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Cartel Regulation

The application of competition regulation in 46 jurisdictions worldwide

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Turkey

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

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.

The national competition authority for enforcing the Competition Law in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. Four divisions with sector-specific work distribution handle competition law enforcement work through approximately 120 case handlers. A research department assists the four technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members.

2 Proposals for change

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

The most recent change with respect to the Turkish cartel regime was the enactment of secondary legislations on the right of access to case files and protection of trade secrets; and the procedures of oral hearings before the Board. Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets has been enacted since 18 April 2010. It regulates the conditions under which investigated undertakings may have access to the investigation case file. It also lays down the principles and conditions of confidentiality with respect to trade secrets. Communiqué No. 2010/2 on Oral Hearings Before the Competition Board has been enacted since 24 April 2010. It regulates the procedures under which oral hearings are held before the Board.

Furthermore, the Competition Law is still expected to undergo significant modifications. The major proposed changes are:

- to bring the 'appreciable effect' test to article 4 enforcement and recognise de minimis exceptions and defences;
- to abandon the concept of 'negative clearance'; and
- to revise the applicable time limits for the investigation phase.

3 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) (ex article 81(1) of the EC Treaty). 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 bring a definition of 'cartel'. It rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Unlike the TFEU, article 4 does not refer to 'appreciable effect' or 'substantial part of a market' and thereby excludes any de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

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.

Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU.

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 rules are:

- the Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- the Block Exemption Communiqué No. 2003/2 on R&D Agreements;
- the Block Exemption Communiqué No. 2008/3 for the Insurance Sector; and
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements.

These are all modelled on their respective equivalents in the EU.

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.

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.

The Turkish antitrust regime also condemns concerted practices, and the Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The special challenges posed by the proof standard concerning concerted practices are addressed in question 13.

4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. 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.

Due to the 'presumption of concerted practice' (further addressed in question 13), oligopoly markets for the supply of homogenous products (for example, cement, bread yeast) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (over 15 investigations in the cement and ready-mixed concrete markets in 14 years of enforcement history) leads to an industry-specific offence would be debatable.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples.

5 Application of the law

Does the law apply to individuals or corporations or both?

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 and corporations alike if they act as an undertaking.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

Turkey 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 Turkey. The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members (see, for example, *Sisecam/Yioula*, 28 February 2007; 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004; 04-43/538-133; *Refrigerator Compressor*, 1 July 2009; 09-31/668-156) in the past, as long as there is an effect on the Turkish markets. It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service).

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 they produce an effect on a Turkish market, regardless of where the conduct takes place.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

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 decides to conduct 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 onsite inspections) (see question 8) and other investigatory tools (for example, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition 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, 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 (first written defence). Subsequently, the main investigation report is issued by the Competition 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. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition 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 Competition Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

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 12,327 Turkish lira. 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 onsite investigations. 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 onsite investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 12,327 Turkish lira. It may

also lead to the imposition of a periodic daily-based fine of 0.05 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) for each day of the violation.

The Competition Law therefore provides vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. While the mere wording of the Law allows verbal testimony to be compelled of employees, case handlers do allow delaying an answer so long as there is a 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 timeline. Computer records are fully examined by the experts of the Competition Authority, including but not limited to deleted items.

Officials conducting an onsite 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 (that is, that which is written on the deed of authorisation).

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Article 43 of Decision No. 1/95 of the EC–Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European Commission (DG Competition) to apply relevant measures if the Board believes that cartels organised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (EU-Turkey), 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 Competition Authority and the competition agencies in other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Competition Authority also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order to assess their results, and submits its recommendations to the Board. In this respect, a cooperation protocol was signed on 14 October 2009 between the Turkish Competition Authority and the Turkish Public Procurement Authority in order to procure a healthy competition environment with regard to public tenders by cooperating and sharing information.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

The interplay between jurisdictions does not materially affect the handling of the Board in cartel investigations.

11 Adjudication

How is a cartel matter adjudicated?

A cartel matter is primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. In private suits, cartel members are adjudicated before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

12 Appeal process

What is the appeal process?

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the High State Council by filing an appeal case within 60 days of receipt by the parties of the justified 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 of the plaintiff the court, by providing its justifications, may decide the stay of the execution if the execution of the decision is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the High State Council usually takes about 24 to 30 months.

13 Burden of proof

With which party is the burden of proof?

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 Competition Law, and especially of the 'object or effect of which…' prong, 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 parallelism is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an 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. 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.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. 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 sections 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be condemned by up to two years of imprisonment and a judicial monetary fine under section 237 of the Turkish Criminal Code.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In the case of a 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 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 Board 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 or the compliance with their commitments etc, 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 in order to restore the level of competition and status as 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 in case there is a possibility of serious and irreparable damages.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, 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.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Articles 57 et seq of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts.

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.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

In 2010, the Board decided on a total of 252 antitrust infringement cases (99 cases on article 4; 111 cases on article 6 (abuse of dominant position); 38 mixed). Out of 137 article 4 cases, 11 relate to horizontal infringements, 59 to vertical infringements and 67 to both. There is also a significant and easily detectable decrease in the sum of monetary fines imposed on substantive grounds (39.4 million Turkish lira in 2010, compared to 91.12 million Turkish lira in 2009). Article 4 cases accounted for almost all of the monetary fines imposed on substantive grounds (35.65 million Turkish lira for article 4 infringements and 3.75 million Turkish lira for infringements of both articles 4 and 6). This trend seems to have been reversed however, since 2011 is already marked by record fines and some of the most significant cartel cases in the history of Turkish antitrust enforcement. In *Automotive Manufacturers* (18 April 2011, 11-24/464-139), 15 car manufacturers were fined around 277.4 million Turkish lira for violating article 4 by exchanging competition-sensitive data. In *Banking Industry* (7 March 2011, 11-13/243-78), seven banks were fined around 72 million Turkish lira for a gentlemen's agreement to not advance promotions to certain customers. The maximum fine possible is 10 per cent of the Turkish turnover generated by the infringing entity 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). No criminal sanctions have been imposed against individuals for cartel activity.

