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Q&A Chapters

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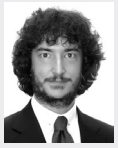
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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The statutory basis for cartel prohibition is Law No. 4054 on the Protection of Competition, dated 13 December 1994 ("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 and actions in order to secure the free-market economy. The Turkish cartel regime is "administrative" and "civil" in nature, not criminal. That being said, certain antitrust violations, such as bid rigging in public tenders and illegal price manipulation, may also be criminally prosecutable, depending on the circumstances. The Competition Law applies to individuals and companies alike, if and to the extent that they act as an undertaking within the meaning of the Competition Law.

After rounds of revisions and failed attempts of enactment spanning several years, the proposal for an amendment to the Competition Law ("Amendment Proposal") has finally been approved by the Turkish Parliament, namely the Grand National Assembly of Turkey. On 16 June 2020, the amendments passed through Parliament and entered into force on 24 June 2020 ("Amendment Law"). (The Amendment Law was published in the Official Gazette dated 24 June 2020 and numbered 31165.) According to the recital of the Amendment Proposal, these amendments aim at reflecting in the Competition Law the Turkish Competition Authority's ("Authority") experience in over 20 years of enforcement and in bringing Turkish competition law closer to EU law. (Available at: https://www2.tbmm.gov.tr/d27/2/2-2875.pdf, last accessed on 18 July 2023.)

(Please refer to question 1.5 for the definition of "undertaking".)

1.2 What are the specific substantive provisions for the 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.

One of the most important amendments in the Amendment Law is the introduction of the *de minimis* principle, bringing Turkish competition law closer to EU law. With this amendment, the Turkish Competition Board ("Board") is able to decide not to launch a fully-fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings that do not exceed the thresholds (e.g., a certain market share level or turnover) that are determined by the Board. Pursuant to the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings that do not Significantly Restrict Competition ("Communiqué No. 2021/3") published on 16 March 2021, the principle applies to (i) agreements between competitors, provided the total market share of the parties to the agreement does not exceed 10% in any of the relevant markets affected by the agreement, and (ii) agreements between non-competing undertakings, provided the market share of each of the parties does not exceed 15% in any of the relevant markets affected by the agreement. This principle is not applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this mechanism, the Authority appears to aim at steering its direction, as well as public resources, to more significant violations.

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

As is the case with Article 101 (1) of the TFEU, Article 4 brings a non-exhaustive list of restrictive agreements. It prohibits, in particular, agreements that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- share markets or sources of supply;
- limit or control production, output or demand in the market;
- place competitors at a competitive disadvantage or involve exclusionary practices such as boycotts;
- aside from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and
- make the conclusion of contracts, in a manner contrary to customary commercial practices, subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list is non-exhaustive and is intended to generate further examples of restrictive agreements.

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

The block exemption rules currently applicable are: (i) Block Exemption Communiqué No. 2002/2 on Vertical Agreements; (ii) Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) Block Exemption Communiqué No. 2008/3 for the Insurance Sector; (iv) Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; (v) Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and (vi) Block Exemption Communiqué No. 2016/5 on R&D Agreements, which are all modelled on their respective equivalents in the TFEU.

Restrictive agreements that do not benefit from: (i) the block exemption under the relevant communiqué; or (ii) an individual exemption issued by the Board, are caught by the prohibition in Article 4.

A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed *per se* illegal.

The Turkish antitrust regime also condemns concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism termed "the presumption of concerted practice". The definition of concerted practice in Turkey does not fall far from the definition used in EU competition law. A concerted practice is defined as a form of coordination between undertakings which, without having reached the stage where a so-called agreement has been properly concluded, knowingly substitutes practical cooperation between them for the risks of competition. Therefore, this is a form of coordination, without a formal "agreement" or "decision", by which two or more companies come to an understanding to avoid competing with each other. The coordination does not need to be in writing; it is sufficient if the parties have expressed their joint intention to behave in a particular way, perhaps in a meeting, via a telephone call or through an exchange of letters. The special challenges posed by the proof standard concerning concerted practices are addressed under question 9.2.

1.3 Who enforces the cartel prohibition?

The Authority enforces the cartel prohibition and other provisions of the Competition Law in Turkey. The Authority has administrative and financial autonomy. It consists of the Board, Presidency and Service Departments, including six divisions with sector-specific work distribution that handle competition law enforcement work through approximately 288 case handlers as of 1 January 2023. A research and economic analysis department, leniency unit, decisions unit, information technologies unit, external relations unit, management services unit, strategy development unit, internal audit unit, consultancy unit, media and public relations unit, human resources unit and a cartel and on-site investigation support unit assist the six technical divisions and the Presidency in the completion of their tasks. As the competent body of the Authority, the Board is responsible for, *inter alia*, investigating and condemning cartel activity. The Board consists of seven independent members, according to Article 22 of the Competition Law. The Presidency handles the administrative works of the Authority.

