Cartels Comparative Guide

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1.Legal and enforcement framework

1. 1. Which legislative and regulatory provisions apply to cartels in your jurisdiction?

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The main legislation on cartels is Law 4054 on the Protection of Competition. Article 4 of Law 4054 lays down the essential principles of cartel regulation. Law 4054 was relatively recently subject to certain amendments which passed through the Grand National Assembly of Turkey on 16 June 2020, and entered into force on 24 June 2020.

Article 4 is essentially modelled on Article 101(1) of the Treaty on the Functioning of the European Union. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market, or a part thereof. As a general provision, Article 4 prohibits all forms of restrictive agreements, including any form of cartel. It also sets forth a non-exhaustive list of anti-competitive practices that potentially violate Law 4054, which include most common types of cartels, such as price fixing, market sharing and concerted control of output or input.

Secondary legislation issued by the Turkish Competition Authority (TCA) also 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 ('Regulation on Fines') sets out the range of the base fines for cartels. Under the Regulation on Active Cooperation for Detecting Cartels ('Regulation on Active Cooperation'), cartel members that actively cooperate with the authority may be granted full immunity or a discounted fine, depending on the timing of their leniency application.

Cartel-type violations fall within the scope of 'hard-core violations' that cannot benefit from the *de minimis* principle set out in Communiqué 2021/3 on *De Minimis* Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings and Communiqué 2021/2 on Remedies for Preliminary Investigations and Investigations on Anti-competitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position.

1. 2. Do any special regimes apply to cartels in specific sectors?

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No sector-specific violations or defences are provided under the framework of Law 4054. There are no exemptions and/or sector-specific rules in terms of cartel cases. Along with the other provisions of Law 4054, the rules governing cartels apply to all entities, provided that they qualify as an 'undertaking' within the meaning of Law 4054. Under Article 3 of the law, 'undertakings' are "real and legal persons who produce, market and sell goods or services in the market, as well as units that can make independent decisions and form an economic whole". Law 4054 does not exempt any sector or activity as a whole from its scope of application. State-owned entities are also captured by Article 4, as confirmed by various decisions of the Turkish Competition Board.

1. 3. Which authorities are responsible for enforcing the cartel legislation?

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Competition law in Turkey is enforced by the TCA, a legal entity with administrative and financial autonomy, which consists of the Competition Board and six divisions with sector-specific focuses. The Competition Board is the decision-making body of the TCA and is responsible, among other things, for deciding whether agreements, concerted practices and decisions of undertakings active in various markets restrict competition.

1. 4. How active are the enforcement authorities in investigating and taking action against cartels in your jurisdiction? What are the statistics regarding past and ongoing cartel investigations? What key decisions have the enforcement authorities adopted most recently?

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Although the TCA does not officially publish specific statistics solely on cartel investigations, its investigations concerning horizontal violations within the scope of Article 4 of Law 4054 provide some valuable insight in this regard.

The TCA's annual report for 2021 stated that the Competition Board decided a total of 74 cases relating to competition law violations in 2021. Of those, 40 cases were subject to Article 4 of Law 4054 and 11 cases were subject to both Article 4 and Article 6 of Law 4054. The Competition Board concluded 44 of the cases through fully fledged investigations and 29 cases through preliminary investigations; while one case was concluded in the first examination without opening a preliminary investigation. The Competition Board rejected the allegations of violations of competition law in 44 of those cases; while 25 cases resulted in the imposition of monetary fines and five concluded with commitments proposed by undertakings. The sectors that came under the most intensive scrutiny were, in the following order:

- food (eg, production, wholesale, retail);
- machines (eg, including household appliances, electronics);
- information technologies and platform services;
- healthcare services; and
- chemicals and mining.

Finally, the Competition Board issued monetary fines amounting to a total of TL 4,355,666,695 in 2021.

One of the recent prominent cases was the Competition Board's investigation into fast-moving consumer goods chain stores (Decision 21-53/747-360 of 28 October 2021). The Competition Board concluded that A101, Şok, Carrefour SA, BİM and Migros had been exchanging competitively sensitive information and setting retail prices; and that Savola had facilitated the price coordination between these retailers as their common supplier. Accordingly, the Competition Board determined that the relevant undertakings had formed a hub and spoke cartel and imposed administrative monetary fines on the grounds of violation of Article 4 of Law 4054.

In harmony with its continuing focus on the fast-moving consumer goods sector, the Competition Board concluded another investigation just before the end of 2022 (Decision 22-55/863-357 of 15 December 2022) following its recent investigation (Decision 21-53/747-360 of 28 October 2021). As a result of this latest investigation, the Competition Board imposed administrative monetary fines based on a hub and spoke cartel once again (also in conjunction with resale price maintenance practices) while also fortifying its decisional practice in terms of the application of *ne bis in idem* principle by way of not imposing administrative monetary fines to certain chain stores and suppliers/retailers.

The Competition Board's recent healthcare sector decision (Decision 22-10/152-62 of 24 February 2022) is a significant example of its enforcement activity: it investigated 29 undertakings and associations of undertakings and imposed monetary fines under three different violations. Considering price fixing regarding freelance doctors and other services as a single violation, the Competition Board concluded that six undertakings had established a pricing cartel in two different cities. On the other hand, the Competition Board found that the practices of 16 undertakings aimed at limiting competition in the labour market by preventing personnel transfers and wage fixing constituted another single violation of Article 4 of Law 4054. Finally, the Competition Board imposed administrative monetary fines on eight undertakings on the grounds of exchanging competitively sensitive information; seven undertaking were found to have been directly active in information exchange, while one was a facilitator.

