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2023

Global interview panel led by Hengeler Mueller

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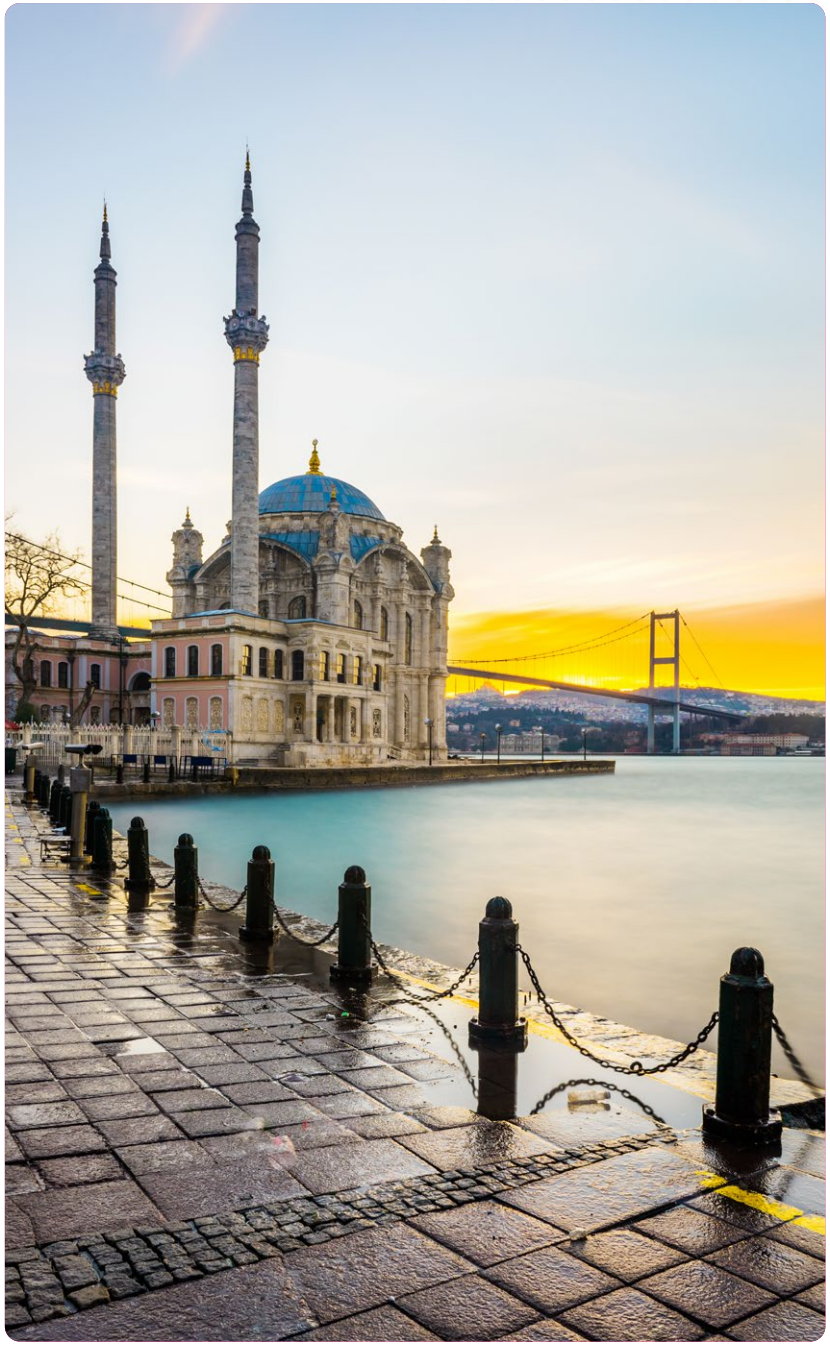

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Turkey

Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. He graduated from Ankara University Faculty of Law in 1997. Gönenç received his LLM degree from Harvard Law School, and his Bar memberships are as follows: Istanbul Bar, 1997; American Bar Association, 2001; New York Bar, 2001 (currently non-practising; registered); Brussels Bar, 2003–2004 (B List; not maintained); Member of the Law Society of England & Wales, 2004 (currently non-practising; registered).

