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Cartels

Turkey – Law & Practice

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Law and Practice

Contributed by ELIG, Attorneys-at-Law

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ELIG, Attorneys-at-Law ELIG, Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005. ELIG delivers the top competition law practice in Turkey with 36 competition law specialists. The team has three partners and one counsel and is led by Mr Gönenç Gürkaynak, the firm's managing partner. In addition to our unparalleled experience in merger control issues, ELIG has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before the courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.During the past year, we have been involved in over 50 merger clearances by the Turkish Competition Authority, more than 20 defence project investigations and over ten appeals before the administrative courts. ELIG also provided more than 40 antitrust education seminars to its clients' employees.

Authors

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1. Legislative Framework

1.1 Legal Basis

The relevant legislation on cartel regulation is the Law on Protection of Competition No 4054 of 13 December 1994 ('the Competition Law'). It finds its underlying rationale in Article 167 of the Turkish Constitution of 1982. This Article 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 closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union ('the TFEU'). Within the scope of Article 4, all agreements between undertakings, decisions by associations of undertakings and concerted practices, which 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, are forbidden. Rather than providing a definition of a cartel, Article 4 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. This is a specific feature of the Turkish cartel regulation system, recognising the broad discretionary powers of the Competition Board ('the Board').

The cartel enforcement regime under the Competition Law is underlined by the President of the Turkish Competition Authority ('the TCA') as follows; 'Obviously, the most important efficiency criterion with the highest priority is to prevent infringements of competition. […] In other words, it is to prevent unjust enrichment, behaviour restricting the customers' freedom of choice, and practices hindering the cheaper production and consumption of higher quality goods and services: in short, practices which hinder the efficient use of resources. If we can talk about measurable positive developments in relation to reaching those goals, about a discernible or relative competence in that area, we can say that the Board has been efficient.'

1.2 Cartel Conduct

In contrast to the TFEU, Article 4 of the Competition Law does not refer to 'appreciable effect' or 'substantial part of a market' and therefore does not provide a place for de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

Article 4 of the Competition Law prohibits the agreements which restrict competition by object or effect. The assessment as to whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the surrounding economic and legal context. The finding of liability is irrespective of the parties' intentions, which may be considered as an aggravating or mitigating factor, depending on the circumstances. Article 4 of the Competition Law also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. According to the Guideline on Horizontal Co-operation 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.

In parallel to Article 101(1) of the TFEU, Article 4 includes price-fixing, market allocation, and refusals to deal agreements as examples of restrictive agreements which have consistently been deemed to be per se illegal. Certain other types of competitor agreements, such as vertical agreements and purchasing cartels, are generally dependent on a competitive effects test.

The prohibition on restrictive agreements and practices is not applicable for agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are parallel to regulations in the European Union. These rules are as follows:

- 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

Restrictive agreements that do not fall within the scope of block exemption under the relevant communiqué or an individual exemption decision issued by the Board are covered by the prohibition in Article 4.

1.3 Limitation Periods

The Board is entitled to impose administrative monetary fines within eight years from the date of infringement. In the case where infringement is continuous, the eight-year period is counted from the day on which the infringement has ceased or repeated. The eight-year limitation period is to be suspended when the Board takes any action to investigate a claimed infringement. In private suits, the general provisions of the Turkish Code of Obligations are to be applicable for the periods of limitation. The general provisions are to be applied in accordance with which the right to sue violators on the basis of an antitrust- driven injury claim will terminate after ten years have elapsed since the event which gave rise to the damage to the plaintiff. Prosecution of offences of a criminal nature (such as bid-rigging activity and illegal price manipulation) is subject to the criminal statutes of limitation, which are generally applicable, depending on the severity of the sentence that may be imposed.

1.4 Exemptions

There are antitrust exemptions that are sector-specific. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. Specific exceptions to government-sanctioned activities are not regulated in Turkish competition law. There are, however, examples where the Board took the state action defence into account (see eg Opet/ Türkiye Petrol Rafinerileri, 17.01.2014, 14-03/60-24; Paper Recycling, 8 July 2013, 13-42/538-238; Waste Accumulator, 4 October 2012, 12-48/1415-476; Esgaz, 9 August 2012, 12-41/1171-384; Pharmaceuticals, 2 March 2012, 12-09/290-91).

