GETTING THE DEAL THROUGH

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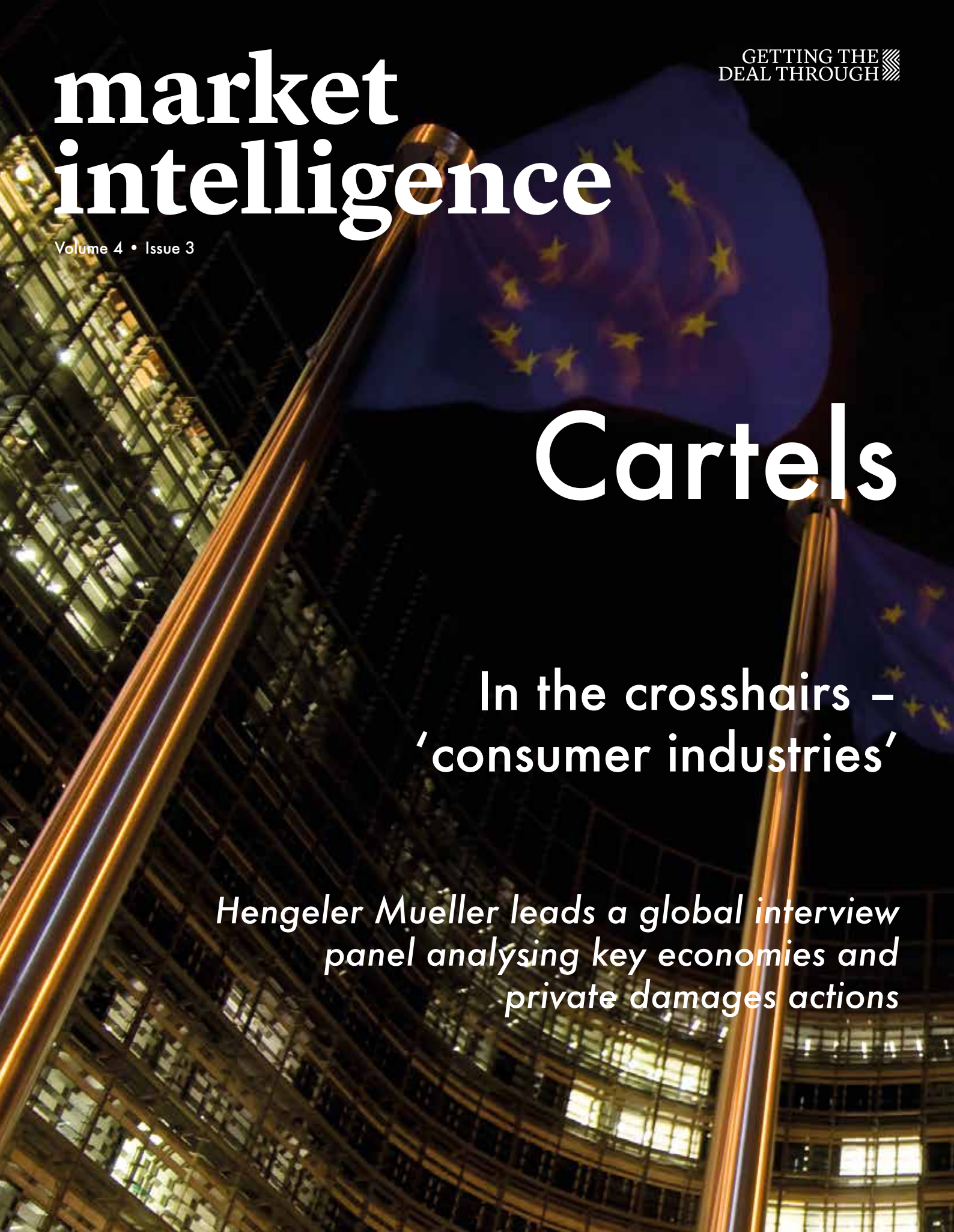

Cartels

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CARTELS IN TURKEY

Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels, and England and Wales. Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles by various international and local publishers. He also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures at other universities in Turkey.

Öznur İnanılır joined ELIG Gürkaynak Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LLM degree in European law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Ms İnanılır became a partner within the 'Regulatory and Compliance' department in 2016 and has extensive experience in all areas of competition law, in particular, compliance to competition law rules, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. Ms İnanılır has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

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"There are no industry-specific offences or defences that lead to particular scrutiny."

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

Gönenç Gürkaynak and Öznur İnanılır: The Turkish Competition Authority (TCA) places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) has nonetheless been repeatedly underlined by the president of the TCA.

The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not set out a definition of 'cartel', but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

There are no industry-specific offences or defences that lead to particular scrutiny. The Competition Law applies to all industries, without exception. Cement, ready-mix concrete, bread yeast, consumer electronics products, including personal computers and game consoles, booking and retail technology superstores, jewellery, aluminium and PVC technologies, glass and glass products, insurance, tobacco and alcoholic beverages, driving schools and bakery industries have been under investigation for cartel and concerted practice allegations in previous years.