A cartel matter is primarily adjudicated by the Board. In addition, administrative enforcement is supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts. Due to a treble-damages clause permitting litigants to obtain three times their loss as compensation, private antitrust litigations are increasingly making 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 (please see section 8 below for further detail on private suits).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

As provided above, the Amendment Law has introduced the *de minimis* principle, bringing Turkish competition law closer to EU law. With this amendment, the Board became able to decide not to launch a fully-fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings that do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. This principle is not applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this mechanism, the Authority appears to aim at steering its direction, as well as public resources, to more significant violations.

The Amendment Law refers to "turnover" and "market share" thresholds for the *de minimis* exception and leaves the setting of the threshold to the Board. Pursuant to Communiqué No. 2021/3, the Board set the thresholds for the safe harbour as 10% for agreements between competitors and 15% for agreements between non-competitors.

The Board is entitled to launch an investigation into an alleged cartel activity *ex officio* or in response to a notice or complaint. A notice or complaint may be submitted verbally or through a petition. The Authority has an online system in which complaints may be submitted via the online form on the official website of the Authority. In case of a notice or complaint, the Board rejects the notice or complaint if it deems it not serious. Any notice or complaint is deemed rejected in cases where the Board remains silent for 30 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (i.e., unannounced on-site inspections – please see section 2 below), and other investigatory tools (e.g., formal information request letters), are used during this pre-investigation process. The preliminary report of the Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended by the Board only once for an additional period of up to six months.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (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, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days, which, as per the recent amendments, is extendable for another 15 calendar days, to prepare an opinion concerning

the second written defence (additional written opinion). The defending parties will have another 30-day period, extendable for another 30 calendar days, to reply to the additional written opinion (third written defence). When the parties' responses to the additional written opinion are served on the Authority, the investigation process will be completed (i.e., the written phase of investigation involving the claim/defence exchange will close with the submission of the third written defence). An oral hearing may be held upon request by the parties. The Board may also *ex officio* decide to hold an oral hearing. Oral hearings are held within at least 30, and at the most, 60 days following the completion of the investigation process under the provisions of the Competition Law. The Board will render its final decision within: (i) 15 calendar days from the hearing, if an oral hearing is held; or (ii) 30 calendar days from the completion of the investigation process, if no oral hearing is held. 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.

1.5 Are there any sector-specific offences or exemptions?

There are no industry-specific offences or defences in the Turkish jurisdiction. The Competition Law applies to all industries, without exception. To the extent they act as an undertaking within the meaning of the Competition Law (i.e., a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services), state-owned entities also fall within the scope of application of Article 4. Due to the "presumption of concerted practice" (further addressed under question 9.2), oligopoly markets for the supply of homogenous products (e.g., cement, bread yeast, etc.) have constantly been under investigation for concerted practices. Nevertheless, whether this track record leads to an industry-specific offence would be debatable. There are some sector-specific block exemptions (such as the block exemption in the motor vehicle sector and the block exemption regulations in the insurance sector).

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Turkey is one of the "effect theory" jurisdictions, where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of: (i) the nationality of the cartel members; (ii) where the cartel activity took place; or (iii) whether the members have a subsidiary in Turkey.

The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members (see, for example, *Şişecam/Yioula*, 28 February 2007, 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004, 04-43/538-133; and *Refrigerator Compressor*, 1 July 2009, 09-31/668-156) in the past, provided there was an effect in the Turkish markets. Additionally, the Board concluded an investigation conducted in relation to the allegation that nine international companies active in the railway freight forwarding services market have restricted competition by sharing customers (*Railway Freight Forwarding*, 16 December 2015, 15-44/740-267). The Board explained that the practices of foreign undertakings may be subject to the Competition Law if they have any effect on the Turkish markets in the meaning of Article 2, regardless of whether these undertakings have any subsidiaries or affiliated entities in Turkey; and that such anticompetitive activities of foreign undertakings should have "direct", "significant" and "intended/foreseeable" effects on the Turkish markets. The Board concluded that the agreements have not produced effects on the Turkish markets within the meaning of Article 2 of the Competition Law and, therefore, the allegations in question did not fall within the scope of the Competition Law. The decision establishes that the Authority's jurisdiction is limited to conducts that create an effect in any given product market in Turkey, notwithstanding whether the agreement, decision or practice takes place in or outside of Turkey.

It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service to foreign entities).

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes*	No
Carry out an unannounced search of residential premises	Yes*	No
Right to "image" computer hard drives using forensic IT tools	Yes	No
Right to retain original documents	No	No
Right to require an explanation of documents or information supplied	Yes	No
Right to secure premises overnight (e.g., by seal)	Yes	No

Please note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the Authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

