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# Cartels
# 2022

Turkey: Law & Practice

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# TURKEY

## Law and Practice

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# 1. BASIC LEGAL FRAMEWORK

## 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

### Primary Legislation

The main legislation prohibiting cartel activity in Turkey is the Law on Protection of Competition No 4054 (the "Competition Law") as amended by Law No 7246 Amending the Law On the Protection of Competition (the "Amendment Law").

Article 4 of the Competition Law provides the main principles related to cartels and is essentially modelled on Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). As a general provision, Article 4 prohibits all restrictive agreements, including any form of cartels. It also sets forth a non-exhaustive list of anti-competitive practices that potentially violate the Competition Law, including the most common types of cartels, such as price fixing, market division and concerted control of output or input. It 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 Turkish Competition Board (the "Board").

### Secondary Legislation

The secondary legislation of the Turkish Competition Authority includes specific provisions on cartels. The Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (the "Fine Regulation") provides the range of the base fines for cartels (see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**).

Under the Regulation on Active Co-operation for Detecting Cartels (the "Leniency Regulation"), parties that actively co-operate with the Authority to reveal a cartel may be granted full immunity or a discount, depending on the timing of their leniency application and the level of their co-operation with the Authority throughout the investigation.

## 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The authority enforcing competition law is the Turkish Competition Authority (the "Authority"), a legal entity with administrative and financial autonomy, consisting of the Board and case units. The Board is the decision-making body and is responsible for deciding whether agreements, concerted practices and decisions of undertakings active in various markets restrict competition. The Board has seven members and is seated in Ankara. The Authority has six case units, each focusing on all types of competition cases (ie, Article 4 cases, mergers and abuse of dominance) in certain industries.

### Penalties

Penalties imposed under the Competition Law are administrative in nature, therefore, the Competition Law can lead to administrative fines (and civil liability) but not criminal penalties. That said, when anti-competitive conduct such as bid rigging in public tenders or price manipulation is also criminally prosecutable, potential legal liability extends to criminal fines as well as imprisonment.

### Fines

The Fine Regulation provides the range of the base fines for cartels: for undertakings/association of undertakings, it is between 2% and 4% of turnover for the latest financial year before the date of the Authority's decision. After calculating the base fine, the Authority applies

aggravating and mitigating factors to calculate the final fine for the relevant undertaking or association of undertakings.

The Authority's fine for cartels cannot exceed 10% of the relevant undertaking's turnover generated in Turkey in the financial year preceding the date of the decision to impose a fine.

### Liability

In addition to legal entities, executives or employees of undertakings may be held liable for cartel activity. Under the Competition Law, employees or members of executive bodies or associations of the undertakings that had a determining effect on a cartel may be fined between 3% and 5% of the fine imposed on the relevant undertaking or association of undertakings. This, however, is unusual in practice. There are only two examples of this in the history of the Board (Poultry Producers (25 November 2009, 09-57/1393-362); Sodium Sulphate Producers (3 May 2012, 12-24/711-199)). Both cases concerned a cartel type of violation.

### Civil Awards

Regarding civil awards, under Article 57 of the Competition Law, persons and companies harmed by anti-competitive conduct have a right to claim treble damages, plus litigation costs and attorney fees.

## 1.3 Private Challenges of Cartel Behaviour/Effects

Under Article 57 of the Competition Law, persons and companies harmed by anti-competitive conduct have the right to claim treble damages, litigation costs and attorney fees. Claims for damages arising from the Competition Law are ultimately subject to the general tort rules, ie, the Turkish Code of Obligations. Accordingly, for a private tort claim to be accepted by the court, the following four conditions must be cumulatively met:

- existence of an illegal act;
- fault;
- damage; and
- causal link.

## 1.4 Definition of "Cartel Conduct"

The general provision regarding cartels is Article 4 of the Competition Law, which prohibits all forms of "restrictive agreement", including any form of cartels. In line with the TFEU, Article 4 includes price fixing, market allocation and refusals-to-deal agreements as examples of restrictive agreements consistently being deemed to be anti-competitive.

Similar to the TFEU, the Board can decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not significantly restrict competition in the market under certain conditions (ie, the de minimis application). However, the de minimis principle is not applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply.

The secondary legislation determining the rules and the procedure of the de minimis application is Communiqué No 2021/3 on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition, which entered into force on 16 March 2021.

Furthermore, cartels are explicitly defined by the secondary legislation of the Authority, namely the Fine Regulation and the Leniency Regulation. According to these regulations, "agreements restricting competition and/or concerted practices between competitors for fixing prices; allocation of customers, providers,

territories or trade channels; restricting the amount of supply or imposing quotas, and bid rigging" are prohibited as cartels (see Article 3 of the Fine Regulation and Article 3 of the Leniency Regulation). Recital 5 of the Leniency Guidelines further describes cartels as "the most serious competition infringements".

### Exemptions

In Turkey, no sector or activity is entirely exempt from the Competition Law apart from limited exceptions granted to certain transactions in the field of merger control.

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 exemption rules are parallel to those applicable in the EU. That said, given that cartels fail to fulfil the conditions for exemption under Article 5(1) of the Competition Law and relevant block exemption regulations, this type of conduct does not benefit from an exemption from the prohibition of Article 4.

Under Article 3 of the Fine Regulation and Leniency Regulation, the following practices are classified as cartel activity:

- price fixing;
- allocation of customers, providers, territories or trade channels;
- restricting the amount of supply or imposing quotas; and
- bid rigging.

