The European, Middle Eastern and African Antitrust Review **2018**

Published by Global Competition Review in association with

AEQUO Law Firm
Baker Botts LLP
bpv Hügel Rechtsanwälte
Bruun & Hjejle
Cadwalader, Wickersham & Taft LLP
Cooley
Covington & Burling LLP
DLA Piper
Dryllerakis & Associates
ELIG, Attorneys-at-Law
Fatur LLC
FBC – Fischer Behar Chen Well Orion & Co
Freshfields Bruckhaus Deringer LLP
Gide Loyrette Nouel
Herbert Smith Freehills LLP
Hogan Lovells
Kellerhals Carrard
Morgan Lewis & Bockius UK LLP
Motieka & Audzevičius
Norton Rose Fulbright LLP
Oppenländer Rechtsanwälte
Popovici Nițu Stoica & Asociații
Quinn Emanuel Urquhart & Sullivan, LLP
Shearman & Sterling LLP
Simonsen Vogt Wiig AS
SZA Schilling, Zutt & Anschütz Rechtsanwalts AG
Vieira de Almeida & Associados
Willkie Farr & Gallagher LLP
WilmerHale LLP

www.globalcompetitionreview.com

GCR
GLOBAL COMPETITION REVIEW

Turkey: Cartels

Gönenç Gürkaynak and Öznur İnanılır
ELIG, Attorneys-at-Law

The statutory basis for cartel prohibition is the Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures to secure a free market economy. The Turkish cartel regime by nature applies administrative and civil (not criminal) law. The Competition Law applies to individuals and companies alike, if they act as an undertaking within the meaning of the Competition Law.

Substantive provisions for cartel prohibition

The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. The provision 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 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. Similar to article 101(1) TFEU, the provision does not give a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity. Unlike the TFEU, however, article 4 does not refer to 'appreciable effect' or 'substantial part of a market', and thereby excludes any de minimis exception as of yet. Therefore, for an infringement to exist, the restrictive effect need not be 'appreciable' or 'affecting a substantial part of a market'. The practice of the Competition Board (the Board) to date has not recognised any de minimis exceptions to article 4 enforcement either, though the enforcement trends and proposed changes to the legislation are increasingly focusing on de minimis defences and exceptions.

Article 4 also prohibits any form of agreement that has the 'potential' to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power to the Board.

As is the case with article 101(1) TFEU, article 4 brings a non-exhaustive list of restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption issued by the Board. To the extent not covered by the protection brought by the respective block exemption rules or individual exemptions, vertical agreements are also caught by the prohibition laid down in article 4.

The block exemption rules currently applicable are:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
- Block Exemption Communiqué No. 2016/5 on R&D Agreements; and
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.

These are all modelled on their respective equivalents in the EU. The newest of these block exemptions, the Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector sets out revised rules for the motor vehicles sector in Turkey, overhauling the Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector. Restrictive agreements that do not benefit from either block exemptions under the relevant communiqué, or individual exemptions issued by the Board, are covered 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 per se illegal.

The Turkish competition regime also condemns concerted practices. The Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The definition of concerted practice in Turkey does not fall far from the definition used in EU competition law. A concerted practice is defined as a form of coordination between undertakings which, without having reached the stage where an agreement has been properly concluded, knowingly substitutes practical cooperation between them for the risks of competition. Therefore, this 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 if the parties have expressed their joint intention to behave in a particular way, perhaps in a meeting, via a telephone call or through an exchange of letters.

Enforcement

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy. It consists of the Board, Presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 120 case handlers. The other service units comprise the department of decisions; the economic analysis and research department; the information management department; the external relations, training and competition advocacy department; the strategy development, regulation and budget department; and the cartel and on-site inspections support division (the leniency

division). As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members. The Presidency handles the administrative works of the Competition Authority.

A cartel matter is primarily adjudicated by the Board. Administrative enforcement is supplemented with private lawsuits as well. In private suits, cartel members are adjudicated before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

Proceedings

The Turkish cartel regime does not recognise de minimis exceptions and there is currently no threshold for opening an investigation into cartel conduct. The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a notice or complaint. A notice or complaint may be submitted verbally or through a petition. The Competition Authority included an online system in which the complaints may be submitted by the online form in the official website of the Competition Authority. In the case of a notice or complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected should the Board remain silent on the matter for 60 days. The Board will decide to conduct a pre-investigation if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation or not. 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 by the Board only once, for an additional period of up to six months.