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

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

As a recent development, the Constitutional Court of the Republic of Turkey ("Constitutional Court") published on June 20, 2023 its reasoned decision dated March 23, 2023 with the application no. 2019/40991, which may potentially impact the standard of due process in the Turkish Competition Authority's dawn raid practice. The Decision, in brief, rules that the Authority is obliged to obtain a court decision (i.e. a warrant) allowing the Authority officials to conduct a dawn raid. In the standard practice of the Authority, which was in full compliance with the Competition Law, the case handlers of the Authority have been able to legally conduct the dawn raids with the certificate of authorisations that can be issued by the Turkish Competition Board. However, the Constitutional Court found that although the Authority's practice has been compliant with the Competition Law in its dawn raid practices, the provisions of Article 15 of the Competition Law regulating the dawn raids is unconstitutional as it does not require the Authority to obtain a court decision before conducting dawn raids in contravention of Article 21 of the Turkish Constitution protecting the immunity of domicile. Since the Constitutional Court found that the Authority's practice has been in full compliance with the Competition Law but certain provisions of the Competition Law regulating the dawn raid are unconstitutional, the said provisions of the Competition Law is likely to be amended in the near future to comply with the Decision. Meanwhile, however, it is considered that the dawn raid practice of the Authority should not be significantly affected in a way that would lessen the frequency of the dawn raids of the Authority. Indeed, with a view to comply with the Decision, the Authority would now be expected to apply to the Criminal Court of Peace (first instance criminal courts) to obtain a warrant allowing the Authority's case handlers to conduct the necessary dawn raids. This application is already a process that is foreseen by the Competition Law and applied to by the Authority from time to time.

In addition to the above, the Amendment Law also includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in companies' physical records as well as those in electronic spaces and IT systems, which the Authority already does in practice. This is also confirmed in the Amendment Proposal's preamble as it indicates that the amendment provides "further" clarification on the powers of the Authority, which are particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

Similarly, 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 the electronic media and information systems, during the on-site inspections ("Guidelines on Examination of Digital Data"). 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.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are no general surveillance powers.

2.4 Are there any other significant powers of investigation?

No, there are no other significant powers of investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The sole people participating in on-site inspections are the Authority's case handlers. Case handlers are not obliged to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to arrive but may impose certain conditions (e.g., to seal file cabinets and/or to disrupt email communications).

2.6 Is in-house legal advice protected by the rules of privilege?

Attorney-client privilege under Turkish competition law has been discussed in several decisions of the Board in the recent past. Specifically, in *Sanofi Aventis* (20 April 2009, 09-16/374-88), the Board indirectly recognised that the principles adopted by the Court of Justice of the European Union in *AM&S v. Commission* (Case no. 155/79 [1982] ECR 1575) might apply to attorney-client-privileged documents in Turkish enforcement in the future, and in *CNR/NTSR* (13 October 2009, 09-46/1154-290), the Board elaborated in detail the privilege rules applied in the European Commission ("EC") and tacitly concluded that the same rules would apply in Turkish antitrust enforcement.

In addition, according to more recent decisions of the Board (*Dow Turkey*, 2 December 2015, 15-42/690-259; *Enerjisa*, 6 December 2016, 16-42/686-314; *Istanbul Department of Customs Association*, 20 June 2019, 19-22/352-158), the attorney-client protection covers the correspondence made in relation to the client's right of defence and documents prepared in the scope of an independent attorney's legal service. Correspondence that is not directly related to the use of the client's right of defence or that aims to facilitate/conceal a violation is not protected, even when it is related to a pre-investigation, investigation or inspection process. For example, while an independent attorney's legal opinion on whether an agreement violates the Competition Law can be protected under the attorney-client privilege, correspondence on how the Competition Law can be violated between an independent attorney and client does not fall within the scope of this privilege. On a final note, correspondence with an independent attorney (i.e., without an employment relationship with her/his client) falls into the scope of attorney-client privilege and shall be protected.

That said, the Eighth Administrative Chamber of the Ankara Regional Administrative Court issued a decision that put further limitations on the scope of attorney-client privilege in 2018 (*Enerjisa*, 10 October 2018, 2018/1236). The decision concerned an internal review report of outside counsel for competition law compliance purposes, which had been prepared before the Authority opened an investigation against Enerjisa. The report was taken by the case handlers during a dawn raid conducted in the scope of the investigation against this company at a later stage. The court held that while the

document comprised correspondence "between an independent attorney and the undertaking", it was not protected under attorney-client privilege given that "it was not directly related to the right to defence", due to its preparation prior to an investigation. In a similar vein, in *Warner Bros* (17 January 2019, 19-04/36-14), the Board decided that documents produced before the date that pre-investigation was made are not directly related to the right to defence and would not benefit from the privilege.

Communications with in-house counsel are not covered by this privilege (*Çiçek Sepeti*, 2 July 2020, 20-32/405-186; *DSM Grup,* 29 April 2021, 21-24/287-130).

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

This is not applicable.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Board may request all 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% 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). The minimum fine is TL 105,688 (around EUR 3,500 at the time of writing) for the year 2023. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, refusing to grant the staff of the Authority access to business premises may lead to the imposition of a daily-based periodic fine of 0.05% 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). The minimum fine to be applied in such case is also TL 105,688 (around EUR 3,500 at the time of writing).

In 2022, the Board fined a number of undertakings for hindering on-site inspections. In this respect, in its *Çözüm* decision (22 December 2022, 22-56/878-363), Çözüm Dergisi Yay. San. Tic. Ltd. Şti. was fined 0.05% of its turnover generated in 2021 for hindering an on-site inspection. Similarly, the Board imposed a fine of 0.05% upon Natura Gıda Sanayi ve Ticaret A.Ş. on the grounds that its employees deleted the e-mails after the initiation of the on-site inspection, although the deleted e-mails had been recovered (*Natura Gıda* 8 September 2022, 22-41/599-250).