1.5 Geographic Reach

In Turkish competition law, effects theory is to be considered for determining the geographic reach of the public enforcement actions. Article 2 of the Competition Law focuses mainly on whether the cartel activity has produced effects on Turkish markets. The nationality of the cartel members,

where the cartel activity took place or whether the members have a subsidiary in Turkey will not to be taken into account whilst identifying the effects on Turkish markets produced by the cartel activity.

The Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there is an effect on the Turkish markets (see eg Block Train, 16 December 2015, 15-44/740-267; Imported Coal, 2 November 2010, 10-57/1141-430; Refrigerator Compressor, 1 July 2009; 09-31/668-156; Sisecam/Yioula, 28 February 2007; 07-17/155-50).

It should be noted, however, that the Board has yet to enforce monetary or other sanctions against firms which are located outside Turkey and which do not have a presence in Turkey, mostly due to enforcement handicaps (such as the difficulties of formal service).

The underlying basis of the Board's jurisdiction is 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.

1.6 The Principle of Comity

The interplay between jurisdictions does not materially affect the Board's handling of cartel investigations, including cross-border cases. In Turkish competition law, there is no explicit provision for principles of comity. A cartel conduct that was investigated elsewhere in the world can be prosecuted in Turkey to the extent that it has produced effects on Turkish markets.

2. Collecting evidence

2.1 Standard of proof

'Presumption of concerted practice' is adopted in the Competition Law regarding standard of proof in cartel cases. On the basis of presumption of concerted practice, the Board is able to enforce Article 4 of the Competition Law in cases where price changes in the market, supply/demand equilibrium or fields of activity of enterprises is parallel to those in the markets where competition is restrained, disrupted or restricted. Turkish antitrust precedents recognise that 'conscious parallelism' is rebuttable evidence of prohibited behaviour and constitutes sufficient grounds to impose fines on the undertakings concerned.

2.2 Surprise Visits

It is possible for the TCA to conduct unannounced on-site inspections (surprise visits) at the companies' premises, pursuant to Article 15 of the Competition Law.

2.3 The Seizure of Evidence

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

i. examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of them;

ii. request that undertakings and trade associations provide written or verbal explanations on specific topics;

iii. conduct on-site inspections with regard to any asset of an undertaking; and examine fully computer records, including but not limited to the deleted items.

Refusal to grant the handlers access to business premises may lead to the imposition of an administrative fine. The fine is fixed at 0.5% of the turnover generated in the financial year preceding the date of the decision to impose the fine. If this is not calculable, the turnover generated in the financial year nearest to the date of the decision to impose the fine will be taken into account. The minimum fine is determined for 2016 as being TRY17,700 (approximately USD6,507 and EUR5,860) within the scope of Article 16 of the Competition Law [whereas the minimum fine for 2017 is determined as being TRY18,377 (approximately USD4,996 and EUR4,689)]. In addition, it may result in the imposition of a fine of 0.05% of the turnover generated in the financial year preceding the date of the fining decision, for each day of the violation.

The Competition Law therefore provides strong authority to the TCA on dawn raids. A judicial authorisation is obtained by the Board only if the undertaking in question refuses to allow the dawn raid. Other than for this purpose, the TCA does not need to obtain a judicial authorisation to use its authority.

2.4 Legal Privilege

The Board has now developed a sensitive and prudent approach to the issue of legal privilege after years of not respecting the attorney-client privilege. In its Sanofi Aventis decision (20 April 2009; 09-16/374-88), the Board indirectly recognised that the principles adopted by the Court of Justice of European Communities in AM&S v Commission (Case 155/79 AM&S Europe v Commission [1982] ECR 1575) might apply to attorney-client privileged documents in Turkish enforcement in the future. In its CNR/NTSR decision (20 August 2014, 14-29/496-262), the Board took more major steps forward. It elaborated in detail the privilege rules applied in the EC and tacitly concluded that the same rules would apply in Turkish antitrust enforcement. More recently, the Board discussed the basic principles of the legal professional privilege, considering its definition, scope,

enforcement and boundaries in Dow decision (02 December 2015, 15-42/690-259).