Importantly, the Competition Board's *Beypazarı/Kınık* decisions (Decision 22-17/283-128 of 14 April 2022 and Decision 22-23/379-158 of 18 May 2022) constitute the first combined application of the settlement and leniency mechanisms. The Competition Board applied a 25% reduction (the highest possible reduction) under the Regulation on the Settlement Procedures to be Applied during Investigations Regarding Anti-competitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance ('Settlement Regulation') and a 35% reduction under the leniency application, reducing the administrative monetary fine by 60% in total. Thus, the monetary fines imposed on Kınık were significantly reduced from TL 2,322,328.75 to TL 928,931.50. For Beypazarı, which applied for lenience after Kınık, the monetary fines were also reduced significantly, from TL 21,885,323.28 to TL 9,848,395.48.

2.Definitions and scope of application

2. 1. How is a 'cartel' defined in the cartel legislation?

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Similar to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), Article 4 of Law 4054 does not define the term 'cartel' explicitly. However, Article 4 of Law 4054 prohibits all kinds of restrictive agreements, including any form of cartel agreement. Article 4 of Law 4054 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Additionally, Article 4 of Law 4054 sets out a non-exhaustive list which provides examples of possible restrictive agreements.

In line with Article 101(1) TFEU, Article 4 of Law 4054 includes price-fixing, market allocation and refusal to deal agreements as examples of restrictive agreements that have consistently been deemed to be anti-competitive *per se*.

Furthermore, cartels are explicitly defined by the secondary legislation of the Turkish Competition Authority (TCA) – namely the Regulation on Fines and the Regulation on Active Cooperation. 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 cartel activity (see Article 3 of the Regulation on Fines and Article 3 of the Regulation on Active Cooperation).

2. 2. What specific offences are defined in the cartel legislation?

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As explained in question 2.1, according to the Regulation on Fines and the Regulation on Active Cooperation, "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 considered as cartels (see Article 3 of the Regulation of Fines and Article 3 of the Regulation on Active Cooperation).

2. 3. Is liability under the cartel legislation civil, criminal or both?

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The Turkish cartel legislation is administrative and civil in nature, not criminal. That said, certain antitrust violations, such as bid rigging in public tenders and illegal price manipulation, may also be criminally prosecutable, depending on the circumstances.

2. 4. Can both individuals and companies be prosecuted under the cartel legislation?

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Law 4054 applies to 'undertakings' and 'associations of undertakings'. An 'undertaking' is defined as a single integrated economic unit that is capable of acting independently in the market to produce, market or sell goods and services. Law 4054 therefore applies to individuals and corporations alike, if and to the extent that they act as an undertaking within the meaning of Law 4054.

Additionally, pursuant to Article 16 of Law 14 and Article 8 of the Regulation on Fines, employees or members of executive bodies of undertakings or associations of undertakings that had a determining effect on a cartel may also be fined between 3% and 5% of the fine imposed on the relevant undertaking or association of undertakings.

2. 5. Can foreign companies be prosecuted under the cartel legislation?

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Turkey is an 'effect theory' jurisdiction. According to Article 2 of Law 4054, the Competition Board has jurisdiction over any cartel that affects Turkish markets, regardless of:

- the nationality of the cartel members;
- where the cartel activity has taken place; and
- whether the members have a subsidiary in Turkey.

The Competition Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there has been an effect on the Turkish markets (see *The Suppliers of Rail Freight Forwarding Services for Block Trains and Cargo Train Services*, Decision 15-44/740-267 of 16 December 2015; *Güneş Ekspres/Condor*, Decision 11-54/1431-507 of 27 October 2011; and *Imported Coal*, Decision 10-57/1141-430 of 2 September 2010).

2. 6. Does the cartel legislation have extraterritorial reach?

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As explained in question 2.5, Article 2 of Law 4054 captures all restrictive agreements, decisions, transactions and practices to the extent they affect a Turkish market, regardless of where the conduct takes place. That said, the specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of Law 4054 at least supports 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, it is fair to say that export cartels do not fall within the scope of jurisdiction of the Authority as per Article 2 of Law 4054. In *Poultry Meat Producers* (Decision 09-57/1393-362 of 25 November 2009), the TCA launched an investigation into allegations that included, among other things, an export cartel. The Competition Board found that export cartels are not sanctioned as long as they do not affect the markets of the host country. Although some other decisions (*Paper Recycling*, Decision 13-42/538-238 of 8 July 2013) suggest that the TCA might sometimes be inclined to claim jurisdiction over export cartels, it is fair to assume that an export cartel would fall outside of the TCA's jurisdiction if and to the extent that it does not produce an impact on Turkish markets.

2. 7. What is the statute of limitations to prosecute cartel offences in your jurisdiction?

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The Competition Board can impose administrative monetary fines on a cartel within eight years of the date of the infringement. If cartel infringement is ongoing, this eight-year period is counted from the date on which the infringement ceases or is repeated. The eight-year limitation period is suspended where the board takes any action to investigate a claimed cartel infringement. In a recent decision concerning the welding industry, the Competition Board found that three undertakings had entered into a price-fixing agreement in 2011 (Decision 21-20/247-104 of 8 April 2021). That said, the Competition Board imposed no administrative fines on the undertakings, given that the evidence that demonstrated the competition law violation was time-barred and there was no evidence of a violation post 2011.

