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EUROPE, MIDDLE EAST AND AFRICA
ANTITRUST REVIEW 2024

The 2024 edition of the *Europe, Middle East and Africa Antitrust Review* is part of the Global Competition Review Insight series, which also covers the Americas and Asia-Pacific. Each review delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes.

GCR works exclusively with leading competition practitioners in each region, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put it into context – that makes this report particularly valuable to anyone doing business in Europe, Africa and the Middle East today.

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review 2024* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister publications covering the Americas and the Asia-Pacific region, this review provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this latest edition, we have significantly expanded coverage of the European Union, with a specific focus on competition law enforcement under the new EU digital market regime, a deep dive into trends in cartel enforcement in Germany and an economist's take on the UK's collective proceedings and unfair pricing. This features alongside updates on various aspects of the antitrust landscape in Cyprus, Denmark, Egypt, the European Union, France, Germany, Greece, Israel, Switzerland, Turkey and the United Kingdom.

GCR has worked closely with leading competition lawyers and government officials to prepare this report. Their knowledge and experience – and above all their ability to put law and policy into context – are what give it such special value. We are grateful to all the contributors and their firms for their time and commitment.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Turkey: updated legislation strengthens Competition Authority's cartel enforcement

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In summary

This article outlines the key aspects of the Turkish regime regarding cartels. It discusses recent developments and information on cartels in Turkey and presents recent cases of the Competition Board's cartel enforcement activity.

Discussion points

- Turkish cartel regulations
- Enforcement, proceedings and sanctions
- Recent developments and statistical data on cartel cases

Referenced in this article

- Law No. 4054 on the Protection of Competition
- Law No. 4077 on the Protection of Consumers
- 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
- Law No. 6352 on the Amendment to Certain Laws for Increasing the Efficiency of Judicial Services and the Suspension of Prosecution and Penalties Regarding Crimes Committed through Press
- Regulation on Active Cooperation for Discovery of Cartels
- Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance
- Block Exemption Communiqué No. 2002/2 on Vertical Agreements
- Guidelines on Vertical Agreements
- Turkish Competition Authority
- Turkish Competition Board

Introduction

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

Substantive provisions for cartel prohibition

The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. The provision is akin to, and closely modelled on, article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

Similar to article 101(1) of the TFEU, the provision does not give a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement; therefore, the scope of application of the prohibition extends beyond cartel activity.

Until 2020, unlike the TFEU, article 4 excluded any possible de minimis exception. However, in 2020, Law No. 4054 was subject to amendments that entered into force on 24 June 2020 (the Amendment Law).

The amendments, with the aim of steering attention and public resources to more significant violations, introduced the de minimis rule under article 41 of the Competition Law. In accordance with the introduction, certain agreements and practices exceeding market share thresholds determined by the Competition Board (the Board) do not benefit from the de minimis principle.

In this regard, the de minimis principle is applicable to agreements falling under article 4; however, it is not applicable to hardcore violations, including:

- price fixing;
- sharing of customers, suppliers, territories and commercial channels;
- restriction of supply volume or imposing quotas thereof;
- bid-rigging; and
- exchange of competitively sensitive future information such as information on prices production or sales volume and resale price maintenance.

In other words, agreements and concerted practices that are of cartel nature directly fall out of the scope of the violations that may benefit from de minimis principle.

Secondary legislation, which provides details on the process and procedure related to the application of the de minimis principle, came into force on 16 March 2021.

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

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

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

The block exemption rules that are currently applicable are:

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

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

The Board's general practice shows that horizontal restrictive agreements, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal.

The Turkish competition regime also condemns concerted practices. The Competition Authority (the Authority) easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called

'the presumption of concerted practice'. The definition of concerted practice in Turkey does not fall far from the definition used in EU competition law.

A concerted practice is defined as a form of coordination between undertakings that, without having reached the stage where an agreement has been properly concluded, knowingly substitutes practical cooperation between them for the risks of competition. This is, therefore, a form of coordination, without a formal agreement or decision, by which two or more companies come to an understanding to avoid competing with each other. The coordination does not need to be in writing; it is sufficient if the parties have expressed their joint intention to behave in a particular way, for example, in a meeting, via a telephone call or through an exchange of letters.