Once the notice has been formally served, the investigated undertakings have 30 days to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once this is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (this is the second written defence). The investigation committee will then have 15 days to prepare an additional 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 this reply is served on the Competition Authority, the investigation process will be completed (ie, the written phase of investigation involving the claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held upon request by the parties. The Board may also ex officio decide to hold an oral hearing. Oral hearings are held between 30 and 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings before the Competition Board. The Board will render its final decision within 15 days from the hearing, if an oral hearing is held; otherwise, the decision is rendered 30 days from the completion of the investigation process. It usually takes around two to three months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

Effect theory

Turkey is one of the 'effect theory' jurisdictions where what matters is the effect a cartel activity has produced 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 refrained from declining jurisdiction over non-Turkish cartels or cartel members (eg, *The suppliers of rail freight forwarding services for block trains and cargo train services*, 16 December 2015,15-44/740-267; *Güneş Ekspres/Condor*, 27 October 2011, 11-54/1431-507; *Imported Coal*, 2 September 2010, 10-57/1141-430; *Refrigerator Compressor*, 1 July 2009, 09-31/668-156) in the past, so long as there was an effect in the Turkish markets. It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly owing to enforcement handicaps (such as difficulties of formal service to foreign entities).

Powers of investigation

The Competition Law provides a vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid, which would also result in a fine. While the mere wording of the Competition Law provides for employees to be compelled to provide verbal testimony, case handlers do allow delaying an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the Competition Authority, including, but not limited to, deleted items.

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

The sole category of people participating in on-site inspections is the staff of the Competition Authority. The staff has no duty to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to come but may impose certain conditions (eg, to seal file cabinets or disrupt email communications).

Sanctions

In the case of a proven cartel activity, the companies concerned shall be separately subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and managers of the undertakings or association of undertakings that had a determining effect on the creation of the violation are also fined up to 5% of the fine imposed on the undertaking or association of undertaking. The minimum fine for 2017 is 18,377 lira.

The Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as:

- the level of fault and the amount of possible damage in the relevant market;
- the market power of the undertaking within the relevant market;
- the duration and recurrence of the infringement;
- cooperation or driving role of the undertaking in the infringement;
- the financial power of the undertaking; and
- compliance with the commitments in determining the magnitude of the fine.

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) was enacted by the Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4% of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision). Aggravating and mitigating factors are then factored in. The Regulation on Fines also applies 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 necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed as 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 for serious and irreparable damages.

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability) but no criminal sanctions. That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (ie, manipulation through misinformation or other fraudulent means) may also be condemned by up to two years' imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

The above-mentioned sanctions may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees or board members or executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Other than these, there is no sanction specific to individuals.

Leniency programme

The Competition Law has undergone significant amendments, enacted in February 2008. The current legislation brings about a stricter and more deterrent fining regime, coupled with a leniency programme for companies.

The secondary legislation specifying the details of the leniency mechanism – namely, the Regulation on Active Cooperation for Discovery of Cartels (the Regulation on Leniency) – was put into force on 15 February 2009. Further, the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels were published in April 2013.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set. According to the Regulation on Leniency, the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringement. A definition of cartel is also provided in the Regulation on Leniency for this purpose. A cartelist may apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity or reduction includes both the undertakings and its employees and managers, with the exception of the 'rig-leader' which can only benefit from a second degree reduction of the fine. The conditions for benefiting from the immunity or reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees and managers can apply for leniency.

A manager or employee of a cartelist may also apply for leniency until the 'investigation report' is officially served. Such an application would be independent from applications by the cartelist itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of a fine for such manager or employee. The requirements for such individual application are the same as stipulated above.

Appeal process

As per Law No. 6352, which took effect on 5 July 2012, the administrative sanction decisions of the Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the justified (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 the stay of the execution if the execution of the decision is likely to cause serious and irreparable damages; and if the decision is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Administrative Court usually takes about 24 to 30 months. If the challenged decision is annulled in full or in part, the Administrative Court remands it to the Board for review and reconsideration.

