

Cartel leniency in Turkey: overview

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A Q&A guide to cartel leniency law in Turkey.

The Q&A is part of the global guide to cartel leniency. Areas covered include an overview of leniency and immunity, the applicable procedure, relevant regulatory authorities, and conditions to be satisfied. Also covered are immunity from civil fines to individuals, the scope of leniency, circumstances when leniency may be withdrawn, leniency plus, confidentiality and disclosure, and proposals for reform.

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Regulation

1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable laws and guidance

The statutory basis for competition law in Turkey is the Law on Protection of Competition No. 4054 (Competition Law). The secondary legislation specifying the details of the leniency mechanism is the Regulation on Active Co-operation for Discovery of Cartels (Leniency Regulation) of 15 February 2009 and the Guidelines on Clarification of Regulation on Leniency (Leniency Guidelines) of 19 April 2013. The Leniency Guidelines were prepared to:

- Provide certainty in interpretations.
- Reduce uncertainty in practice.
- As a requirement under the transparency principle, provide guidance to undertakings and enable them to benefit from the leniency programme more efficiently.

Regulatory authority

The national competition authority for enforcing the Competition Law is the Competition Authority, a legal entity with administrative and economic independence.

The Competition Authority consists of the:

- Competition Board. In its capacity as the competent body of the Competition Authority, the Competition Board is responsible for, among other things, reviewing and resolving cartel cases and leniency applications. The Competition Board consists of seven members and is seated in Ankara.
- Presidency.
- Main Service Units, which comprise the following:
 - five supervision and enforcement departments;
 - department of decisions;
 - economic analyses and research department;
 - information management department;
 - external relations, training and competition advocacy department;
 - strategy development, regulation and budget department; and
 - cartel and on-site inspections support division (Leniency Division).

Each of the five supervision and enforcement departments has a sectoral job definition.

Scope of application

2. What infringements of competition law does the leniency programme cover?

Under the Leniency Regulation, the leniency programme is only available for cartelists. It does not apply to other forms of anti-trust infringement. Section 3 of the Leniency Regulation provides a definition of cartel, which encompasses price fixing, customer/supplier/market sharing, restricting output or placing quotas, and bid-rigging.

The Turkish cartel regime is, in principle, administrative and civil in nature (not criminal). Cartel conduct will not result in imprisonment of the individuals involved. However, there have been cases where the matter was referred to a public prosecutor before or after the competition law investigation was complete. For example, bid-rigging can be prosecuted criminally under section 235 *et seq.* of the Criminal Code. Additionally, illegal price manipulation (that is, manipulation through disinformation or other fraudulent means) can be punished by up to two years' imprisonment and a judicial monetary fine under section 237 of the Criminal Code.

Recent cases and trends

3. What notable recent cases have applied the leniency programme?

Several leniency applications were submitted before the Competition Board after the entry into force of the Leniency Regulation. As leniency applications are confidential, the examples below are limited to certain non-confidential applications.

One of the Competition Board's most recent important decisions concerning leniency applications is the *Corporate Loans* decision (28 November 2017, 17-39/636-276). The Competition Board launched an investigation against 13 financial institutions, including local and international banks active in the corporate and commercial banking markets in Turkey, into whether they had violated Article 4 of Law No. 4054 by exchanging competitively-sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. The Bank of Tokyo-Mitsubishi UFJ Turkey A.Ş. (BTMU) made a leniency application on 14 October 2015 to benefit from Article 4 of the Leniency Regulation. After 19 months of an in-depth investigation, the Competition Board unanimously concluded that BTMU, ING Bank A.Ş. (ING) and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi (RBS) had violated Article 4 of Law No. 4054.

The Competition Board imposed an administrative monetary fine on ING and RBS of TRY21.1 million and TRY66,400, respectively, over their annual turnover for 2016.

BTMU was granted full immunity from fines and the other ten investigated undertakings were not fined.