2.5 Interviews with Company Employees

The TCA is entitled to request that undertakings and trade associations provide written or verbal explanations on specific topics whilst conducting on-site inspections within the scope of Article 15 of the Competition Law. Although the specific wording of the Article allows employees to be compelled to give verbal testimony, case handlers do allow the 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 of which they are uncertain, provided that a written response is submitted within a mutually agreed length of time.

2.6 Privilege Against Self-Incrimination

Given that the ambit of the Board's power to request information is not determined under the Competition Law or secondary legislation, the exercise of this authority raises objections on the basis of the privilege against self-incrimination. As Article 38 of Turkish Constitution provides that 'no one shall be compelled to make a statement that would incriminate themselves or their legal next of kin, or to present such incriminating evidence', the constitutionality of the Board's authority under Article 14 of the Competition Law was brought into question in the past. That said, such objections have been rejected by the appeal court. Notwithstanding, the Board could be deemed to recognise the privilege against self-incrimination to some extent. Accordingly, it is accepted that the Board has to respect privilege against self-incrimination whilst exercising its power.

2.7 Companies Located Outside the Jurisdiction

As indicated in **2.5 Interviews with Company Employees**, Turkey is one of the 'effect theory' jurisdictions. Consequently, the duty to reply to these requests is to be fulfilled by undertakings located outside Turkey, even if this cannot be implemented against firms which are located outside Turkey and have no presence in Turkey, mostly due to the enforcement difficulties.

2.8 Additional Elements of Proof

The framework of the investigative powers of the TCA is set under Articles 14 and 15 of the Competition Law. Thus, there are no other elements of proof that the agency can use to discharge its burden of proof. However, if the conduct is prosecuted in a separate criminal investigation, the Board can and will use the evidence obtained by the public prosecutor as part of the criminal investigation (ie a telephone conversation tape, see the Medical Devices, 1 September 2015, 15-34/514-162).

3. Evidence collected through the leniency program

3.1 Eligibility

After the Leniency Regulation came into force and introduced the leniency regime, the Guideline Regarding the Regulation on Active Co-operation for the Purpose of Discovery of Cartels ('Leniency Guideline') was enacted, in order to provide consistency in comments and practice, to reduce uncertainty in practice and as a requirement of the principle of transparency, and to provide guidance for the undertakings in order that they benefit from the leniency programme more efficiently, on 19 April, 2013. These two statutory regulations provide sufficient clarity about the benefits and risks of disclosure or non-disclosure to government authorities when they are advising clients.

3.2 First-in-the-door (whistleblower)

Pursuant to the Leniency Regulation and the Leniency Guideline, full immunity may be granted to the first applicant who files an appropriately prepared application for leniency before the investigation report is officially served. Employees or managers of the first applicant can also benefit from full immunity.

However, there are several conditions which an applicant must meet in order to receive full immunity from all charges. One condition is that they must not 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 receive a reduction of only between 33% and 100%.

The other conditions are as follows:

a) the applicant is to submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings that are party to the cartel, and specific dates, locations and participants of cartel meetings;

b) the applicant is not to conceal or destroy information or evidence related to the alleged cartel;

c) the applicant is to end their involvement in the alleged cartel except when advised by the assigned unit on the ground that to do so would complicate the detection of the cartel;

d) the applicant is to keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and

e) the applicant is to maintain active co-operation until the Board takes the final decision after the investigation has been completed.

Leniency is also available for markers. As stated above, a cartel member may apply for leniency until the investigation report is officially served. Although the Leniency Regulation does not provide detailed principles on the 'marker system', the TCA can grant a comity period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a preparatory period, it must provide the minimum information concerning the affected products, the duration of the cartel and the names of the parties. A document (showing the date and time of the application and requesting time to prepare the required information and evidence) will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report will not benefit from conditional immunity. However, such applications may benefit from reductions of fines.