In private litigation, the general provisions of the Turkish Code of Obligations are applicable with regard to limitation periods. Accordingly, a damages claim against a cartel can be brought before a court within 10 years of the event which gave rise to the damage to the plaintiff. The prosecution of criminal offences (eg, bid rigging and illegal price manipulation) is subject to the criminal statute of limitations, which may vary depending on the severity of the sentence that may be imposed.

3.Investigations – general

3. 1. On what grounds may the enforcement authorities commence an investigation?

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The Competition Board is entitled to launch an investigation into an alleged cartel *ex officio* or in response to a notice, complaint or leniency application. A notice or complaint may be submitted orally or through a petition. The Turkish Competition Authority (TCA) has an online system through which complaints may be submitted via an online form on its official website. The Competition Board will commence a preliminary investigation if the notice or complaint concerns an alleged violation within the scope of Law 4054. If, after this preliminary investigation, the board finds these allegations "serious and sufficient" under Article 42 of Law 4054, it will initiate a fully fledged investigation. Although this is exceptional in practice, the board may also initiate a fully fledged investigation directly without a preliminary investigation.

Additionally, for the standard of proof adopted by the Competition Board, see question 4.8.

3. 2. What investigatory powers do the enforcement authorities have in conducting their investigation?

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The Competition Board and the case handlers authorised by the board are entitled to request all information deemed necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period specified by the board. Failure to comply with a request for information may lead to a turnover-based fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (or, if this is not available, the turnover generated in the financial year closest to the date of the fining decision). The minimum fine is TL 47,409 until 31 December 2022. Where incorrect or incomplete information is provided in response to a request for information, the same penalty may be imposed.

Article 15 of Law 4054 also authorises the board to conduct on-site investigations and dawn raids. Accordingly, the board is entitled to:

- perform on-site inspections and examine records, paperwork and all sorts of documents;
- take copies of such documents; and
- request written or oral explanations on the premises of the subject entity.

The TCA can also:

- inspect and make copies of all information and documents held on companies' electronic media and information systems; and
- investigate computer records, phone records, emails and other correspondence (eg, WhatsApp messages), including deleted items.

Refusal to grant case handlers access to business premises may lead to a fixed fine of 0.5% of the Turkish turnover generated in the financial year preceding the date of the fining decision (or, if this is not available, the turnover generated in the financial year closest to the date of the fining decision). It may also lead to a fine of 0.05% of the Turkish turnover generated in the financial year preceding the date of the fining decision for each day of violation (or, if this is not available, the turnover generated in the financial year closest to the date of the fining decision).

Case handlers can obtain a court order to conduct a dawn raid where the relevant undertaking refuses to allow the dawn raid. Other than that, case handlers do not need a court order for dawn raids.

While Law 4054 requires the relevant undertaking's employees to provide oral explanations during dawn raids, in practice, case handlers will allow a delay in responding, so long as there is quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers during dawn raids on information they are not certain of at the time, provided that a written response is submitted within a mutually agreed timeframe.

Pursuant to Article 15 of Law 4054, case handlers must carry with them an authorisation certificate when conducting on-site inspections, detailing the subject matter and purpose of the inspection, and explaining that an administrative fine will be imposed should incorrect information be provided. The case handlers' authorisation for dawn raids is therefore limited to the scope set out in this certificate.

3. 3. To what extent may the enforcement authorities cooperate with their counterparts in other jurisdictions during their investigation? How common is such cooperation in practice?

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Article 43 of Decision 1/95 of the EC-Turkey Association Council authorises the TCA to notify and request the European Commission (Directorate-General of Competition) to apply relevant measures if it believes that cartels organised in the territory of the European Union are adversely affecting competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the European Union and Turkey), and thus the European Commission can likewise request the TCA to apply relevant measures to restore competition in relevant markets. There are also a number of bilateral cooperation agreements between the TCA and competition agencies in other jurisdictions on cartel enforcement matters.

3. 4. Is there an opportunity for third parties to participate in the investigation?

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The Competition Board is entitled to request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations may participate in the investigation process by providing the necessary information. Although third parties cannot request access to the file under Communiqué 2010/3 on Regulation of the Right to Access Files and the Protection of Commercial Secrets, they can apply for information under Law 4982 on the Right to Information. On third parties' intervention in appeals of Competition Board decisions, see question 7.2

3. 5. What are the general rights and obligations of the enforcement authorities during the investigation?

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See questions 3.2 and 3.6.

3. 6. What are the general rights and obligations of the target company during the investigation?

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See question 3.2. In addition, target companies are entitled to protect confidential or proprietary information. The main legislation regarding protection of commercially sensitive information is Article 25(4) of Law 4054 and Communiqué 2010/3. Communiqué 2010/3 places the burden of identifying commercial secrets and justifying such classification on undertakings. Therefore, undertakings must request confidentiality from the Competition Board and justify the reasons for confidentiality of the information or document in writing. Under Article 15(2) of Communiqué 2010/3, the TCA may not take confidentiality requests into consideration if they relate to information and documents that are indispensable as evidence of competition infringement. In such cases, the TCA can disclose information and documents that could be considered as trade secrets, by taking into account the balance between the public interest and private interest, and in accordance with the principle of proportionality.

Additionally, target companies have the right to access the case file under two legal grounds in the Turkish competition law regime: Law 4982 on the Right to Information and Communiqué 2010/3. Article 5/1 of Communiqué 2010/3 provides that the right to access the case file will be granted upon written request of the parties within due time during the investigation. This gives 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 case file under Communiqué 2010/3, but can apply for information under Law 4982.