In 2022, the total amount of fines imposed on undertakings that obstructed on-site inspections was TL 115,268,235.48 (around EUR 3,819,472 at the time of writing).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In case of proven cartel activity, the companies concerned shall be separately subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and/or managers of the undertaking/association of undertakings who had a determining effect on the creation of the violation are also fined up to 5% of the fine imposed on the undertaking/association of undertakings. 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(s) within the relevant market; the duration and recurrence of the infringement; the cooperation or driving role of the undertaking(s) in the infringement; the financial power of the undertaking(s); and compliance with the commitments, etc. in determining the magnitude of the monetary fine.

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("Regulation on Fines") was enacted by the Authority in 2009. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but does not cover illegal concentrations. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2% and 4% of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines also applies to managers or employees who had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

As for the highest monetary fines imposed by the Board as a result of a cartel investigation, a recent decision stands out:

(i) The highest monetary fine imposed by the Board on a single company as a result of a cartel investigation is TL 958,129,194.39 (around EUR 31,748,103 at the time of writing). This monetary fine was imposed by the Board on BİM Birleşik Mağazalar A.Ş. ("BİM") (28 October 2021, 21-53/747-360). This amount represented 1.8% of BİM's annual gross revenue for the year 2020.

(ii) The highest monetary fine imposed by the Board for an entire case (i.e., total fine on all companies covered by the cartel conduct) as a result of a cartel investigation was around TL 2.6 billion (around EUR 86 million at the time of writing) for the same case (28 October 2021, 21-53/747-360). The total fine was imposed on seven undertakings active in the retail sector and manufacture of food and cleaning products.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the same level of competition and status as before the infringement. Under Article 9, besides an Article 7 violation, in determination of an infringement of Articles 4 and 6, the Board may order behavioural as well as structural remedies to re-establish the competition and end the infringement. Overall, the Board may order to end practices and/or adopt remedies to restore the *status quo* without imposing an administrative fine. Furthermore, a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Finally, the Competition Law

authorises the Board to take interim measures until the final resolution on the matter, in case there is a possibility of serious and irreparable damage.

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 not criminal sanctions. That said, there have been cases where the matter had to be referred to a public prosecutor after the Competition Law investigation has been completed. On that note, bid rigging activity may be criminally prosecutable under Sections 235 *et seq.* of the Turkish Criminal Code. Illegal price manipulation (i.e., manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. (Please see section 8 below for private suits, which may also become an exposure item against the defendant.)

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The sanctions specified in question 3.1 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 and/or board members/executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific for individuals. On that note, bid rigging activity may be criminally prosecutable under Sections 235 *et seq.* of the Turkish Criminal Code. Illegal price manipulation (i.e., manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. (Please see section 8 below for private suits, which may also become an exposure item against the defendant.)

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

No. The enforcement record indicates that the Board fined entities that had gone bankrupt before the fining decision without a reduction. However, Section 17 of the Law on Minor Offences provides that the fining administrative entity (i.e., the Board) may decide to collect the fine in four instalments (as opposed to one) over a period of one year, on the condition that the first instalment is paid in advance. Additionally, the Regulation on Fines provides that the Board may reduce the fine by one-quarter to three-fifths, if the turnover that is linked to the violation represents a very small portion of the fined undertaking's entire turnover.

3.4 What are the applicable limitation periods?

The Board's right to impose administrative monetary fines terminates upon the lapse of eight years from the date of infringement. In the event of a continuous infringement, the period starts running on the day on which the infringement has ceased or was last repeated. Any action taken by the Board to investigate an alleged infringement cuts the eight-year limitation period. The applicable periods of limitation in private suits (please see section 8) are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of 10 years from the event giving rise to the damage of the plaintiff. Prosecution of offences of a criminal nature (such as bid rigging activity and illegal price manipulation) is subject to the generally applicable criminal statutes of limitation, which would depend on the gravity of the sentence imposable.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. This does not constitute advice on tax deductibility or the accounting/bookkeeping aspects of such payment.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Competition Law does not provide any specific rules regarding the liability of implicated employees for the legal costs and/or financial penalties imposed on the employer. On the other hand, much would depend on the internal contractual relationship between the employer and the implicated employee, as there is no roadblock against the employer claiming compensation from the implicated employee under the general principles of Turkish contracts or labour laws. This does not constitute tax advice.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The Board has a consistent approach of fining the legal entity that was involved in cartel behaviour rather than fining the parent company as a whole.

Article 16 of the Competition Law makes a reference to the term "undertaking" when it identifies the entity on which the monetary fine is to be imposed. Article 3 of the Competition Law defines undertakings as natural and legal persons who produce, market and sell goods or services in the market, and entities that can decide independently and constitute an economic entity. Therefore, it can be argued that it technically leaves the impression that the Board is empowered to go up to the ultimate parent for the calculation of turnover rather than solely focusing on the local turnover of the entity that actually violates the Competition Law.