Gönenç heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 52 lawyers. He has unparalleled experience in Turkish competition law, with more than 25 years of competition law experience. He represents multinational companies and large domestic clients in written and oral defences in Turkish Competition Authority investigations and merger clearances; and in antitrust appeal cases in the country's highest administrative court. He also coordinates worldwide merger notifications, drafts non-complete agreements and clauses and prepares hundreds of legal memoranda on a range of Turkish and EUR competition law topics.

Öznur İnanılır is a partner in ELIG Gürkaynak's regulatory and compliance department. She graduated from Başkent University Faculty of Law in 2005 and obtained her LLM in European law from London Metropolitan University in 2008. Öznur has extensive experience in all areas of competition law, including compliance matters, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The Turkish Competition Authority (the Authority) places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under Law No. 4054 on the Protection of Competition of 13 December 1994 (the Competition Law) has nonetheless been repeatedly underlined by the President of the Authority. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not set out a definition of a cartel, but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

There are no industry-specific offences or defences that lead to particular scrutiny. The Competition Law applies to all industries, without exception. Cement or ready-mix concrete producers, fast-moving consumer goods, pharmaceuticals, insurance, information and communication technology, healthcare, medical equipment, cleaning products, building materials, chemical and mining, petroleum, food (eg, production, wholesale, retail), traffic signal operations, gas stations, machines (eg, household appliances, electronics), roll-on/roll-off (ro-ro) transportation, consumer electronics products (including personal computers and games consoles), online booking and retail technology superstores, jewellery, aluminium and PVC technologies, glass and glass products, tobacco


Gönenç Gürkaynak


Öznur İnanılır

and alcoholic beverages, driving schools and bakery industries have all been under investigation for cartel and concerted practice allegations in previous years.

2 What do recent investigations in your jurisdiction teach us?

In 2020, the Competition Law was subject to essential amendments, which were passed by the Grand National Assembly of Turkey (Parliament) on 16 June 2020, and entered into force on 24 June 2020 (the Amendment Law), the day of its publication in Official Gazette No. 31165. The Amendment Law introduces certain significant substantive and procedural changes to the Competition Law, which to a certain extent apply to cartel infringements.

> "The Board is entitled to launch an investigation into alleged cartel activity *ex officio* or in response to a complaint."

The Authority's decision-making body, the Competition Board (the Board), is entitled to launch an investigation into alleged cartel activity *ex officio* or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent on the matter for 60 days. The Board decides to conduct a preliminary investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (eg, formal information-request letters) are used during the pre-investigation process. The preliminary report by the Authority's experts will be submitted to the Board within 30 days of the 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 a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended by the Board, once only, for an additional period of up to six months. Dawn raids and other investigatory tools are also used during the investigation process.

The investigated undertakings have 30 calendar days, as of the formal service of the notice, to prepare and submit their first written defence (the first written defence). Subsequently, the main investigation report is issued by the Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendible for a further 30 days (the second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence, which is extendible for a further 15 days under the Amendment Law. The defending parties will have another 30-day period to reply to the additional opinion (the third written defence). When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 days and at most 60 days of the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings before the 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. The appeal must be filed before the Ankara administrative courts within 60 calendar days of the official service of the reasoned decision. It usually takes around three to six months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterparty.

The Board may request any information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within

the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Overall, the Amendment Law introduces changes to article 15 that expand the scope of the Board's authority during dawn raids, and further details are provided in the newly enacted Guidelines on Examination of Digital Data During On-site Inspections. The amendments match the recent practice of the case handlers, and, currently, the Board is entitled to: (1) examine and make copies of all information and documents in companies' physical records, as well as those in electronic media and information technology systems (including but not limited to any deleted items); (2) request written or verbal explanations on specific topics; and (3) conduct on-site investigations with regard to any asset of an undertaking.

Within this scope, Guidelines on Examination of Digital Data during On-site Inspections enable the Authority to examine mobile devices (such as mobile phones and tablets), unless it is determined that such devices are used solely for personal use of a given employee. Regardless, the Board is authorised to conduct a quick review for any portable electronic device to determine the intended purpose.

Refusal to grant Authority staff access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

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The minimum fine to be applied in such cases is 105,688 lira for 2023.

Additionally, the secondary legislation (Communiqué No. 2021/3) which provides details on the process and procedure related to application of the de minimis principle came into force on 16 March 2021. Furthermore the Board enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021.