Enforcement

The national competition authority for enforcing cartel prohibition and other provisions of the Competition Law in Turkey is the Authority, which has administrative and financial autonomy. It comprises the Board, the presidency and service departments.

Six divisions with sector-specific work distribution handle Competition Law enforcement work through approximately 160 case handlers. The other service units comprise the department of decisions; the economic analysis and research department; the information technologies department; the external relations and competition advocacy department; the strategy development department; and the cartel and on-site inspections support division.

As the competent body of the Authority, the Board is responsible for, among other things, investigating and condemning cartel activity. It comprises seven independent members. The presidency handles the administrative work of the Authority.

The Authority's administrative enforcement is also supplemented with private lawsuits. Accordingly, in the case of private suits, cartel members are adjudicated before the courts. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigation has increasingly made its presence known in the cartel enforcement arena. Most courts wait for the decision of the Authority and build their own decision on the Board's decision.

Proceedings

As the competent body of the Authority, the Board is responsible for, among other things, investigating and condemning cartel activity. A cartel matter is primarily adjudicated by the Board.

The Turkish cartel regime does not recognise de minimis exceptions, and there is currently no threshold for opening an investigation into cartel conduct. The Board is entitled to launch an investigation into alleged cartel activity ex officio or in response to a notice or complaint, which may be submitted verbally or through a petition. The Authority has an online system through which complaints may be submitted on its official website.

In the case of a notice or complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected should the Board remain silent on the matter for 30 days.

The Board will decide to conduct a pre-investigation if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. At this preliminary stage, the undertakings concerned are not notified that they are under investigation, unless the Authority decides to conduct a dawn raid or use other investigatory tools (ie, formal information request letters).

The Authority experts submit a preliminary report to the Board within 30 days of their assignment. The Board then decides within 10 days whether to launch a fully-fledged formal investigation. If it decides to initiate an investigation, it sends a notice to the undertakings concerned within 15 days. The investigation is to be completed within six months. If deemed necessary, this period may be extended by the Board only once, for an additional period of up to six months.

Once the notice has been formally served, the investigated undertakings have 30 days to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Authority.

Once this is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (the second written defence). The investigation committee will then have 15 days to prepare an additional opinion concerning the second written defence, which, in accordance with the recent amendments, is extendable for a further 15 days.

The defending parties will have another 30 days to reply to the additional opinion (the third written defence), which is also extendable for a further 30 days. When this reply is served on the Authority, the investigation process will be completed (ie, the written phase of investigation involving the claim or defence exchange will close with the submission of the third written defence).

An oral hearing may be held upon request by the parties. The Board may also decide ex officio to hold an oral hearing. Oral hearings are held within between 30 and 60 days of the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings before the Competition Board. The Board renders its final decision within 15 days of the hearing, if an oral hearing is held; otherwise, the decision is rendered 30 days after completion of the investigation process. 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 counterpart.

Effect theory

Turkey is an 'effect theory' jurisdiction where what matters is the effect that a cartel activity has produced on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey.

In the past, the Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members, so long as there was an effect in the Turkish markets.[1] However, the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly owing to enforcement handicaps (eg, difficulties of formal service to foreign entities).

Powers of investigation

The Competition Law provides vast investigative powers to the Authority, such as the power to conduct dawn raids and to apply other investigatory tools (eg, formal information request letters). A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. The prevention or hindering of a dawn raid could result in the imposition of an administrative monetary fine.

Although the mere wording of the Competition Law obliges employees to provide verbal testimony, case handlers usually allow for an answer to be provided after the occurrence of the dawn raid; therefore, in practice, employees can avoid providing answers on issues about which they are uncertain, provided that a written response is submitted within a mutually agreed time limit. Case handlers

1 For example, *The suppliers of rail freight forwarding services for block trains and cargo train services*, 16 December 2015, 15-44/740-267; *Güneş Ekspres/Condor*, 27 October 2011, 11-54/1431-507; *Imported Coal*, 2 September 2010, 10-57/1141-430; *Refrigerator Compressor*, 1 July 2009, 09-31/668-156; *Şişecam/Yioula*, 28 February 2007 07-17/155-50; *Gas Insulated Switchgear*, 30 September 2004, 04-63/907-217.

of the Authority may fully examine computer records and mobile phones used for work purposes, including, but not limited to, deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation issued by the Board, which must specify the subject matter and the purpose of the investigation. The inspectors are not entitled to exceed their authorisation; they must not exercise their investigative powers (copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (specified on the deed of authorisation). Thus, the Authority officials may not copy documents or record verbal testimonies that are not related to or covered by the scope of the investigation.