3.3 Second-in-the-door company and late comers

Companies will be eligible for a reduction of the fine on the condition that they fulfil the requirements sought by the Leniency Regulation. The second firm to file an appropriately prepared application would receive a fine reduction of between 33% and 50%. Employees or managers of the second applicant who actively co-operate with the TCA would benefit from a reduction of between 33% and 100%.

The third applicant would receive a 25% to 33% reduction. Employees or managers of the third applicant who actively co-operate with the TCA would benefit from a reduction of 25% up to 100%.

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

In terms of its recent enforcement activity, the Board's most important decision in the field of cartels is the Fresh Yeast decision (22 October 2014, 14-42/738-346) which concerned four undertakings operating in the market for fresh yeast. The Board launched an investigation against four fresh yeast producers to determine whether they had violated Article 4 of the Competition Law through colluding to set prices of fresh bread yeast. Mauri Maya, made a leniency application on 27 May 2013, following the pre-investigation and the dawn raids, in order to benefit from Article 4 of the Regulation on Leniency. The Board resolved that the investigated companies violated Article 4 and imposed an administrative monetary fine on three of them, whilst it granted full immunity to Mauri Maya by virtue of the added value and sufficient content of its leniency application. Through this decision, the Board implicitly invited more leniency applications, even for the cases where a pre-investigation has already been initiated and dawn raids have been conducted. It serves as a landmark case as it is the first instance where the Board granted immunity after dawn raids.

Amnesty Plus is regulated under Article 7 of the Regulation on Fines. According to Article 7 of the Regulation on Fines, the fines imposed on an undertaking which cannot benefit from immunity provided by the Regulation on Leniency will be decreased by one fourth if it provides the information and documents specified in Article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel. Partial immunity is only available for the first, second, third and subsequent applicant companies.

3.4 Corporate Oral Statements

Pursuant to Article 6 of the Leniency Regulation, information required for making a leniency application (information on the products affected by the cartel, information on the duration of the cartel, the names of the participants in the cartel, dates, locations, and participants in the cartel meetings, and other information or documents about the cartel activity) may be submitted verbally. However, it should be noted that, if this is the case, the information submitted should be recorded in writing by the administrative staff of the TCA and confirmed by the relevant applicant or their representatives. This confirmation is conducted through the execution of the affidavit that has been prepared by the administrative staff or the electronic record of their verbal confirmation on their acceptance of the affidavit. Furthermore, after the information that is provided orally is converted into written form and kept as internal correspondence between the members of the Board, and is accepted as evidence by authorised persons, the parties subject to investigation may view such correspondence within the Board after the notification of the investigation report but may not receive a copy of it.

3.5 Leniency

As per Articles 6 and 9 of the Leniency Regulation, unless stated otherwise by the authorised division, the principle is to maintain the confidentiality of the leniency application until the notification of the investigation report. Nevertheless, if the confidentiality of the investigation will not be at risk, the applicants can provide information to other competition authorities or institutions, organisations and auditors. Apart from such disclosure, the applicant is to maintain active co-operation until the Board takes the final decision after the investigation is completed. Under paragraph 44 of the Leniency Guideline, if the employees or officers of the applicant disclose the leniency application to the other undertakings and breach the principle of confidentiality, the Board will evaluate the situation on a case-by-case basis,

based on the criterion of whether the person in question is a high-level manager, or whether or not the Board was notified promptly after the breach.

Alternatively, the TCA may keep the identity of the leniency applicant confidential until the service of the investigation report.

4. Disclosure of evidence in private damage actions

4.1 Investigative Powers

Any information or document collected through the use of investigative powers is discoverable in court. Email messages, telephone calls and an exchange of letters are all included. Legal privilege (confidentiality between the associates and the clients) constitutes an exception for discoverability in court. In any event, civil courts are not authorised to collect evidence independently in antitrust damage actions. The parties must bring all evidence to the attention of the court.