Overall the de minimis principle is not applicable to 'clear and hardcore violations'. On this note, Communiqué No. 2021/3 defines 'clear and hardcore violations' as:

"Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority does not possess any evidence to support a charge of cartel infringement."

'agreements and/or concerted practices as well as decisions and practices of associations of undertakings on the following subjects, the goal of which is to directly or indirectly prevent, distort or restrict competition in the market for a good or service, or which have led or may lead to such effects: 1) Price fixing among competing undertakings, allocation of customers, suppliers, regions or trade channels, restriction of supply amounts or imposing quotas, collusive bidding in tenders, sharing competitively sensitive information including future prices, output or sales amounts; 2) fixing flat or minimum sales rates of the buyer in a relationship between undertakings operating at different levels of a production or distribution chain.

A similar definition of 'clear and hardcore violations' is provided within Communiqué No. 2021/2. In other words, cartels do not benefit from the de minimis principle.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority does not possess any evidence to support a charge of cartel infringement. Employees or managers of the first applicant will also be totally immune; the applicant must, however, not have been the coercer. If the applicant has forced any other cartel members to participate in the cartel, it may only qualify for a reduction in fine of between 33 per cent and 50 per cent for the firm and between 33 per cent and 100 per cent for the employees or managers. There is a marker system for leniency applications: the Authority can grant a grace period to applicants for submission of the necessary information and evidence to complete their applications.

There is also no legal obstacle to submitting a leniency application orally, in which case, the information submitted should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives. Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately. Barring criminally prosecutable acts such as bid rigging in public tenders, there is no criminal sanction against employees for antitrust infringements in practice.

The Board may impose on the applicants a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in cases where incorrect or misleading information is provided (as discussed earlier).

In terms of leniency applications, the Board's most important decision concerning leniency applications was the Corporate Loans decision, which concerned 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey. The Board launched an investigation against these financial institutions to determine whether they had violated article 4 of the Competition Law by exchanging competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU) made a leniency application on 14 October 2015 to benefit from article 4 of the Regulation on Leniency. After 19 months of in-depth investigation, the Board unanimously concluded that BTMU, ING Bank AŞ (ING) and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi (RBS) had violated article 4 of the Competition Law. In this respect, the Board imposed an administrative monetary fine on ING and RBS

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in the amounts of 21.1 million lira and 66,400 lira, respectively, on their annual turnover in the financial year 2016 (note that monetary amounts given here and elsewhere are rounded for brevity). However, the Board resolved that an administrative monetary fine should not be imposed on BTMU following its leniency application, and granted full immunity to BTMU while also letting off the other investigated undertakings from imposition of an administrative monetary fine (28 October 2017; 17-39/636-276).

The Mechanical Engineering decision was another important decision concerning leniency applications. The Board initiated an investigation against 16 freelance mechanical engineers to determine whether they had violated article 4 of the Competition Law by being part of a profit-sharing cartel. One of the investigated undertakings applied for leniency during the course of the preliminary investigation. The Board concluded that 14 of the freelance mechanical engineers were engaged in a profit-sharing cartel. The leniency applicant received full immunity from fines and the Board also excused another of the

freelance mechanical engineers from imposition of an administrative monetary fine (14 November 2017, 17-41/640–279).

In its decision regarding undertakings active in the ro-ro transportation sector, the Board decided that the undertaking that applied for leniency should have its administrative fine halved in consideration of its application. The Board noted that the information provided by the leniency applicant significantly contributed to the investigation. The Board further noted that the relevant contributions included the information that the starting point of the violation was earlier than detected in the on-site inspection and evidence illustrating that price information was exchanged, the undertakings acting in violation of the law and further details on how the price exchange was conducted (18 April 2019; 19-16/229-101).

Moreover, in another leniency case, initiated following a leniency application by Arçelik Pazarlama AŞ (Arçelik) upon discovery of sharing of insider information by an Arçelik employee with various companies, including Arçelik's competitor Vestel Tipcart AŞ (Vestel), the Board found that Arçelik and Vestel had not violated article 4 of the Competition Law as the investigated practices took place without the knowledge of the senior management, and so did not meet the mutual agreement criteria and did not constitute concerted practices. (2 January 2020, 20-01/13-5).