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 24 to 30 months.

A significant development in competition law enforcement was the change in the competent body for appeals against the Competition Board's decisions. The new legislation has created a three-level appellate court system consisting of administrative courts (as explained above), regional courts (appellate courts) and the High State Court, the regional courts will: (i) go through the case file both on procedural and substantive grounds; and (ii) investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

Damages actions

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Article 57 et seq of the Competition Law entitle any person who shall be injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. 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, and wait for the board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

Turkish procedural law denies any class action or procedure. Class certification requests would not be granted by Turkish courts. While article 25 of Law No. 4077 on the Protection of Consumers allows class action by consumer organisations, these actions are limited to the violations of Law No. 4077 on the Protection of Consumers, and do not extend to cover antitrust infringements. Similarly, article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under article 57 et seq of the Competition Law.

Legislative developments

The most recent changes with respect to the Turkish cartel regime were the publication of the Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, overhauling the Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.

In addition to that, the most significant development regarding Turkish competition law is the Draft Proposal for the Amendment of the Competition Law (the Draft Law) was submitted to the Grand National Assembly of Turkish Republic on 23 January 2014. In 2015, the Draft Law became obsolete due to the general elections in June 2015. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law. If the Turkish parliament does not pass the Draft Law, it is noted in the 2015 Annual Report of the Competition Authority that the Competition Authority may take steps toward the amendment of certain articles.

Recent cases

Recently, the Board concluded that six cement companies operating in the Aegean region of Turkey violated article 4 of Law No. 4054 by allocating regions and increasing resale prices in collusion in the Aegean region (14 January 2016, 16-02/44-14). The Board fined the cement producers a total of approximately 71 million lira. The fines ranged between 3% and 4.5% of each company's 2014 annual income. The fines are considered relatively high in the Turkish jurisdiction in terms of turnover percentage. The decision has been criticised in that no information or evidence was collected during the investigation in addition to the information and documents collected during the pre-investigation phase to link the defendants to the allegations. The decision serves as the new yardstick for the evidential thresholds in competition law proceedings before the Board.

In addition, in one of the most prominent cartel cases, the Board concluded an investigation conducted in relation to the allegation that nine international companies active in railway freight forwarding services market had restricted competition by sharing customers (16 December 2015, 15-44/740-267). At the end of the long, in-depth investigation, the Board concluded that the customer protection agreements had not produced effects on the Turkish markets within the meaning of article 2 of Law No. 4054 and therefore, the allegations in question did not fall within the scope of the Competition Law. As a landmark decision, the decision shows the scope and limits of the Competition Authority's jurisdiction. The decision establishes that the Competition Authority's jurisdiction is limited to conducts that create an effect in any given product market in Turkey, notwithstanding whether the agreement, decision or practice takes place in or outside of Turkey.

Gönenç Gürkaynak
ELIG, Attorneys-at-Law

Mr Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 70 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law counseling issues with more than 19 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 50 merger clearances of the Turkish Competition Authority.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

Öznur İnanılır
ELIG, Attorneys-at-Law

Ms Öznur İnanılır joined ELIG, Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LLM degree in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Ms Öznur İnanılır became a partner within the regulatory and compliance department in 2016 and has extensive experience in all areas of competition law, in particular, compliance to competition law rules, defenses in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. Ms İnanılır has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

ELIG, Attorneys-at-Law

Çitlenbik Sokak No:12 Yıldız Mahallesi
34349 Beşiktaş
Istanbul
Tel: +90 212 327 1724
Fax: +90 212 327 1725

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

Öznur İnanılır
oznur.inanilir@elig.com

www.elig.com

ELIG, Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our managing partner, Mr Gönenç Gürkaynak, and consists of three partners, one counsel and 36 associates.

In addition to 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 courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

ELIG represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

During the past year, ELIG has been involved in over 50 merger clearances by the Turkish Competition Authority, more than 20 defence project investigations, and over 15 antitrust appeals before the administrative courts. ELIG also provided more than 40 antitrust education seminars to employees of its clients.

ELIG has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and/or vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ANTITRUST REVIEW 2018 ISSN 2398-7766