Bid rigging is also prohibited under Article 235 of the Turkish Criminal Code, and perpetrators of this offence may face imprisonment. Furthermore, price manipulation in capital markets is specifically punishable with imprisonment, as per Article 106 of the Turkish Capital Market Law.

## 1.5 Limitation Periods

The Board is entitled to impose fines within eight years of the date of infringement. In the case of a single continuous infringement, the eight years start from the day on which the infringement ceased or repeated. The eight-year limitation period is suspended when the Board takes any action to investigate a claimed infringement.

Regarding private actions, the general provisions of the Turkish Code of Obligations are applicable to the statute of limitation. Accordingly, for a claim arising from a Competition Law infringement, the statute of limitation is two years from the date the plaintiff learns about the damage and who is liable for the damage, and in any case, ten years from the event that caused the harm to the plaintiff.

However, in practice, the 11th Civil Chamber of the Court of Appeals has adopted that the eight-year limitation period under Law No. 5326 on Misdemeanours should apply to limitation periods for competition law damages claims within the scope of Article 72 of the Code of Obligations (see its decisions 30 March 2015, 2014/13296 E, 2015/4424 K; 1 July 2019, 2019/1672 E, 2019/5015 K).

The prosecution of offences of a criminal nature (such as bid rigging and price manipulation) is subject to criminal statutes of limitation, which may vary depending on the severity of the sentence to be imposed.

## 1.6 Extent of Jurisdiction

In the Turkish competition law regime, effects theory is taken into account to determine the geographic scope of the Board's jurisdiction. Article 2 of the Competition Law provides that the relevant law covers all restrictive agreements, decisions, transactions and practices to the extent that they affect markets for goods and

services in Turkey, regardless of where the conduct takes place.

The nationality of the cartel members, where the cartel took place or whether the cartel members have a subsidiary in Turkey will not factor into the assessment of the Board's jurisdiction.

### The Board's Attitude Regarding Jurisdiction

The Board has decided it has jurisdiction over non-Turkish cartels or cartel members in the past, as long as it has an effect on the Turkish markets. That being said, the specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of Law No 4054 would support at least an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

Additionally, export cartels do not fall within the scope of jurisdiction of the Competition Authority, as per Article 2 of Law No 4054. In Poultry Producers (25 November 2009; 09-57/1393-362), the Authority launched an investigation into allegations that included an export cartel.

The Board found that export cartels are not sanctioned as long as they do not affect the markets of the host country (Aegean Region Cement Producers 2016, (14 January 2016, 16-02/44-14)). Although other decisions (Paper Recycling, (8 July 2013; 13-42/538-238)) suggest that the Authority might sometimes be inclined to claim jurisdiction over export cartels, it is fair to assume that an export cartel would fall outside of the Authority's jurisdiction if and to the extent it does not have an impact on Turkish markets.

## 1.7 Principles of Comity

Article 43 of Decision 1/95 of the European Commission-Turkey Association Council authorises the Authority to notify and request the European Commission (Directorate General for Competition) to apply relevant measures if the Board believes that cartels in the EU have adversely affected competition in Turkey. The provision grants reciprocal rights and obligations to the parties; thus, the European Commission has the authority to request that the Board applies the necessary measures to restore competition in the relevant markets.

Upon receipt of such a request, the notified party will consider whether or not to initiate any enforcement action and, if such action is initiated, advise the notifying party of the outcome of the relevant action. This article, however, does not limit the discretion of the Authority and the European Commission under their respective competition laws.

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

## 1.8 COVID-19

The ongoing COVID-19 outbreak did not significantly impact the investigation process of the Authority. The Authority has not requested the co-operation of applicants with special circumstances and it has not announced any limitation on their bandwidth either.

## 2. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – INITIAL STEPS

### 2.1 Initial Investigatory Steps

#### Investigation and First Defence

The Authority may initiate an investigation into an alleged cartel ex officio or upon a complaint. If the Board finds the complaint credible, the first step is a pre-investigation. At this preliminary stage, the undertakings concerned are not notified that they are under investigation unless there is a dawn raid.

After completing the pre-investigation in 30 calendar days, the case handlers submit their findings ("pre-investigation report") to the Board. The Board will decide whether or not to launch an in-depth investigation within ten days of receiving the pre-investigation report. If the Board decides to initiate an in-depth investigation, it will notify the undertakings concerned in 15 days.

In exceptional situations, the Board may also initiate an in-depth investigation directly without a preliminary investigation. The Board opened a direct investigation in only a few instances (Turk Telekom Infrastructure (5 January 2006, 06-02/47-8); Facebook (11 January 2021, 21-02/25-M)).

The investigation must be completed within six months. If deemed necessary, the Board can extend this period once for six months. The relevant parties then have 30 days from the formal service of the notice to submit their first written defence.

#### Responding to the Report and Second and Third Defences

After receiving the parties' first written defence, the Authority issues an "investigation report" (the equivalent of the European Commission's statement of objections). After receiving the investigation report, the parties have 30 days to respond (the second written defence), which is extendable for a further 30 days. Prior to the Amendment Law, the case team used to have 15 days to respond to the parties' second written defence (the "additional opinion"). The Amendment Law now includes an option to double the period for the submission of the Authority's additional opinion. Again, the parties have 30 days to reply to the additional opinion (the third written defence).

With the submission of the parties' third written defence to the Authority, the in-depth investigation process is completed.

#### Oral Hearings

An oral hearing may be held upon the parties' request or at the Board's decision. Oral hearings are held between 30 and 60 days after completing the investigation process.