Sentencing

19 Sentencing guidelines

Do sentencing guidelines exist?

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 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, compliance with their 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 (the Regulation on Fines) was recently enacted by the Turkish Competition Authority. 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. 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 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines applies also to managers or employees that 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.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Yes; sentencing guidelines are binding on the adjudicator.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

The Competition Law has recently been subject to significant amendments that were enacted in February 2008. The new legislation brings about a stricter, 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 (the Regulation on Leniency) was put 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 out.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

The leniency programme is available for cartel members. The Regulation on Leniency 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 up to the point that the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine.

23 First in

What is the importance of being 'first in' to cooperate?

The first firm to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from total immunity. Employees or managers of the first applicant would also be totally immune. However, for there to be total immunity, the applicant must not be the ring leader. If this is the case (ie, if the applicant has forced the other cartel members to participate in the cartel), there would only be a reduction of between 33 and 50 per cent for the firm and between 33 and 100 per cent for the employees or managers.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

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

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

Finally, subsequent applicants would receive a 16 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.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

As stated in question 22, a cartel member may apply for leniency until the investigation report is officially served. There are no other provisions or applications regarding the timing of a leniency application.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

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

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

The following conditions must be met in order for a cartelist to benefit from immunity or fine reduction:

- the applicant must submit:
  - 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; and
  - other information or documents about the cartel activity.

  The required information may be submitted verbally.
- the applicant must avoid concealing or destroying the information or documents on 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; and
- the applicant must continue to actively cooperate with the Competition Authority until the final decision on the case has been rendered.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

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 – if any – applications by the cartel member itself. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartelists.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

Pursuant to the principles set forth under the Regulation on Leniency, the active (continuous) cooperation of the applicant cartel member must be maintained until the Board renders its final decision after the investigation is completed. Therefore, the cartel member must maintain its active cooperation in order to retain the leniency or immunity that was granted with the application.

There are, however, no provisions within the Regulation on Leniency regarding cartelists that have not applied to the Board for leniency or immunity. On the other hand, according to the Regulation on Fines, cooperation of a party is one of the mitigating factors that the Board can consider while determining the amount of fine to be imposed. In such a case, if mitigating circumstances are established by the violator, the fine would be decreased by 25 to 60 per cent.

Update and trends

Despite the decrease in the sum of monetary fines imposed on substantive grounds in 2010, the number and volume of cartel cases in Turkey has hit all-time highs in 2011. The trend is for the Competition Board to shift its focus from merger control cases to concentrate more on the fight against cartels and cases of abuses of dominance. To that end, the Competition Board has, to a very large extent, modified the statutory basis of the cartel enforcement and merger control regimes in Turkey. It has also raised the merger control thresholds to focus more on the fight against cartels. Some of the highest fines for cartel activity (such as 277.4 million Turkish lira for car manufacturers and 72 million Turkish lira for banks) and newly launched back-to-back investigations against cement producers, road transporters and airlines are all signs of this trend.

Recent indications in practice also show that leniency applications have already become a very important element in Turkish cartel enforcement. In 2010 and 2011, several applicants filed leniency applications with the Board to benefit from a lenient treatment under the Regulation on Leniency.

Another talking point continues to be the treatment of attorney–client privileged documents. After years of not respecting attorney–client privilege, the Board finally seems to be developing a more sensitive and prudent approach to the issue. Before *Sanofi Aventis* (20 April 2009; 09-16/374-88) and *CNR/NTSR* (13 October 2009; 09-46/1154-290), legal professional privilege was an extremely underdeveloped area of Turkish procedural law. In practice, the Board indicated that it allowed no room for companies to even exercise their right not to disclose information covered by any form of legal professional privilege during a dawn raid or when responding to a formal request for information. The Board had long denied any privilege doctrine or any other doctrine protecting the confidentiality of advice given by or correspondences with outside counsel, let alone in-house legal advice. This underdeveloped approach finally seems to have changed. In *Sanofi Aventis*, the Board indirectly recognised that the principles adopted by the Court of Justice of European Communities in *AM&S v Commission* (Case 155/79 *AM&S Europe v Commission* [1982] ECR 1575) might apply to attorney–client privileged documents in Turkish enforcement in the future. In *CNR/NTSR*, the Board took even more major steps forward. It elaborated in detail the privileged rules applied in the EC and tacitly concluded that the same rules would apply in the Turkish antitrust enforcement.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

Since active cooperation is required from the applicant cartel member in order 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.

Furthermore, it is also possible to conduct a leniency application orally. In these circumstances, 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 cartel members, dates, locations and participants of the cartel meetings and other information or documents about the cartel's activity) may be submitted verbally. However, it should be noted that in such a case the submitted information should be put in writing by the administrative staff of the Turkish Competition Authority and confirmed by the relevant applicant or its representatives.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews.

Defending a case

33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Turkish law does not prevent counsel from representing both the investigated corporation and its employees. That said, employees are hardly ever investigated separately, and there is no criminal sanction against employees for antitrust infringements in practice.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

So long as 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 practice law in Turkey) can and do represent multiple corporate defendants. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

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35 Payment of legal costs

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

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

36 Getting the fine down

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

Aside from the newly introduced leniency programme, article 9 of the Competition Law, which generally entitles 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.

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