Additionally, the Board has launched an investigation against 12 undertakings operating in the market for auto expertise for violating article 4 by way of collectively fixing prices, coming to an agreement between their competitors in order to prevent providing services on Sundays or providing services in turns through designated undertakings. Süper Test Oto Ekspertizlik Hizmetleri Sanayi ve Ticaret Ltd Şti (Süper Test), made a leniency application on 4 April 2019, by providing information and documents including the names of the participants, dates and places regarding the cartel enforcement activity. Upon the Board's finding that the information and document

QUESTIONS

"There is also no legal obstacle to submitting a leniency application orally, in which case, the information submitted should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives."

stipulating the dates, parties and conduct of the violation provided by Süper Test contributed to the investigation, the Board reduced the administrative fine to be imposed on Süper Test by half pursuant to the Regulation on Fines, while also imposing administrative fines for the remaining investigated parties (9 July 2020, 20-33/439-196).

Finally, in the *Beypazarı/Kınık* decisions, the Board decided that the undertakings violated the article 4 of the Competition Law by way of implementing fixed prices, exchanging current and future price information and therefore establishing a cartel. The Board found evidence on exchange of information on future prices and decided that Beypazarı and Kınık were in an agreement for the purpose of restricting competition, in other words, in a cartel agreement. Importantly, these decisions constitute the first combined application of the settlement and leniency mechanisms. The Board applied a 25 per cent 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 (the Settlement Regulation) and a 35 per cent reduction under the leniency application, reducing the administrative monetary fine by 60 per cent in total. Thus, the monetary fines imposed on Kınık were significantly reduced from 2.322,329 lira to 928,932 lira. For Beypazarı, which applied for lenience after Kınık, the monetary fines were also reduced significantly, from 21,885,324 lira to 9,848,395 lira (14 April 2022; 22-17/283-128 and 18 May 2022; 22-23/379-158).

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The Amendment Law introduces de minimis, commitment and settlement mechanisms under article 43 of the Competition Law

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in an effort to duly conclude investigation processes. Furthermore the Board enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021. The Board also enacted Communiqué No. 2021, which provides details on the process and procedure related to application of the de minimis principle came into force on 16 March 2021

The de minimis principle applies to (1) the agreements signed between competing undertakings, if the total market share of the parties to the agreement does not exceed 10 per cent in any of the relevant markets affected by the agreement, and (2) the agreements signed between non-competing undertakings. If the market share of each of the parties does not exceed 15 per cent in any of the relevant

"The Board can decide not to launch a fully-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure."

markets affected by the agreement, the relevant agreements do not significantly restrict competition in the market.

The commitment mechanism allows parties to voluntarily offer commitments during a preliminary or fully fledged investigation to eliminate the Authority's competition concerns in terms of article 4 (anticompetitive agreements) and article 6 (abuse of dominant position). Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a fully-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. The parties are allowed to submit commitments within the three months following the official service of the investigation notice.

This commitment mechanism is not applicable to hard core violations, including price-fixing, territory or customer sharing, and restriction of supply; in other words, it is not applicable to cartels. Nonetheless, the settlement mechanism is applicable to hard core violations – that is, it is applicable to cartels.

Under the settlement mechanism, the Board may, *ex officio* or upon parties' request, initiate a settlement procedure. As per the Regulation on The Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, parties that admit to competition infringement before the official notification of the investigation report, may benefit from a reduction of the administrative monetary fine from 10 per cent to 25 per cent. The parties may not bring a dispute on the settled matters or the administrative monetary fine once an investigation has been finalised with a settlement.

In its first ever settlement decision the Board announced on its official website that its investigation against Türk Philips Ticaret AŞ (Philips Turkey), Dünya Dış Ticaret Ltd Şti, Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don İnş San Tic AŞ, Nit-Set Ev Aletleri Paz San ve Tic Ltd Şti and GİPA Dayanıklı Tüketim Mamülleri Tic AŞ, based on the allegation that Philips Turkey violated article 4 of the Competition Law by way of determining its dealer's resale prices, was concluded with a settlement decision for each investigated party through the Board's decision (5 October 2021, 21-37/524-258).