3. 7. What principles of attorney-client privilege apply during a cartel investigation?

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Correspondence with an independent attorney may benefit from attorney-client privilege, provided that it relates to the right of defence; communications with in-house counsel are not covered by this privilege. In *Sanofi Aventis* (Decision 09-16/374-88 of 20 April 2009), the Competition 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* (Decision 14-29/496-262 of 20 August 2014), the board took another major step in favour of attorney-client privilege by elaborating on the conditions of the Court of Justice of the European Union under which privilege will apply, and concluding that the same rules will apply under Turkish competition law. Additionally, the board discussed the basic principles of legal professional privilege, considering its definition, scope, enforcement and boundaries, in *Dow* (Decision 15-42/690- 259 of 2 December 2015) and *EnerjiSA* (Decision 16-42/686-314 of 6 December 2016). Accordingly, if a document includes correspondence between the undertaking and external counsel (who is not an employee of the undertaking) and relates to the exercise of the undertaking's right of defence, that document will be protected under attorney-client privilege. Accordingly, if the document includes counsel's advice regarding how to infringe competition law or how to cover up an infringement, this will not be protected by privilege. The Competition Board also indicated in *Huawei* (Decision 19-40/670-288 of 14 November 2019) and *Çiçeksepeti* (Decision 20-32/405-186 of 2 July 2020) that correspondence between an undertaking and its in-house counsel will not benefit from attorney-client privilege.

That said, the Eighth Administrative Chamber of the Ankara Regional Administrative Court issued a unique decision on attorney-client privilege in 2018 (*EnerjiSA,* Decision 2018/1236 of 10 October 2018). The decision concerned an internal review report of outside counsel for competition law compliance purposes, which had been prepared before the TCA opened an investigation against EnerjiSA. The report was taken by the case handlers during a dawn raid conducted in the scope of the investigation against this company at a later stage. The court held that although the document was correspondence "between an independent attorney and the undertaking", it was not protected under attorney-client privilege given that "it was not directly related to the right to defence", due to its preparation prior to an investigation. In line with this, the Competition Board resolved in *Warner Bros* (Decision 19-04/36-14 of 17 January 2019) that documents obtained during an on-site inspection were dated before the initiation of the relevant preliminary investigation by the board and thus could not benefit from attorney-client privilege, given that they were not directly related to the right to defence.

In the Competition Board's relatively recent *DSM Grup* decision (Decision 21-24/287-130 of 29 April 2021), DSM Grup requested the TCA to return documents which had been seized during an on-site inspection and considered to benefit from attorney-client privilege. However, the Competition Board rejected the request on the grounds that the relevant documents did not benefit from such privilege since they did not qualify as correspondence with an independent attorney related to the exercise of the undertaking's right of defence.

3. 8. Are details of the investigation publicly announced? If so, what principles of confidentiality apply?

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Article 53 of Law 4054 provides that "decisions of the Board are published on the website of the Authority in such a way not to disclose the trade secrets of the parties". That said, undertakings must request confidentiality from the TCA and justify their reasons for the confidentiality of the information or document in writing. The TCA may not consider confidentiality requests relating to information and documents that are indispensable as evidence of competition infringement. In such cases, the TCA may disclose such information and documents that could be considered as trade secrets, by taking into account the balance between the public interest and private interest, and in accordance with the principle of proportionality.

4.Investigations – step by step

4. 1. What initial steps do the enforcement authorities take to commence a cartel investigation?

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See question 3.1. During a preliminary investigation, 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 preliminary investigation process. At the end of this preliminary stage, a preliminary investigation report of the case handlers will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the board. The board will then decide within 10 days whether to launch a formal investigation. If the board decides to initiate an investigation, it will send notice to the undertakings concerned within 15 days.

Although this is exceptional in practice, the Competition Board may also initiate a fully fledged investigation directly without a preliminary investigation.

4. 2. Are dawn raids commonly conducted in your jurisdiction? If so, what are the pre-conditions for conducting a dawn raid? When, where and by whom are they conducted? Do the enforcement authorities have the power to search private as well as company premises?

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See question 3.2.

Pursuant to Article 15 of Law 4054, the Turkish Competition Authority (TCA) can conduct dawn raids "at undertakings and associations of undertakings". This should be (and is in practice) interpreted as the company premises only, since Article 21 of the Turkish Constitution provides that no domicile may be entered or searched without a warrant from a court on certain grounds, or unless there is a written order of an agency authorised by law in cases where delay is prejudicial, again on certain grounds. Also, the decision of the competent authority shall be submitted for the approval of the court. The TCA is not among the agencies authorised to search premises.

4. 3. What powers do officers have during the dawn raid? Are there any limitations on these powers?

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See question 3.2.

4. 4. What are the rights and obligations of the target company and any individuals targeted during a dawn raid?

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As explained in question 3.2, Law 4054 requires the relevant undertaking's employees to provide oral explanations during dawn raids, although case handlers will allow a delay in responding so long as there is quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers during dawn raids on information they are not certain of at the time, provided that a written response is submitted within a mutually agreed timeframe.

The relevant parties have a right to legal counsel. The company's legal counsel can be present in order to supervise the inspection. Counsel may be a company lawyer and/or an independent lawyer. That said, case handlers of the TCA who conduct the dawn raid are not obliged to wait for the undertaking's counsel to assist with the dawn raid. Indeed, in *Çekok Gıda* (Decision 18-04/56-31 of 8 February 2018), in which it imposed a fine on an undertaking for obstructing a dawn raid, the Competition Board dismissed an argument that the delay was caused by the wait for external counsel to arrive.