In this regard, the Authority published its Guidelines on Examination of Digital Data During On-site Inspections (the Guidelines on Examination of Digital Data) 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. According to the Guidelines on Examination of Digital Data, the Authority can inspect portable communication devices (mobile phones, tablets, etc) if, as a result of a quick review, it is understood that they include digital data about the undertaking. The inspection of the digital data obtained from mobile phones must be completed at the premises of the undertaking; hence the data cannot be copied for the continuation of the inspection at the Authority's premises.

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

The Authority may also request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of those bodies, undertakings and trade associations are obliged to provide the necessary information within a fixed period.

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. The Board may impose the same amount of fines if an undertaking provides incorrect or incomplete information in response to the Authority's request for information.

Sanctions

In the event of a proven cartel activity, the companies concerned will be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision. If this is not calculable,

the turnover generated in the financial year nearest to the date of the fining decision will be taken into account.

Employees and managers of the undertakings or association of undertakings that had a determinative effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. The current minimum fine is 105,688 lira for 2023.

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

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

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) was enacted by the Authority. The Regulation on Fines sets out detailed guidelines on the calculation of monetary fines applicable in the case of an antitrust violation. It provides detailed guidelines regarding the calculation of fines applicable for antitrust violations and applies to both cartel activity (article 4) and abuse of dominance (article 6). Illegal concentrations (article 7) are not covered by the Regulation.

Fines are calculated by first determining the basic level, which in the case of cartels is between 2 per cent and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision). Aggravating and mitigating factors are then factored in.

The Regulation on Fines also applies to managers or employees that had a determinative effect on the violation (eg, by participating in cartel meetings and making decisions that would involve the company in cartel activity) and provides for certain reductions in their favour.

In addition to the monetary sanction, restrictive agreements may be deemed legally invalid and unenforceable with all its legal consequences. Under article 9, besides an article 7 violation, in the determination of article 4 and 6 infringements, the Board may order behavioural as well as structural remedies to re-establish the competition and end the infringement. It may order to end practices or adopt remedies to restore the status quo without imposing an administrative fine. Additionally, the Competition Law authorises the Board to take interim measures until the final resolution on the matter, if there is a possibility of serious and irreparable damages.

The sanctions that could be imposed under the Competition Law are administrative in nature; therefore, the Competition Law leads to administrative fines (and civil liability) but no criminal sanctions. However, there have been cases when the matter had to be referred to a public prosecutor after the Competition Law investigation had been completed.

On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Criminal Code. Illegal price manipulation (ie, manipulation through misinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil fine under section 237 of the Criminal Code.

The above-mentioned sanctions may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees or board members or executive committee members of the infringing entities, if those individuals had a determinative effect on the creation of the violation. There are no sanctions specific to individuals other than those mentioned above.

Administrative settlement of cases

The amendments introduced a commitment and settlement mechanism under article 43 of the Competition Law to end investigation processes in a timely manner.

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 (Communiqué No. 2021/2) published on 16 March 2021, which sets out principles and procedures in relation to commitments submitted by undertakings to eliminate competition problems.

The commitment mechanism allows parties to voluntarily offer commitments during a preliminary or full-fledged investigation to eliminate the Authority's competitive concerns concerning articles 4 and 6. Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. As per Communiqué No. 2021/2, the deadline for submitting a commitment request to the Authority is three months after the investigation notice is served on the parties.

The commitment mechanism is not applicable to hardcore violations, including:

- price fixing;
- sharing of customers, suppliers, territories and commercial channels;
- restriction of supply volume or imposing quotas thereof

- bid-rigging; and
- exchange of competitively sensitive future information such as information on prices, production or sales volume and resale price maintenance;

In other words, agreements and concerted practices that are of cartel nature directly fall out of the scope of the violations that may benefit from the commitment mechanism.