That said, in practice, the Board does not tend to calculate the revenue by taking into consideration the whole group's (i.e., the undertaking's) revenue, and imposes monetary fines on the basis of the actual infringing legal entity's (infringing subsidiary's) revenue (e.g., *Automotive*, 18 April 2011, 11-24/464-139; *Cement*, 6 April 2012, 12-17/499-140; and *Financial Institutions*, 28 November 2017, 17-39/636-276).

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Amendments to the Competition Law, which were enacted in February 2008, brought about a stricter and more deterrent fining regime, coupled with a leniency programme for companies.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels ("Regulation on Leniency"), came into force on 15 February 2009.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set. According to the Regulation on Leniency, the leniency

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

Additionally, the Authority published the Guidelines on the Clarification of Regulation on Leniency on 19 April 2013. The perspective of the Board stands in parallel with the perspective of the EC, since the leniency applications are quite minimal; however, it is not yet possible to say that Turkish competition law regulation has caught up with EU regulation concerning leniency procedures and reviews.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Although no detailed principles on the "marker system" are provided under the Regulation on Leniency, pursuant to the relevant legislation, a document (showing the date and time of the application and request for time (if such a request is in question) to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

There is no legal obstacle to conducting a leniency application orally. The Regulation on Leniency provides that information required for making a leniency application (information on the products affected by the cartel, information on the duration of the cartel, names of the cartelists, dates, locations and participants of the cartel meetings, as well as other information/documents about the cartel activity) might be submitted verbally. However, it should be noted that in such a case, the submitted information should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or employees/managers of the undertaking) must keep the application confidential until the end of the investigation, unless it is otherwise requested by the assigned unit.

Articles 6 and 9 of the Regulation on Leniency provide that, unless stated otherwise by the authorised division, the principle is to keep leniency applications confidential until the service of the investigation report. Nevertheless, to the extent the confidentiality of the investigation will not be harmed, the applicant undertakings could provide information to other competition authorities or institutions, organisations and auditors. The applicant is in any case obliged to maintain active cooperation until the final decision is taken by the Board following the conclusion of the investigation. As per paragraph 44 of the Guidelines on the Clarification of Regulation on Leniency, if the employees or personnel of the applicant undertaking disclose the leniency application to the other undertakings and breach the confidentiality principle, the Board will evaluate the situation on a case-by-case basis based on the criteria of whether the person at issue is a high-level manager, and whether the Board was notified promptly after the breach.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Pursuant to the principles set forth under the Regulation on Leniency, the active (continuous) cooperation shall be maintained until the Board renders its final decision after the investigation is completed.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

"Amnesty plus" is regulated under Article 7 of the Regulation on Fines. According to Article 7 of the Regulation on Fines, the fines imposed on an undertaking that cannot benefit from immunity provided by the Regulation on Leniency will be decreased by one-quarter if it provides the information and documents specified in Article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

A manager/employee of a cartelist may also apply for leniency until the "investigation report" is officially served. Such an application would be independent of applications – if any – by the cartelist itself. Depending on the application order, there may be total immunity from, or a reduction of, a fine for such manager/employee. The requirements for such individual application are the same as those stipulated under question 4.1 above.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Amendment Law introduces two new mechanisms that are inspired by EU law and aim to enable the Board to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is the commitment procedure. It permits the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or fully fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6 of the Competition Law, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch a fully-fledged

investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing and the restriction of supply. In other words, the commitment mechanism is not applicable to cartels. Additionally, the Board may reopen an investigation in the following cases: (i) substantial change in any aspect of the basis of the decision; (ii) the relevant undertakings' non-compliance with the commitments; or (iii) realisation that the decision was decided on deficient, incorrect or fallacious information provided by the parties. The secondary legislation entitled "Communiqué on Commitments to be Submitted during Preliminary Investigations and Investigations regarding Agreements, Concerted Practices and Decisions Restricting Competition and the Abuses of Dominant Position" and providing details on the process and procedure related to application of the commitment mechanism, came into force on 16 March 2021.

Secondly, the Amendment Law also introduces the settlement procedure. The settlement mechanism is applicable to cartels. It appears that it is also applicable to "other infringements" under Article 4 and abuse of dominance cases under Article 6, since the relevant provision is added to Article 43 concerning investigations of anticompetitive conduct in general, and considering that the Amendment Law does not limit the settlement option to cartels only. The new law enables the Board, *ex officio* or upon the parties' request, to initiate the settlement procedure. Unlike the commitment procedure, settlement can only be offered in fully fledged investigations. In this respect, parties that admit to an infringement can apply for the settlement procedure until the official service of the investigation report. The Board will set a deadline for the submission of the settlement letter and, if settled, the investigation will be closed with a final decision, including the finding of a violation and an administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25%. The parties may not bring a dispute on the settled matters and the administrative monetary fine once an investigation concludes with a settlement. Other procedures and principles regarding settlement will be determined by the Board's secondary legislation. 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 ("Settlement Regulation") on 15 July 2021, which set forth rules and procedures concerning the settlement process for undertakings that admit to the existence of a 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 competition problems. The Authority also published Communiqué No. 2021/3, which set out the principles regarding the criteria to be used to identify the practices of the undertakings that can be excluded from the scope of the investigation.