4. 5. What evidence can be seized during a dawn raid? Do the enforcement authorities have the power to interview witnesses and take statements during a dawn raid?

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See question 3.2.

4. 6. How can a company best prepare itself for dawn raids? What best practices should it follow in the event of a dawn raid?

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In order to avoid the risk of an administrative monetary fine, case handlers should be allowed to:

- access business premises and examine the books, paperwork and all information and documents held in

the electronic media and information systems of undertakings; and
- if necessary, take copies of the same without prejudice to attorney-client privilege.

As stated in question 4.4, the company's legal counsel can be present in order to supervise the inspection. The lawyer may be a company lawyer and/or an independent lawyer. During a dawn raid, legal counsel should assist the client without obstructing the inspection of the case handlers. In addition, legal counsel should supervise the inspection and intervene as necessary if case handlers exceed the scope of their authorisation during the dawn raid. The most common reasons for the intervention of legal counsel during a dawn raid include preventing the case handlers from obtaining documents that are protected by attorney-client privilege or outside the scope of the relevant investigation.

4. 7. What are the next steps in the cartel investigation following a dawn raid? What timeframe do these typically follow?

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If the dawn raid is conducted during a preliminary investigation, this investigation must be completed within 30 calendar days of the date on which the Competition Board opened the preliminary investigation. At the end of this period, the case team will prepare a so-called 'preliminary investigation report' for the board, explaining its findings and including its recommendation on whether to proceed with a fully fledged investigation. The board will decide whether to launch a full investigation within 10 calendar days. If the board decides to initiate a full investigation, it will send notice to the undertakings concerned. The parties then have 30 calendar days to submit their first written defence against the investigation notice. The investigation is completed within six months with the issue of the case team's investigation report (the equivalent of the European Commission's statement of objections). If deemed necessary, this period may be extended by the Competition Board for an additional period of up to six months.

Once the investigation report has been served on the parties, they have 30 calendar days to respond, extendable for another 30 calendar days (second written defence). The case team then has 15 calendar days (extendable for a further 15 calendar days) to prepare an opinion concerning the second written defence. The parties will have another 30-day period to reply to the additional opinion (third written defence), which can be extended for an additional 30 calendar days. Once the parties' responses to the additional opinion have been submitted to the TCA, the investigation process will be completed (ie, the written phase of the investigation involving claim or defence exchange closes on submission of the third written defence).

After the third written defence, an oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held between 30 and 60 days following completion of the investigation process under Communiqué 2010/2 on Oral Hearings before the Competition Board. The board will render its final decision within 15 calendar days of the hearing if an oral hearing is held or within 30 calendar days of completion of the investigation process if no oral hearing is held. Any appeal must be brought within 60 calendar days of official service of the reasoned decision.

4. 8. What factors will the enforcement authorities consider in assessing whether cartel activity has taken place?

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In order to prove an undertaking's participation in cartel activity, the Competition Board must demonstrate that there was such cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. The board has established a relatively low standard of proof concerning cartel activity, with a broad interpretation of Law 4054 and especially Article 4, which states that conduct whose object or effect is to restrict competition is prohibited. The standard of proof is even lower insofar as concerted practices are concerned. In practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice, but is rather based on economic and rational business decisions. Law 4054 provides for a "presumption of concerted practice", which enables the Competition Board to bring an Article 4 case where price changes in the market, supply-demand equilibrium or fields of activity of enterprises resemble those in markets where competition is obstructed, disrupted or restricted. That said, in most decisions, the board has recognised that companies may consciously follow the commercial strategies of their competitors and, in the absence of communication between competitors regarding a collusion or exchange of commercially sensitive information, parallel conduct alone will be insufficient to meet the standard of proof for a cartel.

4. 9. In case of a finding of cartel activity, can the company seek to negotiate a settlement, plea bargain or similar resolution? If so, what is the process for doing so?

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As a result of amendments to Law 4054 which were introduced in 2020, the main points of the new settlement mechanism are set out in Article 43 of the law. Based on this, the Competition Board may initiate a settlement process in view of the procedural efficiencies and any differences of opinion regarding the existence or scope of the violation.

As per Article 43, the settlement process can be commenced only after the initiation of the investigation, and must be concluded before the official service of the investigation report (the statement of objections, which identifies the competition law concerns). Once the parties have officially confirmed their intention to pursue settlement through the submission of a written application to the TCA, the Competition Board will set a definitive timeframe for the undertakings to submit a settlement letter. As this timeframe is definitive, the board will not consider submissions made once it has elapsed. Following the submissions of the undertakings, if the board decides to settle, the investigation will be closed with a final decision including the finding of a violation and the imposition of an administrative monetary fine, which may be reduced by up to 25% as a result of the settlement procedure. As per Article 17(6) of Law 5326 on Misdemeanours, the utilisation of the settlement mechanism does not prevent the application of the fine reduction. However, the Competition Board's decision on the administrative fine and the matters within the scope of the final settlement text is of a final nature and thus cannot be appealed before a higher court. The Settlement Regulation which entered into force on 15 July 2021 determines the other procedures and fundamentals of the settlement process. As regards the applicability of the settlement mechanism, Law 4054 imposes no restrictions in terms of the nature of the violation. The Settlement Regulation sheds light on the dual application of the Regulation on Active Cooperation and the Settlement Regulation. As per Article 10 of the Settlement Regulation, an undertaking may make a separate application in order to also benefit from leniency. To benefit from this, the undertaking concerned must apply for leniency before the settlement letter is submitted to the TCA.

