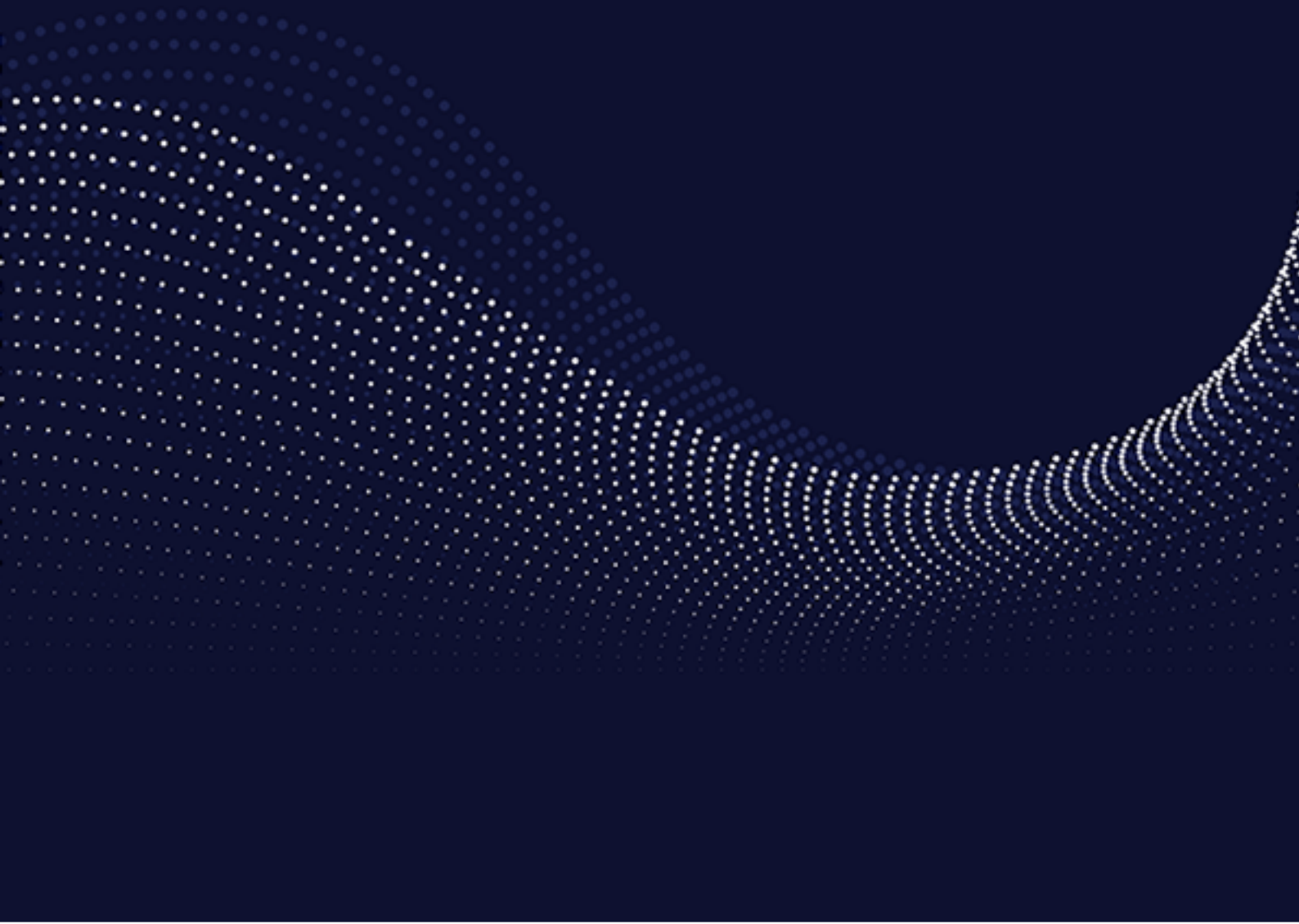
LEXOLOGY
Getting The Deal Through

CARTEL REGULATION

Türkiye



Cartel Regulation

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LEGISLATION AND INSTITUTIONS

Relevant legislation

What is the relevant legislation?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 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 and actions to secure a free market economy. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

After rounds of revisions and failed attempts at enactment over a span of several years, a proposed amendment to the Competition Law (the Amendment Proposal) has been approved by the Grand National Assembly of Türkiye (the Turkish parliament). On 16 June 2020, the amendments passed through parliament and entered into force on 24 June 2020 as Law No. 31165 (the Amendment Law), which was published in Official Gazette on 23 June 2020. According to the recital of the Amendment Proposal, these amendments add the experience of the Competition Authority (the Authority) of more than 20 years of enforcement to the Competition Law and bring it closer to European Union law.

Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The national authority for investigating cartel matters in Türkiye is the Authority. The Authority has administrative and financial autonomy, and consists of the Competition Board (the Board), the presidency and service departments. Six divisions with sector-specific work distribution handle enforcement of the Competition Law through approximately 288 case handlers as at 1 January 2023. Assisting the six technical divisions and the presidency are:

- an economic analysis and research department;
- a decisions unit;
- an information management unit;
- an external relations unit;
- a training and competition advocacy department;
- a regulation and budget department;
- a management services unit;
- a cartel and on-site inspections support unit; and
- a strategy development unit.

As the competent body of the Authority, the Board is responsible for, among other things, investigating and condemning cartel activity. The Board consists of seven independent members. If an instance of cartel activity amounts to a criminally prosecutable act, such

as bid rigging in public tenders, it may be separately adjudicated and prosecuted by Turkish penal courts and public prosecutors.

The Authority's administrative enforcement is also supplemented with private lawsuits. 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 felt in the cartel enforcement arena. Most courts wait for the Authority's decision and build their own decision on that of the Board.

Changes

Have there been any recent changes, or proposals for change, to the regime?

One of the most important amendments in the Amendment Law is the introduction of a de minimis principle, bringing Turkish competition law closer to that of EU law. Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition (the De Minimis Communiqué), which sets out the principles of the de minimis rule, came into force upon its publication on 16 March 2021. This amendment enables the Board to decide against launching full-fledged investigations into agreements, concerted practices and decisions of associations of undertakings that do not exceed the market share and turnover thresholds provided under the De Minimis Communiqué. This principle does not apply to hardcore violations such as price-fixing, territory or customer sharing, or restriction of supply. With this new mechanism, the Authority appears to be steering its direction – and public resources – towards investigating significant violations.

The introduction of the de minimis principle appears to be a more appropriate (and legally less controversial) measure for the Authority to prioritise cases, which has previously used article 9(3) of the Competition Law to terminate a pre-investigation on procedural efficiency grounds, such as when an infringement only affects a small market (eg, the ***Izmir Container Transporters*** decision (20–01/3–2, 2 January 2020)). The De Minimis Communiqué serves to grant the Board the opportunity to focus on more significant competition law matters as well as bringing Turkish competition law closer to the standards of EU competition law, on which it is modelled.

The Amendment Law brought about other significant changes, such as the introduction of settlement and commitment mechanisms. There are also the amended Guidelines on Vertical Agreements, published on 30 March 2018, which include provisions concerning internet sales and most favoured customer clauses.

Currently, an expected and significant development in Turkish competition law is the Draft Regulation on Administrative Monetary Fines for the Infringement of the Competition Law, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the Regulation on Fines). The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation 1/2003. The draft regulation was sent to the Turkish parliament on 17 January 2014, and is statute barred at present. However, its introduction demonstrates the Authority's intention to bring secondary legislation into line with EU competition law during the harmonisation process.

Finally, the following key legislative texts were announced or enacted between 2013 and the time of writing:

- the Communiqué on the Increase of the Lower Threshold for Administrative Fines specified in paragraph 1, article 16 of the Competition Law (to be valid until 31 December 2023);
- The Regulation on The Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position;
- the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition (Communiqué No: 2021/3);
- the Communiqué on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position (Communiqué No. 2021/2);
- the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector (Communiqué No. 2017/3);
- the Block Exemption Communiqué on R&D Agreements (Communiqué No. 2016/5);
- the Block Exemption Communiqué on Specialisation Agreements (Communiqué No. 2013/3);
- the Guidelines on Vertical Agreements, enacted on 29 March 2018;
- the Guidelines Explaining the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector (Communiqué No. 2017/3), enacted on 7 March 2017;
- the Guidelines on the General Principles of Exemption, enacted on 28 November 2013;
- the Guidelines on Horizontal Cooperation Agreements, enacted on 30 April 2013; and
- the Guidelines on the Explanation of the Regulation on Active Cooperation for Detecting Cartels, enacted on 17 April 2013.

Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 4 of the Competition Law is akin to, and closely modelled on, article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly article 81(1) of the Treaty establishing the European Community). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market, or a part thereof.

Article 4 does not offer a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Similar to the TFEU, the Amendment Law introduced the de minimis principle, whereby the Board will be able to decide to not launch full-fledged investigations into agreements, concerted practices and decisions of association of undertakings that do not exceed the market share and turnover thresholds provided under the De Minimis Communiqué.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment of whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains, and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on the circumstances.

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 a broad discretionary power of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) of the TFEU. The list includes examples such as price-fixing, market allocation and refusal-to-deal agreements. 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 to be per se illegal. Certain other types of competitor agreements such as vertical agreements and purchasing cartels are generally subject to a competitive effects test.

