability matters have not been tested in Turkey.

Besides the above-mentioned leniency programme, Article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the status quo, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established by a 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 only to an Article 9 warning, the Board at least found a mitigating factor in the fact that the entity immediately took measures to cease any wrongdoing and to remedy the situation where possible.

Additionally, the participation of an undertaking in cartel activities 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…' rationale, 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 such parallelism 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, the supply and demand equilibrium or fields of activity of enterprises bear a resemblance to those in markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that conscious parallelism is rebuttable evidence of forbidden behaviour and constitutes sufficient grounds to impose fines on the undertakings concerned. The burden of proof is very easily swapped, 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.

VI 'DAY ONE' RESPONSE

Article 15 of the Competition Law authorises the Board to conduct dawn raids. Accordingly, the Board is entitled to:

a examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;

b request undertakings and trade associations to provide written or verbal explanations on specific topics;

c conduct on-site investigations with regard to any asset of an undertaking; and

d fully examine computer records, including but not limited to deleted items.

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). The minimum fine is 17,700 Turkish lira. It may also lead to the imposition of a periodic daily fine rate of 0.05 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) for each day of the violation.

The Competition Law therefore provides broad authority to the TCA on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. While the specific wording of the Law allows verbal testimony to be compelled of employees, case handlers do allow delaying of an answer as 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 timeline. Computer records are fully examined by the experts of the TCA, 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 (which is written on the deed of authorisation).

The Board may also 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 17,700 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.

VII PRIVATE ENFORCEMENT

A cartel matter is primarily adjudicated by the Board. Enforcement is also supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts.

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. Owing 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 TCA, then build their own decision on that finding.

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

Moreover, as previously mentioned, 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.

VIII CURRENT DEVELOPMENTS

The Prime Ministry sent the Draft Law on Protection of Competition, which is designed to introduce new concepts to the Turkish competition cartel regime such as the *de minimis* defence and the settlement procedure, to the Presidency of the Parliament on 23 January 2014. In 2015, the Draft Law became obsolete again because of the general elections in June and November 2015. It is yet to be seen whether the new Parliament or the government will renew the Draft Law. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the reinitiation of the legislative procedure concerning the Draft Law. The 2015 Annual Report of the Competition Authority notes that the Competition Authority may take steps toward the amendment of certain articles if the Parliament does not pass the Draft Law.

There were no groundbreaking cartel cases or record fines for cartel activity in the past year. In fact, there has been a clear decline in the number of cartel cases. Most of the fully fledged investigations did not result in monetary fines against the defendants.

Recently, the Board concluded that six cement companies operating in the Aegean region of Turkey violated Article 4 of the Competition Law by sharing sales territories and increasing resale prices in collusion in the Aegean region (14 January 2016, 16-02/44-14). The decision is pertinent because the Board classified the case as 'cartel' and defined cartels in a manner that encapsulates both agreements and concerted practices. The Board fined the cement producers a total of approximately 71 million Turkish lira. The fines ranged between 3 per cent and 4.5 per cent of each company's 2014 annual turnover. These fines were relatively high in the Turkish jurisdiction in terms of turnover percentage.

Appendix 1

ABOUT THE AUTHORS

GÖNENÇ GÜRKAYNAK
ELIG, Attorneys-at-Law
Gönenç Gürkaynak is the founder and 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, Brussels, and England and Wales (currently as a non-practising solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of three partners and 36 associates. He has unparalleled experience in Turkish competition law counselling issues with over 19 years of competition law experience, starting with the establishment of the Turkish Competition Authority. He files notifications to and obtains clearances from the Competition Authority in more than 45 notifications every year, has led defence teams in several written and oral defences before the Competition Authority, and has represented numerous multinational companies and large Turkish entities before the administrative courts and the High State Court on many appeals in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EU competition law topics. Before founding ELIG, Attorneys-at-Law in 2005, he worked at the Istanbul, New York and Brussels offices of White & Case LLP for more than eight years.

ELIG, ATTORNEYS-AT-LAW
Citlenbik Sokak No. 12
Yıldız Mahallesi
Besiktas
34349 Istanbul
Turkey
Tel: +90 212 327 17 24
Fax: +90 212 327 17 25
gonenc.gurkaynak@elig.com
www.elig.com