According to the Settlement Regulation, if the TCA *ex officio* invites the investigation parties to settlement negotiations, the parties should declare whether they accept this invitation within 15 days. Article 4(4) of the regulation provides that the Competition Board has the discretion to grant a settlement reduction of between 10% and 25%, indicating that the actual reduction of fine due to settlement will not be less than 10%. Article 6(5) of the Settlement Regulation stipulates that the TCA will inform the settling party of:

- the content of the allegations;
- the nature and scope of the alleged violation;
- the main evidence on which the allegations are based;
- the potential reduction rate to be applied in case of settlement; and
- the range of potential administrative fines which might be imposed on the settling party.

Following the settlement negotiations, the Competition Board will adopt an interim decision, which includes the following, among other things:

- the nature and scope of the alleged violation;
- the maximum rate of the administrative fines in accordance with the Regulation on Fines; and
- the reduction rate to be applied at the end of the settlement procedure.

If the settling party agrees on the matters set forth therein, it will submit a settlement letter which includes an express declaration of admission as to the existence and scope of the violation. Article 9(1) of the Settlement Regulation provides that the Competition Board will adopt its final decision to end the investigation within 15 days of submission of the settlement letter. The board's final decision will include the finding of a violation and the administrative fine to be imposed on the settling undertaking.

5.Leniency

5. 1. Is a leniency programme in place in your jurisdiction? If so, how does this function?

Turkey
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The Regulation on Active Cooperation sets out the main principles of immunity and leniency mechanisms. The Turkish Competition Authority (TCA) has also published the Guidelines on Explanation of the Regulation on Active Cooperation to provide guidance on the application of the leniency programme.

A cartel member may apply for leniency until the investigation report has been officially served on it. Depending on the timing of the application, the applicant may benefit from full immunity or a fine reduction.

The first cartel member to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from full immunity. Employees and managers of the first applicant can also benefit from the full immunity granted to the applicant firm. However, the applicant must meet several conditions to receive full immunity from all charges. One of these is not to be the coercer of the reported cartel. If this is the case (ie, if the applicant forced the other cartel members to participate in the cartel), the applicant firm and its employees may receive only a fine reduction of between 33% and 100%. The other conditions are as follows:

- The applicant must 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 must not conceal or destroy information or evidence relating to the alleged cartel;
- The applicant must end its involvement in the alleged cartel, except where otherwise requested by the assigned unit on the grounds that investigating the cartel would become complicated;
- The applicant must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and
- The applicant must maintain active cooperation until the board has taken its final decision after the investigation is completed.

If an applicant does not qualify for full immunity, a fine reduction may still be available for applications filed before the investigation report is served. Accordingly:

- the second leniency applicant will be eligible for a reduction of 33% to 50%;
- the third leniency applicant will be eligible for a reduction of 25% to 33%; and
- all other applicants will be eligible for a reduction of 16% to 25%.

The same conditions for full immunity above also apply to fine reductions. Also see question 4.9 for details of the dual application of settlement and leniency procedures.

5. 2. What are the benefits of applying for leniency, both for the first mover and for subsequent applicants?

Turkey

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See question 5.1.

Amnesty Plus is also available under Article 7 of the Regulation on Fines. The fine to be imposed on an undertaking which cannot benefit from full immunity for this conduct can be reduced by 25% if it provides the information and documents specified in Article 6 of the Regulation on Active Cooperation prior to the Competition Board's preliminary investigation decision in relation to another cartel.

5. 3. What steps does a leniency application involve? What timeframe do these typically follow?

Turkey
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As stated in question 5.1, a cartel member may apply for leniency until the investigation report has been officially served. Although the Regulation on Active Cooperation does not provide detailed principles on the 'marker system', the TCA can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, the duration of the cartel and the names of the parties. A document (showing the date and time of the application and a request for time to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

5. 4. What are the rights and obligations of the applicant during the leniency application and over the course of its cooperation with the enforcement authorities?

Turkey
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According to the principles set forth under the Regulation on Active Cooperation, the applicant (ie, the undertaking or employees or managers of the undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the TCA. The same level of confidentiality also applies to subsequent cooperating parties.

Nevertheless, to the extent that the confidentiality of the investigation will not be harmed, the applicant undertakings can provide information to other competition authorities and institutions, organisations and auditors. The applicant is in any case obliged to maintain active cooperation until a final decision is taken by the Competition Board following the conclusion of the investigation. As per paragraph 44 of the Guidelines on Explanation of the Regulation on Active Cooperation, if the employees or personnel of the applicant undertaking disclose the leniency application to other undertakings and thus breach confidentiality, the board will evaluate the situation on a case-by-case basis based on whether the person at issue is a high-level manager and whether the board was notified promptly of the breach.

While the Competition Board can also evaluate information and documents *ex officio*, the general rule is that information and documents that are not requested to be treated as confidential will be treated as non-confidential. Undertakings must request confidentiality from the board in writing and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. Non-confidential information may become public through a reasoned decision.

Since active cooperation is required of all applicant cartel members in order to benefit from the leniency or immunity granted by the board, extra effort should be spent on keeping the board informed to the fullest extent possible regarding the cartel that is subject to investigation.

As regards settlement, plea bargaining and similar resolution procedures, see question 4.9.

5. 5. Is the leniency programme open to individuals? Can employees or former employees benefit from a leniency application filed by their employer? Do the authorities operate a programme for individual whistleblowers separate to the leniency programme?