In its first ever settlement decision, the Board announced on its official website that its investigation against Türk Philips Ticaret A.Ş ("Philips Turkey"), Dünya Dış Ticaret Ltd. Şti., Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don. İnş. San. Tic. A.Ş., Nit-Set Ev Aletleri Paz. San. ve Tic. Ltd. Şti. and GİPA Dayanıklı Tüketim Mamülleri Tic. A.Ş., 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 August 2021, 21-37/524-258).

The Board 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's 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 "non-carbonated drinks" must be withdrawn, that 40% of the space in refrigerators should be accessible to competitors and that the sales agreements and refrigerator commodatum (loan for use) agreements entered into by Coca-Cola and its distributors 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 into with sales points and executing separate agreements for carbonated drinks and non-carbonated drinks, the termination of transitional terms and conditions across different product categories and increasing the refrigerator space accessible to competitors by 25%. 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 fully-fledged investigation against Singer sewing machines on 4 March 2020 with its decision (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 was exceeding the time limit set by the legislation (i.e., five years), alongside resale price maintenance practices. During the investigation, Singer applied to both settlement and commitment mechanisms. Whilst 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% for resale price maintenance violation (30 September 2021, 21-46/672-336).

In another noteworthy decision, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları A.Ş. ("Şişecam") and Sisecam Çevre Sistemleri A.Ş. 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).

In the recent decisions of the Board concerning Kınık Maden Suları A.Ş ("Kınık") and Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret A.Ş. ("Beypazarı") constitute the first combined application of the Settlement and Leniency Regulations. In its *Kınık* decision (14 April 2022, 22-17/283-128), the Board applied a 25% reduction under the Settlement Regulation (the highest reduction possible) and a 35% reduction under the Regulation on Leniency, amounting in total to a 60% reduction of the administrative monetary fine. Thus, the monetary fines imposed on Kınık decreased drastically from TL 2,322,328.75 to TL 928,931.50. Subsequently, in its *Beypazarı* decision (18 May 2022, 22-23/379-158), where Beypazarı made a leniency application after Kınık, the Board again applied a 25% reduction under the Settlement Regulation and a 30% reduction under the Regulation on Leniency, amounting in total to a 55% reduction

from the administrative monetary fine. Thus, the monetary fines imposed on Beypazarı decreased again drastically from TL 21,885,323.28 to TL 9,848,395.48.

Furthermore, in its *Şişecam* decision (February 23, 2023, 23-10/170-53), the Board recently revised the commitments finalised with its decision dated 21 October 2021 and numbered 21- 51/712-354 ("First Commitment Decision"). In the First Commitment Decision, the Board had decided that Şişecam, through its subsidiary Çevre Sistemleri, had abused its dominant position in the market for glass manufacturing, by way of excluding its competitors in the upstream market for recycled glass, utilised its buyer power to narrow the margin between its competitors' input and output and aggravated their activities through restricting their supply of waste glass. In the First Commitment Decision, the Board accepted the following commitments offered by Şişecam at the preliminary investigation stage and concluded the preliminary investigation against Şişecam:

(i) Terminating all procurement of unprocessed flat glass used in furnace-ready cullet from any undertaking that is outside the scope of Şişecam's economic integration (from third parties operating domestically), for five years beginning from the service of the short decision.

(ii) Terminating all procurement of unprocessed glass container products used in furnace-ready cullet from any undertaking that is outside the scope of Şişecam's economic integration (from third parties operating domestically), for two years beginning from the notification of the short decision and restricting dumping of waste glass containers up to 10,000 tonnes for the first year, 20,000 tonnes for the second year and 40,000 tonnes for the third year.

(iii) Terminating procurements of flat waste glass (for five years) and waste glass container (for two years) from undertakings established abroad (from third parties operating abroad) and outside the scope of Şişecam's Economic Integration.

(iv) The amount of furnace-ready glass procured from third parties shall not exceed 35% of the overall procured amount from third parties applicable for each financial year, lasting for five years from the notification of the short decision.

(v) A copy of notification made via a notary public regarding the termination of supply of waste glass contracts entered into force between Şişecam economic integration and third party undertakings, to be submitted to the Authority, lasting for five years.

(vi) A notification to be made to the Authority to observe the commitments that are being implemented with respect to transactions such as transfer, lease, etc. over the main elements of recycling activities (i.e facility, machinery-equipment), lasting for five years.

(vii) Annual submission of independent audit reports to the Authority prepared with the purpose of fulfilment of the commitments, for five years.

Following the earthquake that took place in Kahramanmaraş province and nearby cities, upon the application of Şişecam for revision of the commitments, the Board has decided that "[t]*here is a substantial alteration in any of the factors on which the decision was based*" in the face of the repercussions of the earthquake and accepted that the commitment in the item above is to be revised. By way of the revision, Şişecam commited to limit its procurement of unprocessed flat glass used in furnace-ready cullet from any undertaking that is outside the scope of Şişecam's economic integration (from third parties operating domestically), for five years beginning from the service of the short decision with an annual 15,000 tonnes.