On the other hand, the settlement mechanism is applicable to hardcore violations (including, but not limited to, cartels). On 15 July 2021, 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 (the Settlement Regulation), which set forth the rules and procedures concerning the settlement process for undertakings that admit to the existence of a violation. Under the settlement mechanism, the Board may, ex officio or upon the parties' request, initiate a settlement procedure. Parties that admit to competition infringements until the official notification of the investigation report may benefit from a reduction of up to up to 25 per cent of the administrative fine. The parties may not bring a dispute on the settled matters or the administrative fine once an investigation is settled.

In its first-ever settlement decision, the Competition 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.[2]

In another important decision where both settlement and commitment mechanisms were implemented, the Board initiated a full-fledged investigation against Singer Sewing Machines on 4 March 2020 (Decision No. 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 legislation (ie, five years), alongside resale price maintenance practices. During the investigation, Singer applied 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 the 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.[3] Further to the acceptance of the commitments, the Board evaluated and accepted Singer's settlement application and rendered its decision to decrease

2 Decision No. 21-37/524-258 (5 August 2021).
3 Decision No. 21-42/614-301 (9 September 2021).

the administrative monetary fine by 25 per cent for resale price maintenance violation.[4]

Additionally, 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 Sistemleri) to remedy competition concerns relating to abuse of dominance in the glass production market. This decision marks the first time since the Amendment Law was enacted that the Board approved the commitments submitted at the preliminary investigation stage.[5]

The Settlement Regulation allows undertakings to benefit from the Regulation on Active Cooperation for Discovery of Cartels (the Regulation on Leniency) under certain circumstances (ie, put in place before the settlement negotiations are finalised and put in writing). The recent decisions of the Board concerning Kınık[6] and Beypazarı[7] constitute the first combined application of the Settlement Regulation and the Regulation on Leniency. In its *Kınık* decision, the Board applied a 25 per cent reduction under the Settlement Regulation (the highest reduction possible) and a 35 per cent reduction under the Regulation on Leniency, which amounted to a 60 per cent reduction in the administrative monetary fine. In its *Beypazarı* decision, where Beypazarı made a leniency application after Kınık, the Board again applied a 25 per cent reduction under the Settlement Regulation and a 30 per cent reduction under the Regulation on Leniency, resulting in a 55 per cent reduction in the administrative monetary fine.

In a more recent decision, the Board concluded the investigation initiated against Numil Gıda Ürünleri San ve Tic AŞ (Numil) with a settlement decision.[8] The Board determined that Numil was involved in resale price maintenance regarding bottled baby formulas and liquid bottled baby formulas in sales channels, such as in discount markets, e-commerce sites, and retail and pharmacy channels, and employed measures in the event of non-compliance with proposed resale prices, such as ceasing to supply or lowering the level of supply of products or ceasing support. The Board concluded that the foregoing actions of Numil amounted to violation of article 4 of Law No. 4054.

The Board accepted the settlement application of Numil, which was submitted within the investigation phase, and initiated settlement negotiations. As a result of the settlement negotiations, Numil has accepted terms set out in the interim settlement decision of the Board and submitted a settlement letter to the Authority indicating that Numil admits the following terms determined by way of the interim settlement decision:

- the existence and scope of the violation;

4 Decision No. 21-46/672-336 (30 September 2021).
5 Decision No. 21-51/712-354 (21 October 2021).
6 Decision No. 22-17/283-128 (14 February 2022).
7 Decision No. 22-23/379-158 (18 May 2022).
8 Decision No. 22-29/483-192 (30 June 2022).

- the maximum administrative monetary fine ratio and the amount that could be applied as a result of the investigation;
- Numil has been sufficiently informed regarding the allegations against it and presented with sufficient opportunity to convey its own views and remarks; and
- the administrative monetary fine and the terms set out in the settlement letter cannot be appealed before courts.

Against the foregoing, the Board decided that a 15 per cent reduction should be applied on the administrative fine to be imposed on Numil within the scope of the settlement procedure.

Leniency programme

The Competition Law underwent significant amendments in February 2008, bringing a stricter and more deterrent fining regime, coupled with a leniency programme for the undertakings.