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Pursuant to Articles 1, 4 and 5 of the Regulation on Active Cooperation, employees of a cartelist also benefit from the same level of leniency or immunity that is granted to the entity if the relevant conditions set out in questions 5.1 and 5.2 are met.

An executive or employee of a cartelist may also apply for leniency before the investigation report is officially served. Such an application is independent from any application by the cartel member itself. Depending on the application order, there may be total immunity from fine or a reduction in fine for such executive or employee. The reduction rates and conditions for immunity or reduction are the same as those for companies.

5. 6. Can leniency be denied or revoked? If so, on what grounds?

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On the conditions which an applicant must meet to receive full immunity from all charges or a fine reduction, see question 5.1. If these conditions are not met, the Competition Board can reject or revoke leniency.

6.Penalties and sanctions

6. 1. What penalties may be imposed in criminal proceedings on companies? What penalties may be imposed on individuals?

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As explained in question 2.3, the sanctions that may be imposed under Law 4054 are administrative in nature. Therefore, Law 4054 leads to the imposition of administrative fines (and civil liability), but not 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. Bid rigging may be prosecuted under Sections 235 and following of the Turkish Criminal Code if it relates to public tenders. Illegal price manipulation (ie, manipulation through disinformation or other fraudulent means) can also be punished by up to two years imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code.

Law 4054 applies to 'undertakings' and 'associations of undertakings'. An 'undertaking' is defined as a single integrated economic unit that is capable of acting independently in the market to produce, market or sell goods and services. Law 4054 therefore applies to individuals and corporations alike if they act as an undertaking.

The sanctions specified below 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/executive committee members of the infringing entities, if such individuals had a determining effect on the violation. Apart from these, there are no sanctions specifically for individuals.

For cartels, the Competition Board may impose a fine of up to 10% of the relevant company's Turkish turnover generated in the financial year preceding the date of the fining decision (or, if this is not available, the turnover generated in the financial year closest to the date of the fining decision). Employees and/or managers of an undertaking/association of undertakings who had a determining effect on the violation can also be fined up to 5% of the fine imposed upon the undertaking/association of undertakings.

6. 2. What penalties may be imposed in civil proceedings on companies? What penalties may be imposed on individuals?

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The most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. In this way, administrative enforcement is supplemented by private lawsuits. Articles 57 and following of Law 4054 entitle any party that is injured in its business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times the damages plus litigation costs and attorneys' fees. If individuals engage in business activities as an undertaking or are held responsible due to their determining effect on the violation, a lawsuit for treble damages can be brought against them.

6. 3. How are penalties in cartel cases determined? In deciding on the applicable penalties, will the enforcement authorities consider penalties imposed in other jurisdictions?

Turkey
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With reference to Law 5326, Article 16 of Law 4054 requires the Competition Board to consider the following factors when determining penalties:

- the level of fault and the extent of possible damage in the relevant market;
- the market power of the undertaking(s) within the relevant market;
- the duration and recurrence of the infringement;
- the cooperation or driving role of the undertaking(s) in the infringement;
- the financial power of the undertaking(s); and
- compliance with any commitments.

The Regulation on Fines sets out the methodology to calculate fines for anti-competitive conduct. According to the regulation, for cartels the basic fine will be between 2% and 4% of the company's turnover in the financial year preceding the date of the fining decision (or, if this is not available, the turnover generated in the financial year closest to the date of the fining decision); aggravating and mitigating factors are then factored in. The regulation also applies to executives or employees who have had a determining effect on the violation and provides for certain reductions in their favour.

In addition to monetary sanctions, the Competition Board is authorised to take all necessary measures to:

- terminate the restrictive agreement;
- remove all *de facto* and legal consequences of every action that has been taken unlawfully; and
- impose behavioural and structural remedies in order to restore the level of competition.

Additionally, Law 4054 authorises the board to take interim measures until the final resolution on the matter if there is a possibility of serious and irreparable damage. Such a restrictive agreement is void and unenforceable, with all its legal consequences.

The Competition Board does not take into account penalties imposed in other jurisdictions, as well as overlapping liability for damages in other jurisdictions.

6. 4. Can a defendant company pay the legal costs incurred by and/or penalties imposed on its employees?

Turkey
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There is no statutory law which prohibits a defendant company from paying the legal costs incurred by and/or penalties imposed on its employees. However, legal compensation of the employer will not result in the transfer of the legal liability for the costs incurred or fines imposed.

7.Appeal

7. 1. Can the defendant company appeal the enforcement authorities' decision? If so, which decisions of the authority can be appealed (eg, all decisions or just the final decision) and to which reviewing authority? What is the standard of review applied by the reviewing authority (eg, limited to errors of law or a full review of all facts and evidence)?

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As per Law 6352, which entered into force as of 5 July 2012, final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to the administrative courts for judicial review within 60 days of the receipt of the board's reasoned decision. Decisions of the board are considered administrative acts and thus legal actions against them shall be pursued in accordance with Law 2577 on Administrative Procedure. The judicial review comprises both procedural and substantive review.

As per Article 27 of Law 2577, filing an administrative action does not automatically stay execution of the decision of the Competition Board. However, upon the request of the plaintiff, the court, by providing its justifications, may decide to stay execution of the decision if this is likely to cause serious and irreparable damage and the decision is highly likely to be against the law (ie, showing of a *prima facie* case).

Decisions of the Ankara administrative courts are subject to appeal before the regional courts (appellate courts) and the Council of State. If the challenged decision is annulled in full or in part, the administrative court will remand it to the Competition Board for review and reconsideration.