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, which aimed to focus attention and public resources on more significant violations, introduced the de minimis rule under article 41 of the Competition Law. In accordance with the introduction of the de minimis principle, 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 minimisprinciple is applicable to agreements falling under article 4; however, it is not applicable to hardcore violations, including resale price maintenance, price-fixing, territory or customer sharing and restriction of supply. In other words, cartels do not benefit from the de minimis principle.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable Block Exemption Communiqués are:

- No. 2002/2 on Vertical Agreements;
- No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- No. 2008/3 for the Insurance Sector;
- No. 2008/2 on Technology Transfer Agreements;
- No. 2013/3 on Specialisation Agreements; and
- No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the European Union. The most recent of these block exemptions – Block Exemption Communiqué No. 2017/3 on Vertical

Agreements in the Motor Vehicle Sector – sets out revised rules for the motor vehicle sector in Türkiye, 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 the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4 of the Competition Law.

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 called 'the presumption of concerted practice'.

Joint ventures and strategic alliances

To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Under the Competition Law, the competitive assessment of joint ventures falls between merger control and cartel regulation. Depending on the full-function character of a joint venture, it can be subject to either merger control or a general antitrust assessment.

If a joint venture is found to be a full-function joint venture, it will be subject to a merger control regime under article 7 of the Competition Law if the applicable turnover thresholds are met. However, if the joint venture is considered not to be full function, it would be subject to a test under article 4 of the Competition Law to see if it has an anticompetitive purpose or effect, and therefore would be subject to cartel regulation.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

Does the law apply to individuals, corporations and other entities?

The Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) applies to undertakings and associations of undertakings. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. The Competition Law, therefore, applies to individuals, corporations and other entities that act as undertakings.

Extraterritoriality

Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Türkiye is one of the 'effect theory' jurisdictions where what matters is whether the cartel activity has produced effects 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 Türkiye. The Competition Board (the Board) has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, provided that there has been an effect on the Turkish markets (eg, 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).

It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Türkiye that lack a presence in Türkiye, mostly due to enforcement shortfalls (such as difficulties of formal service or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a convincing argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Türkiye does not in and of itself produce effects in Türkiye. The Board finds the underlying basis of its jurisdiction in article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent that they produce an effect on a Turkish market, regardless of where the conduct takes place.

Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

It is fair to say that export cartels do not fall within the scope of the jurisdiction of the Competition Authority (the Authority), as per article 2 of the Competition Law. In *Poultry Meat Producers* (25 November 2009, 09–57/1393–362), the Authority launched an investigation into allegations that included, among other things, an export cartel. The Board decided that export cartels could not be sanctioned unless they affected the host country's markets. Although some other decisions (*Paper Recycling*, 8 July 2013, 13–42/538–238) suggest that the Authority might sometimes be inclined to claim jurisdiction over export cartels, it is fair to assume that an export cartel would fall outside of the Authority's jurisdiction if, and to the extent that, it does not produce an impact on Turkish markets.

Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. There are sector-specific block exemption rules, but these do not define any industry-specific offences or defences that do not exist in the Competition Law but detail slightly different rules for the block exemption regulations. One such regulation exists in the motor vehicle sector (the Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector) (Communiqué No 2017/3)). Accordingly, in cases that concern the motor vehicle sector's block exemption, both the defending undertaking and the Authority would consider the thresholds and rules specified within Communiqué No 2017/3.

To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Owing to the presumption of concerted practice, oligopoly markets for the supply of homogeneous products (eg, cement, bread yeast and ready-mixed concrete) have constantly been under investigation for concerted practices. Nevertheless, whether this track record (more than 32 investigations in the cement and ready-mixed concrete markets over 20 years of enforcement history) leads to an industry-specific offence is debatable.

Government-approved conduct

Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There are no defences or exemptions for state-approved or regulated actions.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. The Competition Law does not provide any specific exceptions to government-sanctioned activities or regulated conduct.

However, there are examples where the Board has taken an undertaking's defence that it was acting in a state-approved or regulated manner into account (eg, ***Paper Recycling***, 8 July 2013, 13–42/538–238; *Waste Accumulator*, 4 October 2012, 12–48/1415–476; *Pharmaceuticals*, 2 March 2012, 12–09/290–91; *Et–Balık Kurumu*, 16 June 2011, 11–37/785–248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99–12/91–33; *Esgaz*, 9 August 2012, 12–41/1171–384).

INVESTIGATIONS

Steps in an investigation

What are the typical steps in an investigation?

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

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. 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 to prepare an opinion concerning the second written defence, which, as per the recent amendments, is extendable for a further 15 days. The defending parties will have another 30-day period to reply to the additional opinion (third written defence), which is also extendable for a further 30 days. When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held or within 30 calendar days of completion of the investigation process if no oral hearing is held.

The appeal must be brought within 60 calendar days of the reasoned decision being officially served. It usually takes approximately three to eight months from the announcement of the final decision for the Board to serve a reasoned decision on an appeal.

Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

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 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is currently 105,688 Turkish lira (Communiqué on the Increase of the Lower Threshold for Administrative Fines specified in paragraph 1, article 16 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) (Communiqué No. 2023/1)). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

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

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). It may also lead to the imposition of a fine of 0.05 per cent of the Turkish turnover

generated in the financial year preceding the date of the fining decision for each day of the violation (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

The Competition Law provides vast authority to the Authority on dawn raids. Judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Other than that, the Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Competition Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving an answer provided that there is a quickly 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 within a mutually agreed time. Computer records are fully examined by the experts of the Authority, including, but not limited to, deleted items. Moreover, the Authority published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which sets 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.