The secondary legislation specifying the details of the leniency mechanism – the Regulation on Leniency – came into force on 15 February 2009. The Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels were published in April 2013.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms were set. According to the Regulation on Leniency, the leniency programme is only available for cartelists; it does not apply to other forms of antitrust infringements. A definition of 'cartel' is provided in the Regulation on Leniency for this purpose.

A cartelist may apply for leniency until the investigation report is officially served. The application is independent from applications of the cartelist itself, if there are any.

Depending on the order of application, there may be total immunity from or a reduction of a fine for the manager or employee. The immunity or reduction includes both the undertakings and its employees and managers, with the exception of the 'ringleader', which can only benefit from a second degree reduction of the fine. The conditions for benefiting from immunity or reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees and managers can apply for leniency.

A manager or employee of a cartelist may also apply for leniency until the investigation report is officially served. The application is independent from any application of the cartelist itself. Depending on the order of application, there may be total immunity from or a reduction of a fine for the manager or

employee. The requirements for an individual application are the same as those stipulated above.

Appeal process

In accordance with Law No. 6352 on the Amendment to Certain Laws for Increasing the Efficiency of Judicial Services and the Suspension of Prosecution and Penalties Regarding Crimes Committed through Press, which took effect on 5 July 2012, the administrative sanction decisions of the Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days, upon receipt of the justified (reasoned) decision of the Board by the parties.

In accordance with article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board; however, upon request of the plaintiff, the court, by providing its justifications, may decide the stay of the execution if the execution of the decision is likely to cause serious and irreparable damage and if it is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Administrative Court usually takes between 12 and 24 months. If the challenged decision is annulled in full or in part, the Administrative Court remands it to the Board for review and reconsideration.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts between 24 and 30 months.

As of 20 July 2016, administrative litigation cases have been subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds and investigate the case file, making their decision considering the merits of the case.

The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law. In those cases, the decision of the regional court will not be considered as 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 deciding regional court, which will issue a new decision that takes into account the Council of State's decision.

Damages actions

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages; thus, administrative enforcement is supplemented with private lawsuits. Article 57 et seq of the Competition Law entitles any person who is injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times the damage plus litigation costs and attorney fees. The case must be brought before the competent general civil court.

In practice, the courts usually do not engage in an analysis on whether there is actually a condemnable agreement or concerted practice; they wait for the board to render its opinion on the matter, therefore treating the issue as a prejudicial question. As the courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations have increasingly made their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Authority and build their own decision on that decision.

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

Legislative developments

In a recent development, in relation to the assessment of mergers and acquisitions, Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (the Amendment Communiqué) was published in the Official Gazette on 4 March 2022 and entered into force on 4 May 2022. In accordance with the Amendment Communiqué, transactions that will be closed (ie, concentrations that will be realised) as of or after 4 May 2022 will be required to be notified in Turkey if one of the following alternative turnover thresholds is met:

- the combined aggregate Turkish turnover of all the transaction parties exceeds 750 million lira and the Turkish turnover of each of at least two of the transaction parties exceeds 250 million lira;
- the Turkish turnover of the transferred assets or businesses in acquisition exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds billion lira; or

- the Turkish turnover of any of the parties to the merger exceeds 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira.

Further to the Amendment Communiqué, the Turkish turnover threshold of 250 million Turkish lira mentioned herein will not be sought for acquired undertakings active in certain fields or assets related to these fields if they:

- operate in the Turkish geographical market;
- conduct research and development activities in the Turkish geographical market; or
- provide services to Turkish users.

The fields and related assets include digital platforms; software or gaming software; financial technologies; biotechnology; pharmacology; agricultural chemicals; and health technologies.

Furthermore, with the new amendment introduced by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements (Communiqué No. 2021/4), which was promulgated in the Official Gazette dated 5 November 2021 (No. 31650), the threshold regarding the supplier's market shares for the market or markets for the contract goods has now been lowered to 30 per cent. Pursuant to Communiqué No. 2021/4, only agreements of undertakings that have market shares below 30 per cent in the relevant product markets qualify for block exemption under Communiqué No. 2002/2. Thus, should 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.