The Board renders its final decision 15 days after oral hearings (if held) or 30 days from the completion of the investigation process. It usually takes six to eight months from the announcement of the final decision for the Board to issue a reasoned decision.

### 2.2 Dawn Raids

Article 15 of the Competition Law authorises the Board to conduct dawn raids. The firm, individuals and outside counsel are obliged to co-operate with the Board during the dawn raid. Refusal to grant the case handlers access to business premises can lead to an administrative fine. The fine is fixed at 0.5% of the relevant undertaking's turnover generated in the financial year preceding the date of the Authority's decision to impose the fine (if generated in the financial year closest to the date of the decision to impose the fine will be taken into account). Each day the party does not allow the case

handlers to carry out an on-site inspection will incur an additional penalty of 0.05% per day.

The relevant fine cannot be lower than a specific amount recalculated periodically by the Authority; the minimum fine for 2022 is TRY47,409 (currently approximately USD3,200 or EUR3,000).

### Restrictions on Dawn Raids

During a pre-investigation and in-depth investigation, the Authority can do the following:

- examine the books and documents of undertakings and trade associations;
- request undertakings and trade associations to provide written or verbal explanations on specific topics;
- conduct on-site investigations with regard to any asset of an undertaking; and
- examine computers and other electronic devices of the undertaking, including emails and portable devices that include digital data pertaining to the relevant undertaking.

The Authority cannot seize documents but can make copies. The Authority may take digital copies deemed as evidence, and inspection may continue in Ankara at the Authority's office for those digital copies.

### Procedure of Dawn Raids

The Authority may request all information it deems necessary from private and public institutions, undertakings and trade associations, and such information must be provided within the period determined by the Board. Failure to comply may lead to a fine of 0.1% of Turkish turnover generated in the financial year preceding the date of the fining decision. The same penalty applies to incorrect or incomplete information.

Similarly, refusal to grant the Authority access to business premises may also result in a fine (see **2.3 Spoliation of Information**). In a recent case (Turkish Pharmacists Association (7 November 2019, 19-38/582-248)), the Board imposed a turnover-based fine at the rate of 0.1% and a separate turnover-based fine at the rate of 0.05% for each day of delay in submitting the requested information and documents until the date of compliance (which was 20 days after the deadline).

The Authority's case handlers can interview employees and officers of undertakings, but if the requested information cannot be provided during the interview, the case handlers may grant additional time to respond to such a request. Therefore, in practice, employees and officers can delay responding to questions when they are not in a position to provide accurate or complete information, provided that a written response is submitted within the timeframe agreed upon with the case handlers.

Companies and interviewees have a legal right to request copies of the documents furnished to the enforcement agency regarding these interviews. Moreover, they can request that the copies of documents delivered by the case handlers are stamped as confidential for those that include commercial secrets.

## 2.3 Spoliation of Information

Spoliation of potentially relevant information would be considered obstructing or preventing a dawn raid, resulting in an administrative fine on the undertaking of 0.5% of its turnover. In the TTNET decision (18 July 2013; 13-46/601-M), an employee of TTNET deleted documents from computers during a dawn raid and the Board imposed a fine of 0.5% of TTNET's turnover. In UNMAŞ On-Site Inspection (20 May 2021, 21-26/327-152), an UNMAŞ employee deleted the contents of his WhatsApp correspondences, and the Board imposed a fine of 0.5% of UNMAŞ's turnover.

As mentioned in **2.2 Dawn Raids**, for each day the Authority cannot access the relevant information/document, the undertaking will be subject to an additional fine of 0.05% of its turnover generated in the financial year preceding the date of the fining decision. In a recent case (Mosaş (18-20/356-176, 21.06.2018)), the Board imposed an administrative monetary fine upon Mosaş Akıllı Ulaşım Sistemleri AŞ's ("Mosaş") for obstructing an on-site inspection in the scope of a cartel investigation regarding alleged bid rigging. During the on-site inspection conducted at Mosaş's premises, Mosaş's employees cut off the electricity and internet connection, deleted emails, denied access to computers and prevented case handlers from making copies of the reviewed documents.

The Board imposed two separate administrative monetary fines on Mosaş: a fixed fine for obstructing the on-site inspection, in the amount of 0.5% of Mosaş's 2017 turnover and a proportional penalty of 0.05% of Mosaş's 2017 turnover for each day that the violation continued (ie, until Mosaş invited the Authority for another on-site inspection). In a more recent case (Unilever (7 November 2019, 19-38/584-250)), the Board imposed a fine of 0.5% for not granting access to Unilever's email system for a search using "eDiscovery" for approximately eight hours during the on-site inspection.

### Imprisonment and Further Charges

Apart from the monetary fine imposed by the Board, if the cartel conduct also falls under criminal law (eg, bid rigging in public tenders), individuals who destroy, delete, hide or change evidence may face imprisonment for a period of between six months and five years under Article 281 of the Turkish Criminal Code.

Moreover, the individuals could also be charged with forgery and resistance to public officers if the conditions set out under Articles 205 and 265 of the Turkish Criminal Code are met.

## 2.4 Role of Counsel

Officers or employees have a legal right to counsel. An attorney-at-law can be present to supervise the inspection. The lawyer can be a company lawyer and/or an independent lawyer.

The case handlers conducting the dawn raid are not obliged to wait for the undertaking's counsel to proceed. Indeed, in a recent decision (Çekok Gıda (8 February 2018, 18-04/56-31)), where the Board imposed a fine upon an undertaking for obstructing a dawn raid, the Board dismissed the defence that the delay was due to waiting for external counsel.