4.2 Leniency Program

The evidence that can be collected through the leniency regime is regulated under Article 6 of the Leniency Regulation. Pursuant to Article 6, any document or information related to cartels is to be collected, including email messages, telephone calls and exchange of letters etc. Nevertheless, pursuant to the last paragraph of Article 6, information or documents provided by the parties and collected by violating the other terms of Article 6 by the undertakings themselves are still to be used as evidence before the Court. Furthermore, according to Communiqué No 2010/3 on the Right to Access the Case File and the Protection of Commercial Secrets, no one other than the undertakings under investigation is to access the information and documents submitted within the scope of a leniency application. In addition, those undertakings being investigated may refer to such information and documents only for their defence in relation to the case file and for their applications before the administrative courts.

5. International cooperation between enforcement agencies in multi-jurisdictional cases

5.1 Extent of Cooperation

Within the scope of Article 43 of Decision No 1/95 of the EC–Turkey Association Council (Decision No 1/95), the TCA is authorised to apply relevant measures in cases where the Board believes that cartels organised in the European Union affect competition in Turkey in a harmful way. 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 appropriate measures to restore competition in relevant markets.

In relation to matters of cartel enforcement, Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia, Mongolia, Austria, the Turkish Republic of Northern Cyprus, Egypt, Kazakhstan, Ukraine and Kyrgyzstan are all countries with bilateral co-operation agreements between the TCA and the competition agencies in other jurisdictions. The TCA also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

Periodic consultations and recommendations made by the research department of the TCA, concerning relevant domestic and foreign institutions and organisations, about the protection of competition in order to assess their results, are to be submitted to the Board. For instance, the TCA and the Turkish Public Procurement Authority signed a co-operation protocol on 14 October 2009 in order to promote a healthy competition environment for public tenders by co-operating and sharing information.

5.2 Impact of Cooperation

The Board's handling of cartel investigations is not to be affected by the interactive relation between jurisdictions, including cross-border cases.

6. Decision Making

6.1 Settlement/plea bargaining

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. However, the proposed changes in the legislation are intended to introduce the settlement procedure into Turkish cartel enforcement.

6.2 Sanctions

It is possible for the Board to impose sanctions itself without bringing suit against the companies and/or undertakings in a court. Administrative fines are regulated in the Competition Law, along with civil liability. Criminal sanctions are not included in the Competition Law, excluding prosecutions on conducts such as bid-rigging in public tenders. Cartel conduct is not to be concluded with the imprisonment of individuals implicated in cartel activity.

6.3 Fines

In the case of a proven cartel activity, the undertakings concerned will be individually liable for fines of up to 10% of their turnover generated in Turkey in the financial year preceding the date of the decision to impose a fine (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).

6.4 Criteria

The factors indicated in Article 17 of the Law on Minor Offences to be taken into consideration by the Board when determining the significance of the monetary fine are as follows:

- the level of fault;
- the 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 co-operation or leading role of the undertakings in the infringement; and
- the financial power of the undertakings and compliance with their commitments.

The Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ('the Regulation on Fines') is applicable for calculation of monetary fines in the case of an antitrust violation. The Regulation on Fines is to be applicable to cartel activity and abuse of dominance, excluding 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% of the company's turnover in the financial year preceding the date of the decision to impose a fine. If this is not calculable, the turnover for the financial year nearest to the date of the decision is to be considered in calculation. Aggravating and mitigating factors are then factored into the calculation of monetary fines within the scope of the Regulation on Fines. It is also applicable for managers or employees implicated with a determining effect on the violation. Regulation also provides for certain reductions in their favour.

The last three years witnessed various fining decisions on Article 4 of the Competition Law. The Board imposed administrative monetary fines in no fewer than ten cases (Turkish Cement Producers, 14 January 2016, 16-02/44-14; Yeast Producers, 20 October 2014, 14-42/738-346; Kahramanmaraş Driving Schools, 20 August 2014, 14-29/610-264; Tokat Kırıkkale Private Teaching Institutions, 11 August 2014, 14-27/556-239; Aegean Region Driving Schools, 11 August 2014, 14-27/555-238; Kırıkkale 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; and Erzincan Ready-Mixed Concrete Investigation, 17 September 2013, 13-54/755-315).

As of early 2016, the Board imposed a total fine of approximately TRY70.9 million to six Turkish cement producers (corresponding to 3% to 4.5% of the 2014 annual turnover of each of the participants) for having conducted territorial allocation and price increases (14 January 2016, 16-02/44-14).