In another decision, the Board had launched an investigation against Coca-Cola and found that Coca-Cola held a dominant position in the 'carbonated drinks', 'cola drinks' and 'aromatic carbonated drinks' markets and abused its dominance by way of using its rebate system and refrigerator policies that restricted its competitor activities in the relevant market. The Authority addressed its competition concerns and, in the assessment, found that the exemption previously granted to Coca-Cola for the 'non-carbonated drinks' must be withdrawn, 40 per cent of the space in refrigerators should be accessible to the competitors and the sales agreements and refrigerator *commodatum* (loan for use) agreements entered by Coca-Cola or its distributors, or both, must be amended within four months. In light of the Authority's

assessments, Coca-Cola proposed its commitments including the amendment of the general agreements entered with sales points and executing separate agreements for 'carbonated drinks' and 'non-carbonated drinks' and termination of transitional terms and conditions across different product categories, increasing the refrigerator space accessible for the competitors by 25 per cent. The commitments offered and subsequently agreed by Coca-Cola were deemed to address the concerns raised by the Authority (2 September 2021, 21-41/610-297).

In another important decision where both settlement and commitment mechanisms were implemented, The Board had initiated a full-fledged investigation against Singer sewing machines on 4 March 2020 with its decision numbered 21-11/147-M. In the investigation, the Authority assessed that the dealership agreements Singer had with its resellers included a non-compete clause that exceeded the time limit set by the legislation (ie, five years), alongside resale price maintenance practices. During the investigation, Singer applied to both settlement and commitment mechanisms. While Singer submitted its commitments addressing the deletion of the non-compete clause, it also applied before the Authority for conclusion of the investigation through settlement mechanism by accepting its resale price maintenance violation The Board accepted Singer's commitments as it was deemed that the commitments were adequate to restore competition (9 September 2021, 21-42/614-301). Further to the acceptance of the commitments, the Board evaluated Singer's settlement application, and the Board accepted the settlement application and rendered its decision to decrease the administrative monetary fine by 25 per cent for resale price maintenance violation (30 September 2021, 21-46/672-336).

In a more recent decision, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları AŞ (Şişecam) and Sisecam Çevre Sistemleri AS (Çevre

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Sistemleri) to remedy the competition concerns relating to abuse of dominance in the glass production market. This decision marks the first time where the Board approved the commitments submitted in the preliminary investigation stage, since the Amendment Law was enacted (21 October 2021, 21-51/712-354).

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The Authority's annual report for 2021 provides that the Board finalised a total of 74 cases relating to competition law violations. Among the 74 cases, 44 were subject to article 4 (anticompetitive agreements) only and 11 cases were subject to both article 4 and article 6 (abuse of dominant position). The Board issued monetary fines amounting to a total of 3.453 trillion lira as at 6 February 2023) for article 4 cases. The monetary fine figures of 2021 for article 4 cases show that the Board has in total imposed roughly twice the

monetary fines imposed last year, while the total of monetary fines imposed in article 6 cases decreased compared to the amount of fines imposed in 2020.

Overall, there has been an increase in the monetary fines that were levied under article 4. Specifically, the Board imposed monetary fines totalling 687.3 million lira in relation to horizontal anticompetitive arrangements in 2021, while the monetary fines for such arrangements in 2019 and 2020 were 164.4 million lira and 60 million lira respectively.

In one of its most notable decisions in 2021, the Board concluded imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their supplier, for their cartel arrangement. The Board found that five chain markets, directly or indirectly, through their supplier, and their supplier:

- coordinated their prices or price transitions;
- shared competitively sensitive information;
- colluded on and heightened prices through retailers against the good of consumers; and
- observed and maintained the said collusion.

Thus, the Board decided that the relevant undertakings violated article 4 of the Competition Law. In this respect, the Board imposed a total administrative monetary fine of over 2.6 billion lira on the undertakings. This was highest monetary fine imposed by the Board for an entire case (ie, total fine on all companies involved in the cartel conduct) as a result of a cartel investigation. In the same case, the Board also imposed the highest monetary fine that it imposed on a single company as a result of a cartel investigation, which was 958 million lira. This monetary fine was imposed by the Board on BİM Birleşik Mağazalar AŞ (BİM) . This amount represented 1.8 per cent of BİM's annual gross revenue for the year 2020 (28 October 2021; 19-16/229-101).

> "Overall, there has been an increase in the monetary fines that were levied under article 4."