In addition to the above, the amendments to the Competition Law that passed through parliament and entered into force on 24 June 2020 as Law No. 31165 also include an explicit provision that, during on-site inspections, the Authority can inspect and make copies of all information and documents in the companies' physical records and those in electronic storage and IT systems, which the Authority already does in practice. This is also confirmed in the proposed amendment to the Competition Law's preamble as it indicates that the amendment serves further clarification on the powers of the Authority that are particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

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 (ie, that which is written on the deed of authorisation).

INTERNATIONAL COOPERATION

Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Article 43 of Decision No. 1/95 of the European Union–Türkiye Association Council authorises the Competition Authority (the Authority) to notify and request the European Commission's Directorate-General for Competition to apply relevant measures if the Competition Board (the Board) believes that cartels organised in the territory of the European Union adversely affect competition in Türkiye. The provision grants reciprocal rights and obligations to the parties (the European Union and Türkiye), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

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

The research department of the Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition to assess their results, and submits its recommendations to the Board. As an example, a cooperation protocol was signed on 14 October 2009 between the Authority and the Turkish Public Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Authority's actions.

Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

It is fair to say that the interplay between jurisdictions does not, in practice, materially affect the Board's handling of cartel investigations, including cross-border cases. The principle of comity does not constitute an explicit provision in Turkish competition law. A cartel's conduct that was investigated elsewhere in the world can be prosecuted in Türkiye if it has had an effect on Turkish markets.

CARTEL PROCEEDINGS

Decisions

How is a cartel proceeding adjudicated or determined?

The Competition Board (the Board) can initiate an inspection into an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is also supplemented with private lawsuits. Private suits against cartel members are tried before regular courts. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigation increasingly makes its presence felt in the cartel enforcement arena. Most courts wait for the decision of the Board and build their own rulings on that decision.

Burden of proof

Which party has the burden of proof? What is the level of proof required?

The most important material issue specific to Türkiye is the very low standard of proof adopted by the Board. The participation of an undertaking in a cartel activity requires proof

that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law), and especially of the 'object or effect of which' branch, the Board has established an extremely low standard of proof concerning cartel activity.

The standard of proof is even lower as far as concerted practices are concerned. In practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice. The Competition Law brings a presumption of concerted practice, which enables the Board to engage in article 4 enforcement in cases where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that conscious parallelism is rebuttable evidence of forbidden behaviour and constitutes sufficient ground to impose fines on the undertakings concerned. Therefore, the burden of proof is very easily switched and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

Unlike in the European Union, where the undisputed acceptance is that tacit collusion does not constitute a violation of competition, the Competition Law does not give weight to the doctrine known as 'conscious parallelism and plus factors'. In practice, the Board sometimes does not go to the trouble of seeking plus factors along with conscious parallelism if naked parallel behaviour is established.

Recent indications in practice also suggest that Competition Authority (the Authority) officials are increasingly inclined to adopt a broadening interpretation of the definition of 'cartel'.

Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The Board considers communication evidence and economic data that indicate coordination between competitors as circumstantial evidence. Communication evidence, for instance, can prove that the possible parties to an agreement communicated with or met each other, yet cannot demonstrate the actual content of such communication. If there is no direct evidence demonstrating the existence or content of a violation, the Board might establish an infringement through circumstantial evidence by itself or along with direct evidence, especially in concerted practice cases.

Appeal process

What is the appeal process?

As per Law No. 6352, which entered into force on 5 July 2012, the final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of

receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Board are considered administrative acts and, thus, legal actions against them shall be pursued in accordance with the Administrative Procedure Law No. 2577. The judicial review comprises both procedural and substantive reviews.

As per article 27 of the Administrative Procedure Law No. 2577, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff, the court, by providing its justifications, may decide on a stay of execution if executing the decision is likely to cause serious and irreparable damages and the decision is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes approximately 12 to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the High State Court. If the challenged decision is annulled in full or in part, the administrative court remands it to the Board for review and reconsideration.

A significant development in competition law enforcement was the change in the competent body for appeals against the Board's decisions. The new legislation has created 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 and make 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 No. 2577. In such cases, the decision of the regional court will not be considered a final decision and the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed by the High State Court, it will be returned to the deciding regional court, which will in turn issue a new decision which takes into account the High State Court's decision. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by general procedural laws and usually lasts 24 to 30 months.

An appeal process is typically initiated by the infringing party in cases where the Board finds a violation or by complainants if there is no finding of a violation. The Authority does have the right to challenge a court decision by initiating a judicial review process if a decision of the Board is overturned by the deciding court.