GTDT: What do recent investigations in your jurisdiction teach us?

GG & Öİ: The TCA's decision-making body, the Competition Board (the Board), is entitled to launch an investigation into alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent on the matter for 60 days. The Board decides to conduct a 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 the pre-investigation process. The preliminary report by the TCA's experts will be submitted to the Board within 30 days of the pre-investigation decision being taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months by the Board. Dawn raids and other investigatory tools are also used during the investigation process.

The investigated undertakings have 30 calendar days, as of the formal service of the notice, to prepare and submit their first written defences (the first written defence). Subsequently, the main investigation report is issued by the TCA. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (the second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (the third written defence). When the parties' responses to the additional opinion are served on the TCA, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings are held within at least 30 days and at most 60 days 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


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if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal must be filed before the Ankara administrative courts within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterparty.

The Board may request any information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine to be applied in such cases is currently 21,036 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. Similarly, a refusal to grant the staff of the TCA 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).

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

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

There is a marker system for leniency applications: the TCA can grant a grace period to applicants to submit the necessary information and evidence to complete their applications. There is also no legal obstacle to submitting a leniency application orally. In such cases, the information submitted should be put into writing by the administrative staff of the TCA and confirmed by the relevant applicant or its representatives. Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately. Barring criminally prosecutable acts such as bid-rigging in public tenders, there is no criminal sanction against employees for antitrust infringements in practice.

"The current Turkish competition law regime does not provide for measures that could speed up or streamline the TCA's decision-making process such as a settlement procedure."

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

In terms of its recent enforcement activity, the Board's most important decision concerning leniency applications is the *Corporate Loans* decision (28 November 2017, 17-39/636-276), which concerned 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey. The Board launched an investigation against 13 financial institutions, including local and international banks whether they have violated article 4 of Law No. 4054 by way of exchanging competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU) made a leniency application on 14 October 2015 to benefit from the article 4 of the Regulation on Leniency. After 19 months of an in-depth investigation, the Board has unanimously concluded that BTMU, ING Bank AŞ (ING) and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi (RBS) have violated article 4 of Law No. 4054. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million Turkish liras and 66.4 thousand Turkish liras, respectively, over their annual turnover in the financial year of 2016. However, the Board resolved that BTMU should not have an administrative monetary fine imposed pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.

GTDT: What means exist in your jurisdiction to speed up or streamline the authority's decision-making, and what are your experiences in this regard?

GG & Öİ: The current Turkish competition law regime does not provide for measures that could speed up or streamline the TCA's decision-making process such as a settlement procedure. However, a settlement process has recently been considered within the scope of the draft Law on Protection of Competition (the Draft Law).

The Prime Minister sent the Draft Law, which is designed to introduce new concepts to the Turkish competition cartel regime such as the *de minimis* defence and the settlement procedure, to the president of the Turkish parliament on 23 January 2014. In 2015, the Draft Law became obsolete again because of the general elections in June and November 2015. It is yet to be seen whether the new Turkish parliament or the government will renew the Draft Law. The TCA's 2015 annual report indicates that it has requested the re-initiation of the legislative procedure concerning the Draft Law. In this regard, a settlement procedure is expected to be reconsidered once the reform regarding the Competition Law is included in the government's agenda.

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

GG & Öİ: In addition to the Competition Board's decision on 13 financial institutions (28 November 2017, 17-39/636-276) as explained above, another recent decision rendered by the Competition Board is concerned with the investigation based on the allegations that 10 undertakings active in producing ready-mix concrete in İzmir region in Turkey would have artificially increased the prices of ready-mix concrete by entering into an anti-competitive agreement or concerted practice

THE INSIDE TRACK

What was the most interesting case you worked on recently?

An interesting case that we recently dealt with concerned 13 financial institutions, including local and international banks active in the corporate and commercial banking markets in Turkey (28 November 2017, 17-39/636-276). As explained above, the main allegations concerned the exchange of competition sensitive information regarding current corporate credit transactions and other financial transactions such as interest, maturity and other credit terms and signalling competitors regarding their future courses of action. The investigation process was triggered by the leniency application of Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU). After 19 months of an in-depth investigation, Competition Board (the Board) unanimously concluded that BTMU, ING Bank AŞ and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi were actually engaged in exchanges of competitively sensitive information and violated article 4 of Law No. 4054, while clearing 10 banks from allegations of violation. In this decision, even though the Board did not consider the violation of to fall under the 'cartel' category under article 4 of Law No. 4054, BTMU benefited from a leniency treatment and did not receive any administrative monetary fine. Article 16(6) of Law No. 4054 states that 'to those undertakings or associations of undertakings or their managers and employees making an active cooperation with the Authority for purposes of revealing violations of Law No. 4054, the penalties mentioned in paragraphs three and four may not be imposed. . .' where the the secondary legislation (ie, Regulation on Active Cooperation for Detecting Cartels) uses the word cartel and its provisions are only with regards to the notion of cartels. According to the basic principles of the hierarchy of norms, merely relying on the excessive use of cartel wording in the secondary legislation, one cannot disable the first sentence of article 16(6) of Law No. 4054. To that end, the decision rightfully establishes an important precedent that determination of a cartel is not a pre-condition of granting immunity to the leniency applicant.