Following this recent investigation explained above and in harmony with its continuing focus on the fast-moving consumer goods sector, the Board concluded another investigation just before the end of 2022 in the same sector (15 December 2022; 22-55/863-357). As a result of this latest investigation, the Board imposed administrative monetary fines based on a hub-and-spoke cartel once again 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 on certain chain stores and suppliers/retailers fined in the previous investigation.

In another recent decision, the Board conducted an investigation against Gedik Kaynak Sanayi ve Tic AŞ (Gedik), Kaynak Tekniği San ve Tic AŞ (Askaynak) under the control of Lincoln Electric Holdings, Inc, and Oerlikon Kaynak Elektrodları ve Sanayi AŞ (Oerlikon)/Magmaweld Uluslararası Tic AŞ (Magmaweld) under the control of Zaimoğlu Holding AŞ to decide whether these undertakings violated article 4 of the Competition Law. The Board found that, in 2011, (1) the general managers of Gedik, Askaynak and Oerlikon/Magmaweld took joint

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decisions on product prices and sales methods, (2) they showed an effort to ensure implementation of these decisions by each undertaking and (3) they warned those who do not comply with such decisions. Based on these findings, the Board decided that there was a cartel infringement in 2011 but did not impose an administrative fine on the investigated undertakings for their violation in 2011 due to the expiration of the eight-year statute of limitation. For the following periods from 2011 to 2019, the Board reached the conclusion that there is no sufficient finding to prove that the undertakings violated article 4 of the Competition Law by stating that (1) in the light of the economic analysis, the price changes did not show the effect of an infringement, and therefore, (2) the presumption of the concerted practice cannot be applied for the period of 2017–2019 since there are no indications of 'market behaviour that provides a presumption of communication' (8 April 2021; 21-20/247-104).

The Board's recent healthcare sector decision is another significant example of its enforcement activity: it investigated 29 undertakings and associations of undertakings and imposed monetary fines for three different violations. Considering price-fixing regarding freelance doctors and other services as a single violation, the Board concluded that six undertakings had established a pricing cartel in two different cities. On the other hand, the 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 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 (24 February 2022; 22-10/152-62).

Although, there was no finding as to a cartel agreement, in the Board's *Beypazarı/Kınık* decisions, it decided that the undertakings violated article 4 of the Competition Law by way of implementing fixed prices, exchanging current and future price information and therefore establishing a cartel. The Board found evidence of exchange of information on future prices and decided that Beypazarı and Kınık were in an agreement for the purpose of restricting competition, in other words, in a cartel agreement. Importantly, these decisions constitute the first combined application of the settlement and leniency mechanisms. The Board applied a 25 per cent reduction (the highest possible reduction) under the Settlement Regulation and a 35 per cent reduction under the leniency application, reducing the administrative monetary fine by 60 per cent in total. Thus, the monetary fines imposed on Kınık were significantly reduced from 2.32 million lira to 929,000 lira. For Beypazarı, which applied for lenience after Kınık, the monetary fines were also reduced significantly, from 21.89 million lira to 9.85 million lira (14 April 2022; 22-17/283-128 and 18 May 2022;22-23/379-158).

QUESTIONS

"Article 57 et seq of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times the amount of their damage plus litigation costs and attorney fees."

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The Authority is an independent administrative body and is not required to apply to another body or authority before rendering its decisions. However, the existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing the violators to seek compensation for damage suffered. As in US antitrust enforcement, one of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times the amount of their damage plus litigation costs and attorney fees. That way, administrative enforcement is supplemented with private lawsuits. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually an infringing agreement or concerted practice, waiting instead for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Board. Under article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution of the decision if its execution is likely to cause serious and irreparable damage, and if the decision is highly likely to be found to be against the law (ie, a prima facie case).

If the challenged decision is annulled in full or in part, the administrative court returns it to the Board for review and reconsideration.

Administrative litigation cases (including private litigation cases) are subject to judicial review before the regional courts (the appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeal for private cases). The regional court will go through the case file, both on procedural and substantive grounds, and will investigate the case file and make its decision considering the merits of the case.

The regional court's decision will be considered final in nature but will be subject to review by the Council of State in exceptional circumstances (as set out in article 46 of the Administrative Procedure Law). In such circumstances, the decision of the regional court will not be considered a final decision and the Council of State may decide to uphold or reverse the regional court's decision. If the decision is reversed by the Council of State, it will be returned to the regional court, which will in turn issue a new decision taking into account the Council of State's decision. As the regional courts are newly established, we have yet to see how long it takes for a regional court to finalise its review of a file. Overall, there is no judicial deadline for the relevant decisions, and the decision-making periods vary greatly.