SANCTIONS

Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The sanctions that can be imposed under the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price

manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In the case of proven cartel activity, the undertakings 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 Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Competition Board (the Board) to take mitigating and aggravating factors into account (eg, the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, and the financial power of the undertakings or the compliance with their commitments) in determining the magnitude of the monetary fine.

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 to restore the level of competition and status to the state that it was in before the infringement. Furthermore, such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Similarly, 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.

Civil actions are still rare, but are increasing in frequency. The majority of private lawsuits in Turkish antitrust enforcement are based on allegations of refusal to supply and price manipulation. Civil damage claims are usually settled among the involved parties prior to a court rendering judgment.

Similar to US antitrust enforcement, the most distinctive feature of Turkish competition law is that it provides for civil lawsuits for treble damages and therefore supplements administrative enforcement with private lawsuits. Articles 57 et seq of the Competition Law entitle any legal or natural person injured in their 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 do not usually engage in an analysis as to whether there is a condemnable anticompetitive agreement or concerted practice and wait for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question. As courts usually wait for the Board's decision, the court's decision can be obtained in a shorter period as compared to regular full judiciary processes in follow-on actions.

Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

After the recent amendments, the new version of 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 (among others) the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, and compliance with their commitments in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (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 illegal concentrations are not covered by the Regulation on Fines.

The Regulation on Fines states that fines are calculated by determining their base levels. In the case of cartels, each undertaking's fine is set at between 2 per cent and 4 per cent of its 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 is used. Then, aggravating and mitigating factors are factored in. Such factors are set forth in the Regulation on Fines. Article 5/3 of this regulation states that the amount of the fine may be increased by 50 per cent if a violation lasted between one and five years, and by 100 per cent if it lasted for more than five years. Article 6 allows for the base fine to be increased by 50 per cent to 100 per cent for each repetition of the violation and also further increased onefold if the cartel is maintained after the notification of the investigation decision.

Aggravating factors are defined under article 6 in a non-exhaustive manner and, accordingly, the base fine may also be increased by:

- 50 per cent to 100 per cent, if an undertaking's commitments made regarding the elimination of competition problems raised within the scope of article 4 of the Competition Law have not been met;
- up to 50 per cent, if an undertaking does not provide assistance with an investigation; and
- up to 25 per cent in cases such as coercing other undertakings into the violation.

The provisioned increase for not providing assistance with the investigation differs from the administrative monetary fine is set forth in article 16 of the Competition Law for undertakings that obstruct the investigation process by way of providing misleading information or documents or not providing any information or documents at all, or preventing or obstructing an on-site inspection. In such cases, the Board would impose a separate administrative monetary fine for each instance of obstruction, which is separate from the final administrative monetary fine that is imposed at the end of the investigation process.

Mitigating factors are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner (ie, the Board has flexibility in deciding what constitutes mitigating factors in each specific case). In this regard, the base fine may be reduced by 25 per cent to 60 per cent if:

- the concerned undertaking or association of undertakings:
    - provided assistance to the investigation beyond the fulfilment of their legal obligations;
    - provided evidence of public authorities encouraging or coercing other undertakings to take part in the violation;
    - made voluntary payments of damages to those harmed; or
    - voluntarily terminated other violations; or
- the violating practices formed a very small part of the undertaking's business in relation to its annual gross revenue.

The Regulation on Fines also applies to managers or employees who held ringleader roles within the violation (eg, those participating in cartel meetings made decisions that would involve the company in cartel activity), and also provides for certain reductions in their favour when there are mitigating factors to the violation or the undertaking has provided assistance during the course of the investigation.

The Regulation on Fines is binding on the Competition Authority (the Authority).

Compliance programmes

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Article 7 of the Regulation on Fines follows that the Board may reduce the base fine at a rate of 25 to 60 per cent if the undertakings or association of undertakings concerned prove certain facts such as the provision of assistance to the examination beyond the fulfilment of legal obligations, the existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of violations, and occupation of a very small share by practices subject to the violation within annual gross revenues.

Mitigating factors are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner, in such a way that the base fine may be reduced by 25 per cent to 60 per cent if:

- the concerned undertaking or association of undertakings:
    - provided assistance to the investigation beyond the fulfilment of their legal obligations;
    - provided evidence of public authorities encouraging or coercing other undertakings to take part in the violation;
    - made voluntary payments of damages to those harmed;
    - voluntarily terminated other violations; or

- the violating practices formed a very small part of the undertaking's business in relation to its annual gross revenue.

Regarding mitigating factors, there have been several cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever-*, 12–42/1258–410; *Efes*, 12–38/1084–343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13–49/711–300; *Industrial Gas*, 13–49/710–297).

In ***Industrial Gas***, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's *Mey İçki* decision (17–07/84–34, 16 February 2017) might be signalling a change in its perception of compliance programmes. The Board applied a 25 per cent reduction on the grounds that Mey İçki (a producer and distributor of spirits) ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board before the Board issued its final decision. Similarly, in its *Consumer Electronics* decision (16–37/628–279, 7 November 2016), the Board applied a 60 per cent reduction to an undertaking due to its compliance efforts since the undertaking amended its contracts before the final decision of the Board.