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

The TCA already has an economic analysis and research department, which is empowered to conduct examinations and analyses in sectors or markets relevant to Board investigations. The case handlers may call upon the department if they need further examination into the economic dynamics of a given sector in ongoing cases. Ideally, the department would be expanded and would also be charged with submitting its independent opinion to the Board in each investigation. That way, the department's know-how would be much better utilised, enabling the Board to incorporate more sophisticated economic analyses into its reviews of alleged anticompetitive behaviour.

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(22 August 2017, 17-27/452-194). It is important to indicate that the Competition Board took into account that the economic evidence that show the relevant undertaking was not involved in any kind of anticompetitive agreement or concerted practices and it is understood that the Board took the view of the defendants that it implausible to reach into an agreement within the alleged duration of the agreement, which was three months. Moreover, it could be argued that the decision constitutes a good example that the undertakings, subject to investigation based on the allegations on anticompetitive agreements or concerted practice, are able to defend themselves based on economic and legal evidence even under the presumption of concerted practice of article 4 of the Competition Law and marks the importance of economic evidence.

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

GG & Öİ: The TCA is an independent administrative body and is not required to apply to another body or authority before rendering its decisions. However, the existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing the violators to seek compensation for damage suffered. As in US antitrust enforcement, one of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law 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. That way, administrative enforcement is supplemented with private lawsuits. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually an infringing agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Board. Under article

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

The judicial review period before the Ankara administrative courts usually takes between 12 to 24 months. If the challenged decision is annulled in full or in part, the administrative court returns it to the Board for review and reconsideration.

Following the recent legislative changes, administrative litigation cases (including private litigation cases) are now subject to judicial review before the newly established regional courts (the appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeals for private cases). The regional court will go through the case file, both on procedural and substantive grounds, and will investigate the case file and make its decision considering the merits of the case. The regional court's decision will be considered as final in nature, but will be subject to review by the Council of State in exceptional circumstances (as set forth in article 46 of the Administrative Procedure Law). In such cases, the decision of the regional court will not be considered as a final decision and the Council of State may decide to uphold or reverse the regional court's decision. If the decision is reversed by the Council of State, it will be returned to the regional court, which will in turn issue a new decision taking into account the Council of State's decision. As the regional courts are newly established, we have yet to see how long it takes for a regional court to finalise its review of a file. Accordingly, we cannot provide an estimate as to the Council of State's review period for a regional court decision within the new system, as that also remains to be tested.

GTDT: How is private cartel enforcement developing in your jurisdiction?

GG & Öİ: There is no private cartel enforcement in the Turkish competition law regime.

The existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing violators to seek compensation for any damage suffered.

GTDT: What developments do you see in antitrust compliance?

GG & Öİ: Competition compliance programmes are designed to reduce the risk of anticompetitive behaviour by companies. The TCA Competition Law Compliance Programme (the Compliance Programme) states that a regular assessment and monitoring mechanism is essential for the success of a compliance programme. Since each company operates in different markets with different market conditions, the TCA does not set forth a specific monitoring mechanism requirement; however, briefly, it would be appropriate to test employees' knowledge of the law and of the undertaking's policy and procedures regarding the compliance programme, and to monitor the activities of the employees on a given date, or without notice, to control actual or potential infringements. In addition, notifying senior management of actual or potential infringements and determining suitable problem-solving mechanisms require a regular assessment system to be developed. Moreover, the Compliance Programme suggests that if the undertaking's size permits it and there is the opportunity, it should have a specific department or a consultant for competition policy. According to the Compliance Programme, the company official or consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. Therefore an effective compliance programme with all essential monitoring mechanisms would minimise the risk of competition infringement.

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

GG & Öİ: The most significant development regarding the cartel enforcement policy under the Turkish Competition Law is the draft proposal for the amendment of Law No. 4054 (the Draft Law mentioned earlier).

The Draft Law, which is designed to introduce new concepts to the Turkish competition cartel regime such as the de minimis defence and the settlement procedure, was submitted to the Turkish parliament on 23 January 2014. In 2015, however, the Draft Law was again rendered obsolete because of the general elections in June and November of that year. It remains to be seen whether the new parliament or the government will renew the Draft Law. As reported in its 2015 annual report, the TCA has requested the re-initiation of the legislative procedure concerning the Draft Law; the annual report notes that the TCA may take steps towards the amendment of certain articles if the Turkish parliament does not pass the Draft Law.