7. 2. Can third parties appeal the enforcement authorities' decision, and if so, in what circumstances?

Turkey
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Pursuant to Article 2(1a) of Law 2577, anyone - including a third party - can appeal the Competition Board's decisions if it can prove an interest.

Third parties can also join appeal proceedings, subject to the relevant court's approval, if they have sufficient interest in the case. Pursuant to Article 66 of Code 6100 on Civil Procedure, to which Law 2577 refers on the intervention of third parties in appeals of administrative decisions, if a third party has a legitimate interest in the outcome of proceedings pending before the court and its rights will be directly affected by the outcome of the proceedings, it may seek to join the ongoing proceedings as an intervening party until a final decision is rendered. If the third party's legal interest will be affected by the ruling of the court, the intervention request should be deemed appropriate.

8.Private enforcement

8. 1. Are private enforcement actions against cartels available in your jurisdiction? If so, where can they be brought?

Turkey
ELIG Gürkaynak Attorneys-at-Law

See questions 1.3 and 6.2.

8. 2. Can private enforcement actions be brought against both companies and individuals?

Turkey
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As stated in question 2.4, both individuals and companies may violate competition law if they act as an undertaking within the meaning of Law 4054. Thus, if individuals engage in business activities as an undertaking and injure someone by reason of anything forbidden in the antitrust laws, a lawsuit for treble damages can be brought against them.

8. 3. Are class actions or other forms of collective action available in your jurisdiction?

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Turkish procedural law does not allow for class actions or procedures. Class certification requests are granted by the Turkish courts. While Article 73 of Law 6502 on the Protection of Consumers allows for class actions by consumer organisations, these are limited to violations of Law 6502 and do not extend to antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to bring class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under Articles 57 and following of Law 4054.

Turkish procedural law allows for group actions under Article 113 of the Turkish Procedure Law 6100. Associations and other legal entities may initiate a group action to:

- “protect the interest of their members”;
- “determine their members’ rights”; and
- “remove the illegal situation or prevent any future breach”.

However, group actions do not cover actions for damages. A group action can be brought before the court as a single lawsuit only. The verdict shall encompass all individuals within the group.

8. 4. What process do private enforcement actions follow?

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The case must be brought before the competent general civil court. As a general rule, plaintiffs or defendants can appeal decisions of the general civil courts before the regional courts of civil chambers within two weeks of the reasoned general civil court's decision. Parties to the lawsuit can also appeal the decision of regional courts of civil chambers within two weeks of the reasoned appealable decision before the Turkish Court of Cassation.

8. 5. What types of relief may be sought and what types of relief are most commonly awarded? How is the relief awarded determined?

Turkey
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As stated in question 6.2, Articles 57 and following of Law 4054 entitle any person that is injured in its business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times the damages plus litigation costs and attorneys' fees. In practice, courts usually do not analyse whether there has been a condemnable agreement or concerted practice, and instead wait for the Competition 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, a court decision can be obtained within a shorter timeframe in follow-on actions.

Claims for damages arising from competition law are ultimately subject to the general tort rules - that is, the Turkish Code of Obligations. Accordingly, in order 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.

In Turkish Competition Authority proceedings, the purpose or intent to restrict competition is considered adequate to prove infringement of Law 4054. In civil actions, however, the plaintiff must demonstrate all elements of wrongful act, fault, damage and casual link.

8. 6. Can the decision in a private enforcement action be appealed? If so, to which reviewing authority?

Turkey
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Yes; see question 8.4.

9.Trends and predictions

9. 1. How would you describe the current cartel enforcement landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

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One notable mechanism that was introduced by the 2020 amendments to Law 4054 was the settlement mechanism, which applies to cartels as well as other types of infringements. According to Article 43 of Law 4054, procedures and principles regarding the settlement procedure will be determined in due course through secondary legislation. In this respect, on 18 March 2021 the Turkish Competition Authority published the draft Regulation on the Settlement Procedures to be Applied during Investigations Regarding Anticompetitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance on its official website for public consultation. Following the public consultation period, the Settlement Regulation entered into force on 15 July 2021.

The draft amendment to Law 4054 which was prepared by the TCA in 2022 includes various proposed amendments to regulate digital markets. In particular, the amendment would introduce:

- several new definitions concerning digital markets (eg, relating to core platform services and undertakings with significant market power); and
- new obligations for undertakings with significant market power.

The draft amendment is a result of the TCA's efforts to regulate competition issues in digital markets, which have been ongoing since at least early 2021. The timing for its adoption remains unclear at this stage.

10.Tips and traps

10. 1. What would be your recommendations to companies faced with a cartel investigation and what potential pitfalls would you highlight?

Turkey
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An undertaking facing a cartel investigation should do the following:

- Immediately consult attorneys with extensive experience in Turkish Competition Authority (TCA) investigations in order to safeguard its right to defence and commence a self-compliance procedure regarding Law 4054;
- Cooperate with the TCA to the fullest extent possible;
- Not obstruct a dawn raid;
- Assess the severity of the documents/evidence obtained by the TCA and evaluate the risk of a potential sanction/administrative monetary fine resulting from the investigation;
- Consider whether it would be prudent or advantageous to apply for leniency or initiate settlement negotiations with the TCA. The leniency and settlement mechanisms also require the investigated undertakings to act in a timely manner due to the statutory deadlines; and
- Consider whether the risk of potential damages claims would outweigh the expected benefits of the

leniency and settlement mechanisms.

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