Director disqualification

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The sanctions specified in terms of undertakings themselves 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 an infringing entity's employees, or board or executive committee members, if such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific to individuals. On that note, bid rigging activity may be criminally prosecutable under sections 235 et seq of the Turkish Criminal Code. Illegal price manipulation (ie, manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Bid riggers in government procurement tenders may face blacklisting (ie, debarment from government tenders) for up to two years under article 58 of the Public Tenders Law No. 4734. The blacklisting is decided by the relevant ministry implementing the tender contract, or by the relevant ministry that the contracting authority is subordinate to or is associated with.

It is a duty, not an option, for administrative authorities to apply blacklisting in cases of bid rigging in government tenders.

Blacklisting is only applicable to bid rigging. It is not available in cases of other forms of cartel infringement.

Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Yes. The same conduct can trigger administrative or civil sanctions (or criminal sanctions in the case of bid rigging or other criminally prosecutable conduct) at the same time.

PRIVATE RIGHTS OF ACTION

Private damage claims

Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

One of the most distinctive features of the Turkish competition law regime is that it provides for treble damages in lawsuits. Article 57 et seq of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) entitles any person injured in their business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish Code of Obligations regulates the joint creditors and prevents the debtor from double recovery. All the creditors shall pursue a claim against the debtor and, in that case, a debtor shall pay on the amount of their shares. However, in the event that the debtor makes a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

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

Indirect purchaser claims have not yet been tested before the courts. However, there is no regulation that prevents potential umbrella purchaser claims as well since article 58 of the Competition Law focuses on the existence of damage by stating that:

> Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited.

Class actions

Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. While article 73 of Law No. 6502 on the Protection of Consumers allows class actions by consumer organisations, these actions are limited to violations of this law 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, but this has no reasonable relevance to private suits under article 57 et seq of the Competition Law.

Turkish procedural law allows group actions under article 113 of the Turkish Procedure Law No. 6100. Associations and other legal entities may initiate a group action to 'protect the interest of their members', 'to determine their members' rights' and 'to remove the illegal situation or prevent any future breach'. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The verdict shall encompass all individuals within the group.

COOPERATING PARTIES

Immunity

Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Regulation on Active Cooperation for Discovery of Cartels (the Regulation on Leniency) was enacted on 15 February 2009. The Regulation on Leniency sets out the main principles of immunity and leniency mechanisms. In parallel to the Regulation on Leniency, the Competition Board (the Board) published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels in April 2013.

The leniency programme is only applicable to cartel cases. It does not apply to other forms of antitrust infringement. Section 3 of the Regulation on Leniency provides for a definition of 'cartel' that encompasses price-fixing; customer, supplier or market sharing; restricting output or placing quotas; and bid rigging.

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

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

- the applicant shall submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, and specific dates, locations and participants of cartel meetings;
- the applicant shall not conceal or destroy information or evidence related to the alleged cartel;
- the applicant shall end its involvement in the alleged cartel except when otherwise requested by the assigned unit on the ground that detecting the cartel would be complicated;
- the applicant shall keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit; and
- the applicant shall maintain active cooperation until the Board takes the final decision after the investigation is completed.

Subsequent cooperating parties

Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Regulation on Leniency provides for the possibility of a reduction of the fine for second-in and subsequent leniency applicants. Also, the Competition Authority (the Authority) may consider the parties' active cooperation after the immunity application as a mitigating factor as per the provisions of the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the Regulation on Fines).

Going in second

How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 per cent and 50 per cent. Employees or managers of the second applicant that actively cooperate with the Authority would benefit from a reduction of between 33 and 100 per cent.

The third applicant would receive a 25 per cent to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

Amnesty plus is regulated under article 7 of the Regulation on Fines. According to article 7, the fines imposed on an undertaking that cannot benefit from immunity provided by the

Regulation on Leniency will be decreased by 25 per cent 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.

Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

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

Leniency applications submitted after the official service of the investigation report would not benefit from conditional immunity. Still, such applications may benefit from fine reductions.

Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

An applicant must submit:

- information on the products affected by the cartel;
- information on the duration of the cartel;
- the names of the cartelists;
- the dates, locations and participants of the cartel meetings; and
- other information or documents about the cartel activity.

The required information may be submitted verbally. Markers are also available. Admission of actual price effect is not a required element of a leniency application. The applicant must avoid concealing or destroying the information or documents concerning the cartel activity. Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel. Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served. The applicant must continue to actively cooperate with the Authority until the final decision on the case has been rendered. The applicant must also convey any new documents to the Authority as soon as they

are discovered, cooperate with the Authority on additional information requests and avoid statements contradictory to the documents submitted as part of the leniency application.

These ground rules apply to subsequent cooperating parties as well.