On 16 March 2021, the Authority published the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings that do not Significantly Restrict Competition, which sets out the principles regarding criteria to be used to identify practices of the undertakings that can be excluded from the scope of the investigation. Additionally, on 16 March 2021, 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, which sets out principles and procedures in relation to commitments submitted by undertakings to eliminate competition problems.

On 15 July 2021, the Authority published the Regulations on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, which set

forth rules and procedures concerning the settlement process for undertakings that admit to the existence of the violation.

Recent cases

According to the Competition Authority's 2022 annual report, 78 of the 386 cases the Board decided related to competition law violations: 58 of those cases related to article 4 of the Competition Law and 38 of those 58 cases related to horizontal agreements. Overall, the Authority recorded increased article 4 enforcement and cartel enforcement under horizontal agreements assessments.

In respect of cartel enforcement activity, the Board issued a reasoned decision that concluded with the imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their suppliers for their cartel arrangement.[9] The Board found that five chain markets, directly or through their supplier indirectly, and their suppliers:

- 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 this collusion by using sanction strategies.

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 to the undertakings.

In another recent decision,[10] 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, (i) the general managers of Gedik, Askaynak and Oerlikon/Magmaweld made joint decisions on product prices and sales methods, showed an effort to ensure implementation of these decisions by each undertaking and warned those who did not comply with these decisions. Based on these findings, the Board decided that there was cartel infringement in 2011 but did not impose an administrative fine on the investigated undertakings for their violation in 2011 owing to the expiration of the eight-year statute of limitation. For the following period of 2011 to 2019, the Board reached the conclusion that there are no sufficient findings to prove that the undertakings violated article 4 of the Competition Law by stating that in the light of the economic analysis, the price changes did not show the effect of an

9 Decision No. 21-53/747-360 (28 October 2021).
10 Decision No. 21-20/247-104 (8 April 2021).

infringement, and therefore, the presumption of the concerted practice cannot be applied for 2017–2019 as there are no indications of 'market behaviour that provides a presumption of communication.

Additionally, the Competition Board's recent healthcare sector decision[11] 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 undertakings were found to have been directly active in information exchange, while one was a facilitator.

Gönenç Gürkaynak

ELIG Gürkaynak Attorneys-at-Law

Dr Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. Dr Gürkaynak graduated from Ankara University, faculty of law, in 1997 and was called to the Istanbul Bar in 1998. Dr Gürkaynak received his LLM degree from Harvard Law School, and was admitted to the: Istanbul Bar in 1998; American Bar Association in 2002; New York Bar in 2002 (currently non-practising; registered); Brussels Bar in 2003–2004 (B List; not maintained); and Law Society of England & Wales in 2004 (currently non-practising; registered). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Dr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Dr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 56 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 25 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Dr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about

11 Decision No. 22-10/152-62 (24 February 2022).

15 antitrust appeal cases in the high administrative court and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and European Commission competition law topics.

Dr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has six books, which are *A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective* (published by the Turkish Competition Authority), *Fundamental Concepts of Anglo-American Law*, *The Academic Gift Book of ELIG, Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Turkey*, *The Second Academic Gift Book of ELIG Gürkaynak Attorneys-at-Law on Selected Contemporary Competition Law Matters* (published by Legal Publishing), *Turkish Competition Law* (published in November 2021 by Concurrences in Paris) and *Rekabet Hukuku* (published in October 2022). He has also published more than 200 articles in English and Turkish with various international and local publishers. Dr Gürkaynak holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures at other universities in Turkey.

Öznur İnanılır

ELIG Gürkaynak Attorneys-at-Law

Ms Öznur İnanılır joined ELIG Gürkaynak Attorneys-at-Law in 2008. She graduated from Başkent University, faculty of law, in 2005 and, following her practice at a reputable law firm in Ankara, she obtained her LLM degree in European law from London Metropolitan University in 2008. She is a member of the Istanbul Bar.

Ms İnanılır became a partner within the regulatory and compliance department in 2016 and has extensive experience in all areas of competition law, in particular compliance with competition law rules, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority.

Ms İnanılır has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our founding partner Dr Gönenç Gürkaynak, with four partners, nine counsel and 42 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases and leniency handlings and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

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

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

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

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