The highest amount of administrative monetary fine ever imposed by the Board in a case concerning Article 4 of the Competition Law is TRY213,384,545.76, which was imposed on the economic entity in the banking industry (Banking Industry, 8 March 2013, 13-13/198-100). This amount represented 1.5% of the relevant entity's annual gross revenue for the year 2011.

6.5 Joint and Several Liability

The wording of Article 3 of the Competition Law which provides the definition of 'undertaking' as 'a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services' appears to allow the parent companies of cartel participants to be held jointly and severally liable. In relation to cases involving joint ventures, there have been certain decisions of the Board whereby the parent companies of a joint venture were found liable instead of the joint venture itself (see for example Waste Paper Decision; 8 July 2013, 13-42/538-238). However, in practice, the Board chooses to find the directly infringing subsidiary liable without applying the joint and several liability principles.

6.6 Other Sanctions

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 to the way it was before the infringement. Furthermore, such a restrictive agreement is to 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.

6.7 Sanctions Against Company Employees

Administrative sanctions may be imposed on company employees, since the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. 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% of the fine imposed on the undertaking or association of undertakings.

Cartel conduct will not result in imprisonment against employees as individuals. That being 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 sections 235 and following of the Turkish Criminal Code. Illegal price manipulation may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

7. Damage claims

7.1 Collective Redress

Turkish procedural law does not allow for class actions or procedures. Turkish courts would not grant class certification requests.

Group actions are permitted under an Article of the Turkish Procedure Law No 6100. Associations and other legal entities aiming to protect the interest of their members or to determine their members' rights and to remove the illegal situation or prevent any future breach may be the reason for initiating a group action. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The court decision is to cover all individuals within the group.

7.2 Indirect Purchasers

Articles 57 and following of the Competition Law entitle any person injured in their 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.

Antitrust-based private lawsuits are rare but increasing in practice. The refusal-to-supply allegations constitute the majority of private lawsuits in Turkish antitrust regime.

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

7.3 Types of Compensation

Pursuant to Articles 57 and following of the Competition Law, claimants can sue the violators for three times their damages plus litigation costs and attorney fees.

7.4 Quantifying Damages

Article 58 of the Competition Law determines how to calculate the amount of damages to be paid. Pursuant to Article 58 of the Competition Law, those who suffer as a result of the prevention, distortion or restriction of competition may claim as damages the difference between the cost they paid and the cost they would have paid if competition had not been restricted. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings which limited competition. In determining the damages, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving their gross negligence, the judge may, upon the request of the injured party, award compensation of up to three times the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

8. Judicial review

8.1 The Appeal Process

Decisions of the Board are considered to be administrative acts, and thus legal actions against them are to be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

As per Law No 6352, which entered into force on 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 calendar days of the official service of the justified (reasoned) decision.

If the challenged decision is annulled in full or in part, the Administrative Court remands it to the Board for review and reconsideration.

The judicial review period before the Administrative Court usually takes about eight to 12 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the administrative courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the administrative court.

As of 20 July 2016, administrative litigation cases will be subject to judicial review before the newly established regional courts (appellate courts), creating 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. The regional courts will 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. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law,

the decision of the regional court will be subject to the High State Court's review and therefore will not be considered as a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed, it will be remanded back to the deciding regional court, which will in turn issue a new decision to take account of the High State Court's decision.

As stated in 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 administrative courts and appeal usually takes about 24 to 30 months.

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8.2 Extent of Review

The judicial review of the Board's decisions before the administrative courts is conducted pursuant to administrative law principles. Ankara administrative courts will go through the case file to see whether the Board's decision complies with the law in terms of (i) subject matter, (ii) form, (iii) purpose, (iv) jurisdiction and (v) reason. In other words, Ankara administrative courts will only review whether there was any irregularity/non-compliance on the part of the Board in terms of these five elements. Ankara administrative courts would not give their own judgment on the merits of the case, as such an action would fall outside of the court's jurisdiction. Ankara administrative courts cannot substitute or replace the Board, or decide on the matter instead of the Board.