Counsel may present and advise and speak during interviews and interfere if the interview leads to any potential violation of the company's rights (particularly, the prohibition against self-incrimination, request of information exceeding the scope of the current investigation or documents protected by attorney-client privilege).

### Requirement to Obtain Separate Counsel

Turkish law does not prevent counsel from representing the investigated corporation and its employees as long as there is no conflict of interest.

### Initial Steps Taken by Defence Counsel

An attorney-at-law can be present to supervise the inspection. During the initial phase of an enforcement effort, a defence counsel should only assist their client (the undertaking accused of cartel behaviour) without obstructing the inspection rights of case handlers.

In addition, a defence counsel should supervise and interfere in the inspection in question as necessary where case handlers exceed the

scope of their authorisation during the dawn raid. The most common incidents requiring intervention from a defence counsel during a dawn raid involve preventing the case handlers from obtaining documents protected by attorney-client privilege and/or outside the scope of the investigation.

## 2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

As explained in **2.2 Dawn Raids**, the Board may obtain documents and testimonies in the course of investigating an alleged cartel by:

- examining books, paperwork and documents of undertakings and trade associations, and, if necessary, making copies of them;
- requesting undertakings and trade associations to provide written or verbal explanations on specific topics; or
- conducting on-site inspections on business premises and inspecting computers and emails, and portable devices, including digital data pertaining to the relevant undertaking.

Pursuant to Article 15 of Law No 4054, case handlers must carry with them an authorisation certificate when they conduct on-site inspections showing the subject matter and purpose of the inspection and explaining that an administrative fine shall be imposed if incorrect information is provided. The case handlers' authorisation for dawn raids is, therefore, limited to the scope written in this certificate.

### Procedure for Obtaining Other Types of Information

See **2.2 Dawn Raids**, Procedure of Dawn Raids and **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**.

## 2.6 Obligation to Produce Documents/ Evidence Located in Other Jurisdictions

Pursuant to Article 44 of the Competition Law, the Board "may request the provision of any documents and information it deems necessary from the parties and other places concerned". Even if relevant documents or other evidence are located in another jurisdiction, the company or individual is obliged to produce it, as long as the cartel has an actual or potential effect on Turkish markets.

## 2.7 Attorney-Client Privilege

Correspondence with an independent attorney (ie, an attorney without an employment relationship with the relevant undertaking) may benefit from attorney-client privilege, provided that it is related to the right of defence; communications with in-house counsel are not covered by this privilege ((Trendyol (29 April 2021, 21-24/287-130)).

In Sanofi Aventis (20 April 2009, 09-16/374-88), the Board recognised that the principles adopted by the European Court of Justice in AM&S Europe v European Commission (Case 155/79 [1982] ECR 1575) could apply to documents protected by attorney-client privilege in Turkey. In CNR/NTSR (20 August 2014, 14-29/496-262), the Board took another major step in favour of the attorney-client privilege by elaborating on the conditions of the European Court of Justice under which the privilege would apply and concluded that the same rules are applicable in Turkish competition law.

If a document includes correspondence between the undertaking and external counsel (who is not an employee) and is related to the use of the right of defence of the undertaking, this document will be protected under attorney-client privilege (Dow (2 December 2015, 15-42/690-259); Enerjisa (6 December 2016, 16-42/686-314); Warner Bros (17 January 2019, 19-04/36-14); Istanbul

Department of Customs Association (20 June 2019, 19-22/352-158)). If, however, the document includes counsel's advice regarding how to infringe the competition law or how to cover an infringement, this will not be protected by this principle. Further, the Board has recently decided that an internal email exchange among company employees would not be covered by the attorney-client privilege only because the company's independent counsel was copied throughout the email chain if the emails did not include any statement addressed to or from such independent counsel (Huawei, 14 November 2019, 19-40/670-288).

In another recent decision, the Eighth Administrative Chamber of the Ankara Regional Administrative Court recognised that attorney-client privilege would be available to the documents related to an ongoing investigation or trial (Enerjisa, 10 October 2018; E: 2018/658) and that any document not directly related to the right to defence (ie, not linked to a pre-investigation, an investigation or a legal action against a decision of the Board) would not be afforded the attorney-client privilege.

### Other Relevant Privileges

Article 38 of the 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".

Given that the ambit of the Board's power to request information is not determined under the Competition Law or secondary legislation, execution of this power raises objections from time to time on the basis of the privilege against self-incrimination. That said, such objections have thus far been rejected by the court appeal.

## 2.8 Non-cooperation With Enforcement Agencies

Requests for information by the Authority are not resisted, with very few exceptions, since refusal to provide the information requested by the Authority may result in an administrative fine. See **2.3 Spoliation of Information** and **2.2 Dawn Raids**.

## 2.9 Protection of Confidential/ Proprietary Information

### Competition Law and Communiqué No 2010/3

The main legislation regarding the protection of commercially sensitive information is found in Article 25(4) of the Competition Law and Communiqué No 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets ("Communiqué No 2010/3"). Communiqué No 2010/3 places the burden of identifying commercial secrets and justifying such classification on the undertaking. Therefore, undertakings must request confidentiality from the Board and justify their reasoning in writing.

### Communiqué 2010/3, Article 15(2)

Under Article 15(2) of Communiqué 2010/3, the Authority may not take confidentiality requests related to information and documents that are indispensable to prove the infringement of competition into consideration. In such cases, the Authority can disclose such information and documents that could be considered trade secrets by taking into account the balance between public and private interest and in accordance with the principle of proportionality.