7 How is private cartel enforcement developing in your jurisdiction?

There is no private cartel enforcement in the Turkish competition law regime. The existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing violators to seek compensation for any damage suffered.

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8 What developments do you see in antitrust compliance?

Competition compliance programmes are designed to reduce the risk of anticompetitive behaviour by companies. The Competition Authority Competition Law Compliance Programme (the Compliance Programme) states that a regular assessment and monitoring mechanism is essential for the success of a compliance programme. Since each company operates in different markets with different market conditions, the Authority does not set out a specific monitoring mechanism requirement; however, briefly, it would be appropriate to test employees' knowledge of the law and of the undertaking's policy and procedures regarding the compliance programme, and to monitor the activities of the employees on a given date, or without notice, to control actual or potential infringements. In addition, notifying senior management of actual or potential infringements and determining suitable problem-solving mechanisms require a regular assessment system to be developed. Moreover, the Compliance

Programme suggests that if the undertaking's size permits it and there is the opportunity, it should have a specific department or a consultant for competition policy. According to the Compliance Programme, the company official or consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. Therefore, an effective compliance programme with all essential monitoring mechanisms would minimise the risk of competition infringement.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

The Amendment Law introduces certain significant substantive and procedural changes to Competition Law. As elaborated in the previous questions, the Amendment Law introduces new provisions related to the de minimis principle, on-site inspection powers, behavioural and structural remedies and commitment and settlement mechanisms. The Amendment Law replaces, Inter alia, the dominance test taken into consideration in merger control assessments under article 7 with the significant impediment of effective competition (SIEC) test, clarifies the self-assessment procedure applied to individual exemption cases under Article 5 and also grants the Authority 15 more days for preparation of its additional opinion in response to the undertakings' second written defence in a fully-fledged investigation under article 45. Since the Amendment Law, the majority of the newly introduced mechanisms and investigation methods were clarified via enactment of secondary legislation. The Authority published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media and information systems, during on-site inspections.

"The Amendment Law introduces new provisions related to the de minimis principle, on-site inspection powers, behavioural and structural remedies and commitment and settlement mechanisms."

Moreover, the Authority published the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position on 15 July 2021, which set forth rules and procedures concerning the settlement process for undertakings that admit to the existence of the violation. Furthermore, the Authority published the Communiqué on the Commitments to be offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position on 16 March 2021, which set out principles and procedures in relation to commitments submitted by undertakings in order to eliminate the competition problems. The Authority also published the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition on 16 March 2021, which set out the principles regarding criteria to be used to identify the practices

of the undertakings which can be excluded from the scope of the investigation.

Furthermore, with the new amendment introduced by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements, which promulgated in the Official Gazette dated 5 November 2021 and No. 31650, the threshold regarding the supplier's market share for the market or markets for the contract goods has now been lowered to 30 per cent. Accordingly, only agreements of undertakings that have market shares below 30 per cent in the relevant product markets qualify for the block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements. Thus, the relevant market shares of the undertakings in question exceed the 30 per cent threshold, the agreement automatically falls outside the scope of the block exemption rules. In that case, the relevant suppliers may not impose any kind of direct or indirect vertical restraints on buyers with respect to the goods or services covered by the agreements, unless an 'individual exemption' is granted by the decision of the Board.

Moreover, consequent to its sector inquiry on the fast-moving consumer goods (FMCG) retailers, the Authority published its preliminary report on 5 February 2021, which addresses the changes in dynamics in the retail sector.

As in the rest of the world, technology and digital platforms feature on the Authority's radar. In May 2020, the Authority announced plans for a strategy development unit to focus on digital markets, and on 16 July 2020 it launched a sector inquiry focusing on electronic marketplace platforms. On 9 December 2021, the Authority published its report titled 'Analysis Report on the Financial Technologies in Payment Services', which, inter alia, evaluates the effect of the use of financial technologies in the financial sector, the obstacles to innovation and competition in the relevant markets and the entry of

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big technology companies (eg, Facebook, Amazon, Google and Apple) into the market.