7 Appeal Process

7.1 What is the appeal process?

As per Law No. 6352, the administrative sanction decisions of the Board can be submitted for judicial review before the Ankara Administrative Courts by the filing of an appeal case within 60 days upon receipt by the parties of the justified (reasoned) decision of the Board. As per Article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request by the plaintiff, the court, providing its justifications, may decide the stay of execution of the decision if such execution is likely to cause serious and irreparable damage, and if the decision is highly likely to be against the law (i.e., the showing of a *prima facie* case).

The judicial review period before the Ankara Administrative Courts usually takes approximately 12 to 24 months. After exhausting the litigation process before the Ankara Administrative Courts, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the Administrative Courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the Administrative Court.

Since 2016, administrative litigation cases are 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 go through the case file both on procedural and substantive grounds. The regional courts investigate the case file and make their decision considering the merits of the case. The regional courts' decisions are considered final in nature. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review and therefore will not be considered a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed, it will be remanded back to the deciding regional court, which will in turn issue a new decision to take account of the High State Court's decision.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 36 months.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No. As stipulated under question 7.1 above, 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 on a stay of execution.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The administrative courts and High State Council do not cross-examine witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow-on' actions as opposed to 'stand alone' actions?

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Articles 57 *et seq.* of the Competition Law entitle any person who is injured in his business or property, by reason of anything forbidden in the antitrust laws, to sue the violators for three times their damages plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

8.2 Do your procedural rules allow for class-action or representative claims?

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

8.3 What are the applicable limitation periods?

As noted above in question 3.4, the applicable periods of limitation in private suits are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of 10 years from the event giving rise to the damage of the plaintiff.

8.4 Does the law recognise a 'passing on' defence in civil damages claims?

The Competition Law and judicial precedents do not specifically recognise "passing on" defences in civil damages claims. "Passing on" defences are yet to be tested in Turkish enforcement. However, this is still an area of controversy; a part of the doctrine suggests that "passing on" defences should be permitted, whereas some other scholarly writings argue that they should not be accepted. However, there is no roadblock under the general civil claims rules against a defendant to put forward a "passing on" defence in civil damages claims. Nevertheless, the issue requires a case-by-case analysis, as the admissibility of the defence depends on the position of the claimant and the nature of the claim.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Any person who is injured in his business or property by reason of cartel activity is entitled to sue the violators for three times their damages, plus litigation costs and attorney fees. Other than this, there are no specific cost rules for cartel cases. The general cost rules for civil law claims also apply in cartel cases.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Antitrust-based private lawsuits are rare, but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations. Civil damage claims have usually been settled among the parties involved prior to the court rendering its judgment.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

According to the decision statistics of the Authority for 2022, 78 of the 386 cases that the Board decided on are related to Competition Law violations: 64 of those cases related to Article 4 of the Competition Law; and 38 of those 38 cases related to horizontal agreements. Overall, the Authority recorded increased Article 4 and cartel enforcement under horizontal agreements assessments.

In respect of cartel enforcement activity, the Board issued a reasoned decision that concluded imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their supplier, for their cartel arrangement (28 October 2021, 21-53/747-360). 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 TL 2.6 billion on the undertakings.

Furthermore, in the *MDF* decision, the Board concluded that AGT Ağaç Sanayi ve Ticaret A.Ş., Çamsan Ordu Ağaç San. ve Tic. A.Ş., Divapan Entegre Ağaç Panel San. Tic. A.Ş., Gentaş Dekoratif Yüzeyler Sanayi ve Ticaret A.Ş., Kastamonu Entegre Ağaç Sanayi ve Ticaret A.Ş., Kronospan Orman Ürünleri San. ve Tic. A.Ş., İntegre San. ve Tic. A.Ş., Starwood Orman Ürünleri Sanayii A.Ş., Teverpan MDF Levha Sanayii ve Ticaret A.Ş., Yıldız Entegre Ağaç San. ve Tic. A.Ş. and Yıldız Sunta Orman Ürünleri İth. İhr. ve Tic. A.Ş, which are producers of medium-density fibreboards ("MDF") and chipboards, were involved in a cartel agreement to fix the price increase timing and the percentages regarding MDF and chipboard products (1 April 2021, 21-18/229-96). In the relevant case, although the violation occurred in two different time periods (2014 and 2016–2017), the Board determined that a single base fine for both time periods should be applied with respect to the violation.

Moreover, in the *Sunny* decision (18 May 2022, 22-23/371-156), the Board decided not to initiate a full-fledged investigation in a recent preliminary investigation concerning the allegations that Sunny Elektronik Sanayi ve Ticaret A.Ş. ("Sunny") prohibited its resellers' online sales and engaged in resale price maintenance and facilitated indirect information exchange between its resellers, namely CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. ("CarrefourSA"), Migros Ticaret A.Ş. ("Migros") and Yeni Mağazacılık A.Ş. ("A101"), despite the fact that the case handlers of the Authority had suggested initiation of a full-fledged investigation.