### Right of Access

The right of access to the file has two legal grounds in the Turkish competition law regime: Law No 4982 on the Right to Information and Communiqué No 2010/3. Article 5/1 of Communiqué No 2010/3 provides that the right of access to the case file will be granted upon the

written requests of the parties (the investigated undertakings) within the due period during the investigations.

Access to the case file grants the applicant access to information and documents in the case file that do not qualify as internal documents of the Authority or trade secrets of other firms or trade associations. Third parties cannot request access to the file as per Communiqué No 2010/3, but could apply for information as per Law No 4982.

### 2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

The defence counsel can raise legal and factual arguments during the first, second and third legal defences and the oral hearing. Additionally, if the Authority issues any information requests during a pre-investigation and investigation, the defence counsel may advocate against cartel allegations where appropriate.

### 2.11 Leniency and/or Immunity Regime

Pursuant to the Leniency Regulation, full immunity may be granted to the first applicant (and employees and officers) who provides all the required information before the investigation report is officially served. However, several conditions must be met to receive full immunity from all charges. One condition is that they must not be the coercer of the cartel. If this is the case (ie, if the applicant has forced other cartel members to participate in the cartel), while the applicant may only receive a reduction of between 33% and 50%, its employees may receive between 33% and 100%.

Other conditions are:

- 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;
- the applicant is not to conceal or destroy information or evidence related to the alleged cartel;
- the applicant 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;
- the applicant keep the application confidential until the end of the investigation unless otherwise requested by the assigned unit; and
- the applicant maintains active co-operation until the Board takes the final decision after the investigation has been completed.

Under the Turkish leniency regime, it is possible to apply for a marker. As stated, 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 Authority can grant additional time for applicants to submit the necessary information and evidence.

#### Eligibility

For the applicant to be eligible for a marker, they must at least provide information on affected products, the duration of the cartel and the parties' names. A document showing the date and time of the application and granting time to prepare the required information and evidence will be given to the applicant by the assigned unit. A fine reduction may be available for applicants who do not qualify for full immunity providing that they apply until the investigation report is served and meet the conditions above.

Accordingly, the second leniency applicant will be eligible for a fine reduction of 33–50%, the third leniency applicant will be eligible for a reduction of 25–33%, and all other applicants will be eligible for a reduction of 16–25%. The

same conditions for full immunity above also apply to fine reduction.

Officers and employees of the relevant companies can also benefit from leniency independent from their companies. Accordingly, the first applicant (provided that there is no leniency application of a relevant undertaking prior to the application of the individual) may benefit from full immunity; the second applicant may be granted a 33–100% reduction, and the third applicant may be granted a 25–100% reduction and other applicants a 16–100% reduction. The same conditions for the leniency application of undertakings also apply to employees and officers.

### 2.12 Amnesty Regime

See **2.11 Leniency and/or Immunity Regime**.

## 3. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – WHEN ENFORCEMENT ACTIVITY PROCEEDS

### 3.1 Obtaining Information Directly From Employees

See **2.2 Dawn Raids**.

### 3.2 Obtaining Documentary Information From the Target Company

As explained in **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony** and Procedure for Obtaining Other Types of Information, pursuant to Article 44 of the Competition Law, the Board "may request the provision of any documents and information it deems necessary from the parties and other places concerned". As an investigating authority, the Board is entitled to seek and obtain any relevant evidence and/or documents related to the cartel activity directly from the target company or other companies and third parties concerned. The Board can either issue information requests to the relevant party or conduct dawn raids to obtain documentary evidence.

### 3.3 Obtaining Information From Entities Located Outside This Jurisdiction

As explained in **1.6 Extent of Jurisdiction**, the jurisdiction of the Authority is determined on the basis of the "effects theory". Thus, as mentioned in **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, the Authority is able to request information directly from any company involved in a cartel affecting Turkish markets. Companies located outside Turkey are also required to provide these documents.

### 3.4 Inter-agency Co-operation/Co-ordination

The Board may request information that it deems necessary from public institutions and organisations, undertakings and trade associations. Officials from these bodies are obliged to provide such information within the period fixed by the Board. The Board also has co-operation agreements with various government agencies, including the Public Tenders Authority.

Accordingly, when certain conduct potentially violates both the Competition Law and other laws (such as regulations on public tenders), the Authority co-operates with the relevant authority (and the public prosecutor's office when the conduct falls under criminal law) to exchange information.

In Medical Consumables (19 December 2008; 08-74/1180-455), the Authority opened a pre-investigation regarding bid-rigging allegations against medical consumable suppliers. During the pre-investigation, the Authority conducted dawn raids but could not find evidence proving a violation of the Competition Law. However, the Authority took notice of a parallel criminal

investigation of the public prosecutor's office and co-operated with the public prosecutor to collect evidence. Accordingly, the public prosecutor shared its indictment with the Authority, which included numerous recordings of communications regarding price fixing and allocation of tenders among the relevant companies. The Authority imposed administrative fines on 11 companies involved in the cartel.

### 3.5 Co-operation With Foreign Enforcement Agencies

See **1.7 Principles of Comity**.

### 3.6 Procedure for Issuing Complaints/ Indictments in Criminal Cases

As indicated in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, the sanctions that can be imposed under the Competition Law are administrative in nature, although bid-rigging activity may be criminally prosecutable under Article 235 et seq of the Turkish Criminal Code. For price manipulation in capital markets, the defendant may also be sentenced to imprisonment for two to five years or incur a criminal fine under Article 106 of the Capital Market Law.

The crimes mentioned above are litigated before criminal courts in Turkey, which are also responsible for acting as the finder of facts alongside the prosecution office. In an investigation process, the accused are entitled to access information possessed by the enforcement agencies unless the judge decides not to allow access to the information upon the request of the prosecutor.