On 14 April 2022, the Authority published its Final Report on the E-Marketplace Sector Inquiry. The report analysed how e-marketplace platforms affect competition and accordingly proposed a policy towards e-marketplaces. The report remarked that network externalities, multi-homing, economies of scope and scale, multi-sidedness and data-driven business models contribute to the market power of e-marketplace platforms. As a result of these market characteristics, e-marketplaces are associated with high barriers of entry and expansion and a tendency to evolve into a single platform (ie, tipping). The report concluded with two main policy proposals concerning competition law legislation in order to address these competition concerns in the market (1) *ex ante* gatekeeper regulation; and (2) strengthening of secondary legislation. In line with this, the Authority is in the process of considering legislative actions concerning digital markets. It is expected that regulations focusing on gatekeepers mentioned in the online marketplaces report will be

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incorporated as an addition to article 6 of the Competition Law, which regulates abuse of dominant position, or possibly as a separate article while also being reflected in secondary legislation. The amendment is expected to constitute the most drastic change to the law on digital markets and is speculatively expected to compound the EU Digital Markets Act with increasing antitrust focus on digital.

The draft amendment to Law 4054, which was prepared by the Authority 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 Authority'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 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

No specific measures have been implemented to address the pandemic through competition law rules. Moreover, the Authority has announced no limitations on its operational capacity and has not requested applicants' cooperation regarding the special circumstances of the ongoing pandemic. As usual, the Authority has encouraged use of the electronic submission system to ensure the continued smooth running of day-to-day activities.

Having said that, in 2020, the Authority made covid-19 pandemic-related infringement warnings to various stakeholders. On separate

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occasions, the Authority announced on its official websites different complaints received regarding price hikes in various sectors, such as fresh fruit and vegetables, and the health and hygiene sector, as well as the food sector in general. In this context, the Authority invited third parties to report any competition-sensitive practices and emphasised that they will be further investigating such practices. During this term, the Authority launched various preliminary and fully fledged investigations for evaluation of practices adopted during the pandemic period.

Additionally, the investigation against retail grocery chains and suppliers of such chains, active in the fields of retail food and cleaning products is noteworthy in terms of competition law enforcement activity in covid-19 pandemic. The investigation involved leading global suppliers of food and cleaning products such as Henkel, Unilever, Nestlé, Johnson & Johnson, Procter & Gamble and Nivea as well as almost all retailers active in the fast-moving consumer goods business in Turkey. In the reasoned decision, the Board found that there is either a direct or indirect contact via mutual distributors between retail grocery chains that enable the coordination of price transitions and share of competitively sensitive information including future prices, term activities and campaigns. The Board also found that one of the parties to the investigation violated article 4 by way of interfering with the prices of its customers who did not increase their prices (28 October 2021, 21-53/747-360). Following this recent investigation, the Board concluded another investigation just before the end of 2022 in the same sector (15 December 2022; 22-55/863-357). As a result of this latest investigation, the Board imposed administrative monetary fines based on a hub-and-spoke cartel once again while also fortifying its decisional practice in terms of the application of the *ne bis in idem* principle by way of not imposing administrative monetary fines to certain chain stores and suppliers or retailers fined in the previous investigation.

QUESTIONS

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QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

On 19 January 2022, the Authority published a highly anticipated decision of the Board regarding the investigation handled by ELIG Gürkaynak against retail grocery chains and suppliers, active in the fields of retail food and cleaning products. The investigation concerned potential involvement in agreements and concerted practices showing characteristics of a hub-and-spoke cartel. The Decision of the Board serves as a game-changer in the retail and wholesale FMCG sector given that the remarks of the Board clarify the rules of the game in terms of information exchange at horizontal level as well as vertical level (28 October 2021, 21-53/747-360). In addition to this investigation, the Board concluded another investigation in the same sector where it fortified its decisional practice in terms of the application of the *ne bis in idem* principle by way of not imposing administrative monetary fines on certain chain stores and suppliers or retailers fined in the previous investigation (15 December 2022; 22-55/863-357).

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The Authority already has an economic analysis and research department (the Department), which is empowered to conduct examinations and analyses in sectors or markets relevant to Board investigations. Ideally, the Department would be expanded and would also be charged with submitting its independent opinion to the Board in each investigation. That way, the Department's know-how would be much better utilised, enabling the Board to incorporate more sophisticated economic analyses into its reviews of alleged anticompetitive behaviour.

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