Indications in practice show that the Authority was, until recently, inclined to adopt an extremely high standard regarding what constitutes 'necessary documents and information for a successful leniency application' and the 'minimum set of documents that a company is required to submit'. In ***3M*** (12–46/1409–461, 27 September 2012), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

In 2015, the Board slightly eased the tensions and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the Board's reasoned decision of an investigation of fresh yeast producers was released (14–42/783–346). The decision was the first of its kind, where the Board granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was granted to a submission made after the initiation of a preliminary investigation and dawn raids were executed. It served as a landmark case in that it was the first example of the Board granting immunity after dawn raids. The Board justified this unprecedented action by claiming that substantive evidence and added value were brought in through the leniency application. In parallel, in the ***Mechanical Engineering*** decision (17-41/640–279, 14 December 2017), the Board accepted one undertaking's leniency application during the course of the preliminary investigation. The leniency applicant received full immunity from fines. In its decision regarding undertakings active in the roll-on, roll-off transportation sector (19–16/229–101, 18 April 2019), the Board decided that the administrative fine for an undertaking that applied for leniency during the investigation should be halved if the information that it provides significantly contributed to the investigation. The Board further noted that relevant contributions included providing evidence that the violation's starting point was earlier than what was detected during the on-site inspection, and evidence illustrating that price information was exchanged by the violating undertakings and further details on how the price exchange was conducted. The case is therefore expected to result in an increase in the number of leniency applications in Türkiye in the near future.

Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the principles set forth under the Regulation on Leniency, the applicant (an undertaking or the employees or managers of an undertaking) must keep the application

confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is applicable to subsequent cooperating parties as well. While the Board can also evaluate the information or documents ex officio, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request, in writing, confidentiality from the Board and justify the confidential nature of the information or documents that they are requesting be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Board has decided on the case.

Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The amendments to the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) that passed through parliament and entered into force on 24 June 2020 as Law No. 31165 introduced two new mechanisms inspired by EU law that 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 will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of articles 4 and 6 of the Competition Law, which prohibit restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide to not launch a full-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, or the restriction of supply. The Regulation on the Settlement Procedures to be Applied during Investigations Regarding Anticompetitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance (the Settlement Regulation), which entered into force on 15 July 2021, determines the other procedures and fundamentals of the settlement process. As regards the applicability of the settlement mechanism, the Competition Law imposes no restrictions in terms of the nature of the violation.

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

- the content of the allegations;

- the nature and scope of the alleged violation;
- the main pieces of evidence that constitute a basis for the allegations;
- the potential reduction rate to be applied in case of settlement; and
- the range of the potential administrative monetary fine that might be imposed against the settling party.

Following the settlement negotiations, the Board would adopt an interim decision, which would include (among other factors) the nature and scope of the alleged violation, the maximum rate for the administrative monetary fine in accordance with Regulation on Fines, and the reduction rate to be applied at the end of the settlement procedure. Subsequently, if the settling party agrees on the matters set forth therein, it will submit a settlement letter that shall include (among other things) an express declaration of admission as to the existence and scope of the violation. Article 9(1) of the Settlement Regulation provides that the Board shall adopt its final decision to end the investigation within 15 days following the submission of the settlement letter. The Board's final decision shall include the finding of the violation and the administrative monetary fine to be imposed against the settling undertaking.

Additionally, the Board may reopen an investigation when:

- there is a substantial change in any aspect of the basis of the decision;
- the relevant undertakings does not comply with the commitments; and
- there is a realisation that the decision was decided on deficient, incorrect or fallacious information provided by the parties.

Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The current employees of a cartelist entity also benefit from the same level of leniency or immunity that is granted to the entity. There are no precedents about the status of former employees as yet.

Apart from this, according to the Regulation on Leniency, a manager or employee of a cartelist may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such a manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for cartelists.

Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Since active cooperation is required from all applicant cartel members to maintain the leniency or immunity granted by the Board, extra effort should be spent to keep the Board informed to the maximum possible extent regarding the cartel that is subject to investigation.

DEFENDING A CASE

Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The right of access to the file has two legal bases in the Turkish competition law regime: Law No. 4982 and Communiqué No. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3). Article 5/1 of Communiqué No. 2010/3 provides that the right of access to the case file will be granted upon the written requests of the parties within the due period during the investigations. The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement. This right can only be used once, provided that no new evidence has been obtained within the scope of the investigation.

On the other hand, Law No. 4982 does not have such a restriction in terms of timing or scope. Access to the case file enables the applicant to gain access to information and documents in the case file that do not qualify as either internal documents of the Competition Authority (the Authority) or trade secrets of other firms or trade associations.

Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Provided that there are no conflicts of interest, Turkish law does not prevent counsel from representing both an undertaking under investigation and its employees. That said, employees are hardly ever investigated separately and there are no criminal sanctions against employees for antitrust infringements.

Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

If there are no conflicts of interest and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Türkiye) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes that bind attorneys in Türkiye.

Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. It is advisable to seek separate tax or bookkeeping advice before the corporation pays the legal costs or penalties imposed on its employee.

Taxes

Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Pursuant to article 11 of Corporate Tax Law No. 5520, any administrative monetary fine is not considered tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

There is a reduction mechanism for administrative monetary fines. The relevant legislation on payment of administrative monetary fines allows the undertakings to discharge from liability by paying 75 per cent of the fine, provided that the payment is made before any appeal. The payment of such an amount is without prejudice to a later appeal. The time frame in which to pay the 75 per cent portion terminates on the 30th calendar day from the service of the full reasoned decision.

International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No. The Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules.

Overlapping liability for damages in other jurisdictions is not taken into account.

Getting the fine down

What is the optimal way in which to get the fine down?

Aside from the leniency programme, article 9 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law), which generally entitles the Competition Board (the Board) to order structural or behavioural remedies to restore the competition as before the infringement, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established through a very diligent review of the relevant implicated businesses to identify all the problems, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject to only an

article 9 warning, the Board at least found a mitigating factor in that the entity immediately took measures to cease any wrongdoing and if possible to remedy the situation.

Following amendments in 2008, the new version of Competition Law refers to article 17 of the Law on Minor Offences to require the Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

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

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (***Unilever***, 12-42/1258-410; ***Efes***, 12-38/1084-343).

However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (***Frito Lay***, 13–49/711–300; ***Industrial Gas***, 13–49/710–297).

In ***Industrial Gas***, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's ***Mey İçki*** decision (17–07/84–34, 16 February 2017) might be signalling a change in its perception of compliance programmes. The Board applied a 25 per cent reduction on the grounds that Mey İçki (a producer and distributor of spirits) ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board before the Board issued its final decision. Similarly, in its ***Consumer Electronics*** decision (16–37/628–279, 7 November 2016), the Board applied a 60 per cent reduction to an undertaking due to its compliance efforts since the undertaking amended its contracts before the final decision of the Board.

UPDATE AND TRENDS

Recent cases

What were the key cases, judgments and other developments of the past year?

According to the decision statistics of the Competition Authority (the Authority) for 2022, the Competition Board (the Board) decided on 386 cases, of which 78 were related to competition law violations. Of that 78, 64 were related to article 4 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) and 38 of those 64 cases related to horizontal agreements.

In terms of cartel enforcement activity, the Board recently issued a reasoned decision that concludes 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 suppliers – and their supplier:

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

Thus, the Board decided that the defendants had violated article 4 of the Competition Law. It imposed an administrative monetary fine of over 2.6 billion Turkish lira in total.

The Competition Board's recent healthcare sector decision (24 February 2022, 22-10/152-62) 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.

The Competition Board's ***Beypazarı/Kınık*** decisions (14 April 2022, 22-17/283-128 and 18 May 2022, 22-23/379-158) constitute the first combined application of the settlement and leniency mechanisms. The Competition Board applied a 25 per cent reduction (the highest possible reduction) under the Regulation on the Settlement Procedures to be applied during Investigations Regarding Anti-competitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance (Settlement Regulation) and a 35 per cent reduction under the leniency application, reducing the administrative monetary fine by 60 per cent in total. Thus, the monetary fines imposed on Kınık were significantly reduced from 2.32 million Turkish lira to 928,931 Turkish lira. For Beypazarı, which applied for lenience after Kınık, the monetary fines were also reduced significantly, from 21.89 million Turkish lira to 9.85 million Turkish lira.

Furthermore, the Board decided that Novartis Sağlık Gıda ve Tarım Ür San ve Tic AŞ (Novartis) and Roche Müstahzarları San AŞ (Roche) violated article 4 of the Competition Law in relation to the drugs Lucentis and Altuzan, both of which are used for the treatment of age-related macular degeneration eye diseases (21 January 2021, 21-04/52-21). The Board determined that Novartis and Roche had agreed to shift market demand towards Lucentis in intraocular treatment and discourage the use of Altuzan by providing misleading information to administrative and judicial authorities, highlighting Altuzan's side effects and the risk of endophthalmitis. Ultimately, the Board determined that Novartis and Roche had been engaged in cartel activity and acquiring unlawful profits by seeking to shift demand towards the more expensive medication, Lucentis. The Board concluded that the actions of Novartis and Roche constituted a violation of article 4 of the Competition Law and it imposed

an administrative fine of 165.46 million Turkish lira on Novartis and 112.97 million Turkish lira on Roche.

The investigations that have been initiated by the Authority to date clearly show that it does not focus on specific sectors when it comes to the investigation of cartel behaviour, but rather aims to tackle all conduct and practices that might restrict competition among competing undertakings. It is expected that this trend will continue in future.

Regime reviews and modifications

Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 16 June 2020, the long-awaited and expected proposed amendments to the Competition Law passed through the parliament. They entered into force on 24 June 2020. According to the recital of the proposed amendment to the Competition Law, these amendments add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to EU law. There are no further reviews or changes expected at this stage.