### 3.7 Procedure for Issuing Complaints/ Indictments in Civil Cases

Under Article 57 of the Competition Law, persons and companies harmed by anti-competitive conduct have a right to claim treble damages plus litigation costs and attorney fees.

The private damages claims must be brought before civil courts in Turkey. In practice, courts do not usually analyse whether there is an anti-competitive agreement or concerted practice and defer to the Board's opinion, thus 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.

As per Article 195 of the Civil Procedure Code, the parties can request that the court collect certain evidence to support their claim. Upon the request of the relevant party, the court may issue a request for information to official institutions as well as third parties.

The parties themselves could seek information based on the right to information. The right of access to the file has two legal bases in the Turkish competition law regime: Law No 4982 and Communiqué No 2010/3 on the Regulation of the Right to Access to File and Protection of Trade Secrets. Article 5/1 of Communiqué No 2010/3 ensures that the right of access to the case file will be granted upon the written request of the parties within the due period during the investigations. Access to the file can be requested until the end of the period for submitting the last written defence.

#### Preserving Confidentiality and Evidence

In order to preserve the confidentiality of the investigation and prevent the destruction of evidence, the Authority may delay any access to the file until after the Investigation Report is delivered to the relevant parties (Article 8/2 of Communiqué No 2010/3). The right to access can only be used once unless new evidence has been obtained during the investigation. Access to the case file enables the applicant to access

information and documents not specified as internal documents of the Authority or trade secrets of other companies or trade associations.

Law No 4982 has more exceptions to accessing the file, including:

- information or documents regarding state secrets, intelligence, or administrative actions that are not subject to judicial review;
- information or documents that may harm Turkey's economic interest if disclosed from the scope of the right to information; or
- information related to administrative investigations and may harm individuals' right to privacy, risk their life or safety, risk the security of the investigation or may jeopardise revealing information/documents relevant to the investigation.

### 3.8 Enforcement Against Multiple Parties

As an enforcement agency in Turkey, the Authority is entitled to take actions against multiple parties in a single proceeding, and in practice, the Authority usually opts for this method. Although the parties could request that the Authority separate the proceeding, the Authority is likely to continue the proceeding with multiple parties for procedural efficiency, among others.

If the Board decides to hold an oral hearing at the end of the investigation, all relevant undertakings involved in the investigation are entitled to attend the hearing (although they may request individual sessions if they need to reveal trade secrets or other confidential information).

### 3.9 Burden of Proof

The standard of proof adopted by the Board is frequently criticised as being too low. In order to prove an undertaking's participation in cartel activity, the Authority must demonstrate that such activity took place or that the particular undertaking was a participant. The Board has established an extremely low standard of proof concerning cartel activity with a broad interpretation of the Competition Law and, especially, the "object or effect of which..." part of Article 4.

The standard of proof is even lower as far as concerted practices are concerned. If parallel behaviour is established, a concerted practice might readily be inferred, and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice but based on economic and rational business decisions. The Competition Law provides a "presumption of concerted practice", which enables the Board to bring an Article 4 case where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted. Recently, the competent court of the first instance has confirmed with an annulment decision, where the Board's Sahibinden decision was being reviewed (01 October 2018, 18-36/584-285), that the High State Court, the highest court for the administrative law matters, requires the Board to prove the competition law infringements "beyond reasonable doubt with clear and precise evidence" (Ankara 6th Administrative Courts Sahibinden decision dated 18 December 2019 numbered 2019/946 E. and 2019/2625 K.).

That said, in a majority of decisions, the Board recognised that companies might consciously follow commercial strategies of their competitors and, in the absence of communication between competitors regarding collusion or exchange of commercially sensitive information, parallel conduct alone will not be sufficient to meet the standard of proof for a cartel.

### 3.10 Finders of Fact

In civil proceedings, the burden is on the plaintiff to prove the facts of the case, whereas the criminal court is responsible for acting as the finder of facts in criminal litigation. Nevertheless, as mentioned, criminal proceedings are rare in the Turkish competition law regime and limited to bid rigging in public tenders and price manipulation.

### 3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

Any information or document collected through the use of investigative powers is discoverable in court, including emails, telephone calls and an exchange of letters. Legal privilege (confidentiality between the associates and the clients) constitutes an exception for discoverability in court. 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.

As regards evidence provided to the Authority within a leniency application, the leniency reward does not protect the applicant from liability in other (civil and criminal) proceedings. Pursuant to Article 6 of the Leniency Regulation, information or documents provided by the parties can still be used as evidence before the courts.

As regards proceedings before the Authority, according to Communiqué No 2010/3, no one other than the undertakings under investigation has a right 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.

### 3.12 Rules of Evidence

The parties must bring all evidence to the attention of the court in civil proceedings. In criminal proceedings, the court collects the evidence to prove a crime.

### 3.13 Role of Experts

In proceedings before the Authority, the parties can submit the analyses and opinions of independent experts, including economists. Although the Authority does not rely solely on economic analyses in cartel cases, it increasingly recognises the added value of such analyses. The Authority itself has a dedicated department for economic analysis and research (the "Economic Analysis and Research Department"), which assists the case teams where relevant.

In civil law proceedings, depending on the course of the proceeding of the trial, the judge may assign an expert, which could be an economist or part of another discipline, to review the case and evidence from an expertise point of view. The parties may also bring in a consultant to submit an opinion to the court, who could be an expert in a specific area.