The *Sunny* decision analysed the findings through the lens of a hub & spoke infringement and concluded that the findings in the particular case did not show any violation of such and hence deemed that there was no information and/or document indicating that Sunny, and the resellers of products supplied by Sunny, A101, CarrefourSA and Migros were involved in a restrictive agreement and violated Article 4 of the Competition Law and as a result, the Board decided not to initiate a full-fledged investigation.

In addition, the Board decided in its *FMCG II* Decision (15 December 2022, 22-55/863-357) that BİM Birleşik Mağazalar AŞ, CarrefourSA Carrefour Sabancı Ticaret Merkezi AŞ, Migros Ticaret AŞ, Şok Marketler Ticaret AŞ and Yeni Mağazacılık AŞ had violated Article 4 of the Competition Law by agreements or concerted practices related to a hub & spoke cartel.

The cartel aimed to determine the retail sale prices of many products offered for sale by the above retailers. It involved coordinating the price and/or price increases through indirect contacts between the said undertakings through common suppliers. They also exchanged competitively sensitive information such as future prices, price increase dates, seasonal activities, and campaigns through common suppliers. Moreover, undertakings interfered with the prices and imposed price increases on retailers that had not yet increased their prices during a period of general market price increases, through suppliers, to the detriment of customers. They observed the compliance with the collusion between undertakings by strategies such as product-specific price reduction in case competitor prices do not rise.

Therefore, the Board decided that an administrative monetary fine must be imposed on said undertakings pursuant to Article 16 of Competition Law. However, since an administrative fine was already imposed on the relevant undertakings pursuant to the Board's *FMCG I* Decision (28.10.2021, 21-53/747-360), in accordance with the general principle of law "*ne bis in idem*", the Board decided not to impose a new administrative monetary fine within the scope of the current investigation.

The pre-investigations and investigations that have been initiated by the Authority so far clearly demonstrate that the Authority does not focus on any specific sectors when it comes to the investigation of cartel behaviour, but rather aims to tackle any conduct or practice that might point to a restriction of competition among competing undertakings. It is expected that this trend will continue in future cases.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

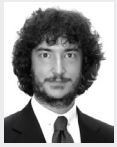
Similar to the rest of the world, technologies and digital platforms are on the Authority's radar. The Authority announced plans for the strategy development unit to focus on digital markets in May 2020 and launched a sector inquiry focused on e-marketplace platforms on 16 July 2020. The Authority published its Final Report on its Sector Inquiry on E-Marketplace Platforms on 14 April 2022. In the Final Report, it stated that that the Authority is working on digital market regulations and mentions Regulation (EU) 2022/1925 ("Digital Markets Act") as a basis for legislative action concerning digital markets. It is expected that regulations focusing on gatekeepers mentioned in the report will be 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 Turkish law on digital markets and is speculatively expected to compound the Digital Markets Act with increasing antitrust focus on digital markets; however, the proposed text of the Turkish act is not publicly available and its details remain unknown.

Moreover, on 7 April 2023 the Authority published its Preliminary Report on Online Advertising Sector Inquiry which was initiated in January 2021 together with the an expected DMA-type legislation in Turkey.

On 18 April 2023, the Authority published the Study on the Reflections of Digital Transformation on Competition Law, which provides an overview of the competition law framework for digital markets and highlights the challenges posed by data practices, algorithmic collusion, interoperability, and platform neutrality.

On a final note, on 30 March 2023, the Authority published its Final Report on its Sector Inquiry on the fast-moving consumer goods sector.

In 2022, the Authority participated in the following programmes: (i) the "2022 ICN Cartel Workshop" organised New Zealand Trade Commission, together with the ICN Cartel Study Group; (ii) the "Global Competition Forum", organised by the Organisation for Economic Co-operation and Development ("OECD"); (iii) the 7th International Conference on "Anti-monopoly Policy: Science, Practice and Education" organised by Federal Antimonopoly Service-FAS; (iv) the Startups. watch Ankara 2022 event; (v) the 16th Competition and Regulation European Summer School and Conference, ("CRESSE"); (vi) the "Competition Law and Policy Intergovernmental Experts Group" meetings organised by the United Nations Conference on Trade and Development ("UNCTAD"); (vii) the CMA Data, Technology and Analytics Conference organized by Competition and Markets Authority ("CMA"); (viii) the "Competition Law Izmir Symposium" organised by Izmir Democracy University; and (ix) the "hub & spoke cartels workshop" organised in cooperation with the OECD-Republic of Latvia Competition Council.



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In addition to his continuing private practice as an attorney, primarily through ELIG Gürkaynak, Gönenç is an Honorary Professor of Practice at UCL Faculty of Laws in London. In addition to his academic role at University College London, he also teaches competition law at Bilkent University Faculty of Law in Ankara/Turkey since 2005, and he has taught competition law in more than 10 universities in Turkey, in the EU, in the UK and in the US in the last 18 years.
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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 the founding partner, Dr. Gönenç Gürkaynak, along with four partners, nine counsel and 40 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, 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 in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and/or vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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