### 3.14 Recognition of Privileges

See **2.7 Attorney-Client Privilege**.

### 3.15 Possibility for Multiple Proceedings Involving the Same Facts

As mentioned in **3.4 Inter-agency Co-operation/Co-ordination**, multiple administrative authorities and criminal courts may initiate proceedings in parallel regarding the same activity.

## 4. SANCTIONS AND REMEDIES IN GOVERNMENT CARTEL ENFORCEMENT

### 4.1 Imposition of 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 conduct such as bid rigging in public tenders and price manipulation.

The Authority's fine for cartel activity cannot exceed 10% of the relevant undertaking's 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).

### 4.2 Procedure for Plea Bargaining or Settlement

The Amendment Law introduced a settlement mechanism that may be utilised in a cartel investigation. It is inspired by the EU law and aims to enable the Board to end investigations without going through the entire investigation procedure. The Board now may come to a settlement with the undertakings and associations of undertakings under investigation, which acknowledge the existence and scope of the infringement before the notification of the investigation report.

As a result of a settlement, a fine may be reduced by up to 25%. In case the process is concluded with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court. With regard to the secondary legislation, the Authority enacted on 15 July 2021 the "Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position" ("Settlement Regulation"). The settlement negotiations may be initiated by the undertaking's acceptance of the ex officio invitation of the Authority or by the Authority's acceptance of the undertaking's request to initiate the settlement negotiations. The Settlement Regulation provides that if the Authority ex officio invites the investigation parties to settlement negotiations, the parties should declare whether they accept the invitation to initiate settlement negotiations with the Authority within 15 days.

The settlement negotiations shall start as soon as the Board accepts the request to initiate the settlement negotiations or the investigation parties duly accept the Board's invitation.

After the interim decision is issued, if the settlement parties agree on the matters set forth therein, they will submit a settlement letter which shall include, inter alia, an express declaration of admission as to the existence and scope of the violation.

If there are deficiencies in the submitted settlement letter, the Board will grant, for one time only, an additional period of seven days and notify the parties that the settlement procedure will be brought to an end if the parties fail to correct the deficiencies.

The Settlement Regulation states that the Board must set out the reasons for its decisions:

- to terminate the procedure for the reasons stated under Article 4/6; or
- to reject the settlement request as per Article 5/1 in its final settlement decision.

Pursuant to Article 4/4 of the Settlement Regulation, a reduction of 10% to 25% may be applied to the administrative fines as a result of the settlement procedure.

## 4.3 Collateral Effects of Establishing Liability/Responsibility

### Private Damages Claims

As explained in **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**, private damages claims must be brought before civil courts in Turkey. The Board's finding of a cartel is not considered prima facie evidence. In practice, courts do not usually analyse whether there is an anti-competitive agreement or concerted practice and defer to the Board to render its opinion on the matter, thus treating the issue as a prejudicial question.

Since courts usually wait for the Board to render its decision rather than decide on the matter themselves, the court decision can be obtained in a shorter period in follow-on actions.

### Plea Bargaining and Settlement

As regards plea bargaining and settlement (see **4.2 Procedure for Plea Bargaining or Settlement**), a new settlement mechanism has been introduced to the Turkish competition law practice, inspired by the EU practice.

As mentioned in **2.11 Leniency and/or Immunity Regime**, pursuant to the Leniency Regulation and the Leniency Guidelines, full immunity may be granted to the first applicant who applies for leniency in accordance with the conditions under the Leniency Regulation before the investigation report is officially served. Employees or managers of the first applicant can also benefit from full immunity. Additionally, leniency protects against collateral effects in other proceedings, such as being banned from public tenders.

## 4.4 Sanctions and Penalties Available in Criminal Proceedings

See **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **1.4 Definition of "Cartel Conduct"** for bid rigging in public tenders and price manipulation.

According to Article 235 of the Turkish Criminal Code, individuals involved in bid rigging shall incur a monetary fine or be sentenced to imprisonment for three to seven years. Further, according to Article 106 of the Turkish Capital Market Law, individuals who are involved in price manipulation in capital markets shall incur a monetary fine or be sentenced to imprisonment for two to five years.

## 4.5 Sanctions and Penalties Available in Civil Proceedings

See **1.3 Private Challenges of Cartel Behaviour/Effects**.

## 4.6 Relevance of "Effective Compliance Programmes"

In its precedent, the Board has acknowledged the importance of compliance programmes for undertakings (see, eg, Frito Lay, 29.08.2013, 13-49/711-300; Kraft Gıda 7.07.2015, 15-28/345-115) and considered the existence of a compliance programme as an indication of good faith (Unilever 28.08.2012, 12-42/1258-410). However, the Board has also found that a compliance programme would not constitute a mitigating factor when calculating a fine for anti-competitive conduct and rejected such defences (see, eg, Linde Gaz 29.08.2013, 13-49/710-297; Consumer Electronics 7.11.2016, 16-37/628-279).

This being said, in a recent decision, the Board took note of the companies' comprehensive compliance efforts, which appear to have factored in the fine calculation (Mey İçki 16.02.2017, 17-07/84-34).

### 4.7 Mandatory Consumer Redress

Sanctions in governmental proceedings for cartel activities are limited to administrative monetary fines. Thus, consumer redress would not be a mandatory proceeding based on sanctions, but it is the consumers' initiative to obtain remedies.

### 4.8 Available Forms of Judicial Review or Appeal

Decisions of the Board are administrative acts, therefore, legal actions against them are to be pursued in accordance with the Turkish Administrative Procedural Law, which is a common procedure against the Board's decisions. The judicial review comprises both procedural and substantive review.

#### Administrative Courts

As per Law No 6352, which entered into force on 5 July 2012, the relevant parties can appeal against the final decisions of the Board, including on interim measures and fines, before the administrative courts in Ankara within 60 calendar days of the official service of the reasoned decision.

As stated in Article 27 of the Administrative Procedural Law, filing an administrative action does not automatically cease the execution of the decision of the Board. However, at the request of the plaintiff, the court may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages and if the decision is highly likely to be reversed (ie, showing of a prima facie case).

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 of the administrative court usually takes about eight to 24 months. The relevant parties can appeal against administrative courts' decisions before the regional courts within 30 calendar days of the official service of the reasoned decision of the administrative court.

#### Administrative Litigation

As of 20 July 2016, administrative litigation cases have been 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.

#### Regional Courts

The regional courts review the case on both procedural and substantive grounds, and their decisions will be considered final. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the parties can appeal against the decision of the regional court before the High State Court and, therefore, the decision will not be considered final. 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.

The judicial review of the administrative courts and appeal usually take about 24 to 30 months.

## 5. PRIVATE CIVIL LITIGATION INVOLVING ALLEGED CARTELS

### 5.1 Private Right of Action

See **1.3 Private Challenges of Cartel Behaviour/Effects**. There is no threshold requirement for private actions under Turkish law: any person who has been harmed by a competition law violation may claim damages.

In terms of the differences in standards for relief in a private civil action, in the Authority's proceedings, the purpose or intent to restrict competition is considered adequate to prove an infringement of the Competition Law. In civil actions, however, the plaintiff has to demonstrate the wrongful act, fault, damages and the causal link altogether.

As regards the forms of relief most commonly sought or obtained, since private action arising from competition law violations is a rather new concept in Turkish competition law, there is no publicly available court decision that has exhausted all appeal stages.

### 5.2 Collective Action

Turkish procedural law does not allow class actions or procedures. Group actions are permitted under Turkish Procedure Law No 6100 and can be initiated by associations and other legal entities aiming to protect the interest of their members, or determine their members' rights, remove the illegal situation, or prevent any future breach. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit. The court decision covers all individuals within the group.

### 5.3 Indirect Purchasers and "Passing-On" Defences

Indirect purchaser claims or "passing-on" defences have not yet been tested in the Turkish courts. See **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**.

### 5.4 Admissibility of Evidence Obtained From Governmental Investigations/ Proceedings

See **3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings.**

### 5.5 Frequency of Completion of Litigation

As explained in **4.2 Procedure for Plea Bargaining or Settlement**, the Settlement Regulation introduced a settlement procedure into Turkish cartel enforcement. Also, as mentioned in **5.1 Private Right of Action**, private action arising from competition law violations is a new concept in Turkish competition law, and there is no publicly available court decision that has exhausted all appeal stages. Therefore, it is not yet possible to comment on how often the claims of this type proceed to completed litigation as opposed to dismissal or settlement.

### 5.6 Compensation of Legal Representatives

The amount of attorney fees is based on the value of the claim. Under Article 330 of the Code of Civil Procedure, the court will determine the attorney fee based on the Minimum Attorneyship Fee Tariff. The fee generally ranges from 1% to 12% of the value of the claim.

Furthermore, under Article 329 of the Code of Civil Procedure, a malevolent defendant or a complainant who takes legal action, although they do not have any legal ground to take such an action, could be obliged to compensate the other party's contractual attorney fees, in addition to the amount determined pursuant to the Minimum Attorneyship Fee Tariff.

### 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

As stated under Article 329 of the Code of Civil Procedure, a complainant who takes legal action, although they do not have a right to do so, could be obliged to compensate the other party's contractual attorney fees, in addition to the amount determined pursuant to the Minimum Attorneyship Fee Tariff, along with the litigation costs. However, the amount of the cost (defence

costs and/or attorneys' fees) depends on the nature of the case.

As mentioned in **5.2 Collective Action**, class actions have not yet been adopted by Turkish law.

### 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

As a general rule, according to the Turkish law of procedure, plaintiffs or defendants can appeal the decision of the general civil courts before the Regional Courts of Civil Chambers within two weeks of the reasoned general civil courts' decision. Parties to a lawsuit can also appeal the decision of the Regional Courts of Civil Chambers within two weeks of the reasoned appealable decision before the High Court of Appeal.

## 6. SUPPLEMENTARY INFORMATION

### 6.1 Other Pertinent Information

There are no other items of information that are pertinent to an understanding of the process, scope and adjudication of claims involving alleged cartel conduct in Turkey.

### 6.2 Guides Published by Governmental Authorities

The Authority has published two important guidelines regarding cartel conduct:

- Guidelines on the Explanation of the Regulation on Active Co-operation For Detecting Cartels; and
- Guidelines on Horizontal Co-operation Agreements.

There is also an "application guideline" on the Authority's website that provides basic information on Article 4 infringements and the leniency procedure.

**ELIG Gürkaynak Attorneys-at-Law** is committed to providing high-quality legal services, combining a solid knowledge of Turkish law with a business-minded approach to develop legal solutions to meet the ever-changing needs of clients in their international and domestic operations. The competition law and regulatory department is led by the founding partner Gönenç Gürkaynak, along with four partners, eight counsel and 40 associates. In addition to unparalleled experience in merger control issues, the firm 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. The firm represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters while collaborating with many international law firms.

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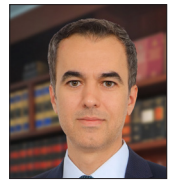

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