In *Mechanical Engineering* (14.12.2017, 17-41/640-279), the Competition Board initiated an investigation against 16 freelance mechanical engineers operating to determine whether they violated Article 4 of Law No. 4054 by a profit-sharing cartel. One of the investigated undertakings applied for leniency during the course of the preliminary investigation. The Competition Board concluded that 14 of the freelance mechanical engineers were engaged in a profit-sharing cartel. The leniency applicant received full immunity from fines, while also relieving one of the freelance mechanical engineers from an administrative monetary fine.

Following a leniency application, the Competition Board initiated an investigation in early 2014 concerning several undertakings, including the Deutsche Bahn group of companies, operating in the market for rail freight forwarding services on allegations of an Article 4 violation through customer allocations agreements within the framework of Balkan Train and Soptrain cooperation (16 December 2015, 15-44/740-267). At the end of the long in-depth investigation, the Competition Board concluded that the customer protection agreements had not produced effects on the Turkish markets within the meaning of Article 2 of Law No. 4054 and therefore, the allegations in question did not fall within the scope of the Competition Law.

In *Yeast* (22 November 2014, 14-42/738-346), the Competition Board launched an investigation against four fresh yeast producers to determine whether they violated Article 4 of the Competition Law by fixing the prices of fresh bread yeast. The Competition Board held that the defendants violated Article 4 and imposed a total fine of approximately TRY14 million (approximately EUR5 million) on three yeast producers. The fines range between 1.8%

and 2.7% of their annual turnover. Mauri Maya San. A.Ş received full immunity as a result of its leniency application. The leniency application was submitted after dawn raids. Mauri Maya could otherwise have received a monetary fine of 4.5% of its annual turnover. Through this decision, the Competition Board implicitly invited more leniency applications, even for cases where a pre-investigation has already been initiated.

Availability of leniency

Administrative liability

4. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

Application for leniency

A cartelist can apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity or reduction includes both offending companies and their employees/managers, with the exception of the "ring-leader", which can only benefit from a second degree reduction of fine.

First applicant

The first applicant undertaking to file a complete application for leniency before the opening of a preliminary investigation (or after the preliminary investigation up until the "investigation report") is officially served, may benefit from total immunity, provided that the Competition Authority has no evidence on the cartel infringement. Employees/managers of the first applicant will also be totally immune. However, for there to be total immunity, the applicant must not be the "ring-leader". If that is the case (that is, the applicant has forced the other cartelists to participate in the cartel), there will be a reduction of fine between 33% and 50% for the undertaking and between 33% and 100% for the employees/managers.

Second applicant

The second applicant to file a correctly prepared application will receive a 33% to 50% reduction of the fine. Employees/managers of the second applicant who actively co-operate with the Competition Authority will benefit from a reduction of 33% to 100%.

Third applicant

The third applicant will receive a 25% to 33% reduction. Employees/managers of the third applicant who actively co-operate with the Competition Authority will benefit from a reduction of 25% to 100%.

Subsequent applicant

Subsequent applicants will receive a 16% to 25% reduction. Employees/managers of subsequent applicants will benefit from a reduction of 16% to 100%.

Conditions for immunity

The conditions for benefiting from the immunity/reduction are as follows:

- 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 can be submitted verbally.
- The applicant must avoid concealing/destroying the information/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.
- The applicant must continue to actively co-operate with the Competition Authority until the final decision on the case has been rendered.

5. Is there a sliding scale of available leniency from administrative penalties?

See [Question 4](#).

6. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

Immunity or leniency is available to managers and employees. There are as yet no precedents about the status of former employees (*see Question 4*). Individuals who carry out an economic activity and act as an undertaking within the meaning of competition laws can also benefit from the leniency programme, if they take part in a cartel.

The Competition Board may not grant any reduction in fines to the applicant in cases where one or more of its employees refuse to co-operate. In its decision, the Competition Board considers the number of executives/

employees who do not co-operate with the Competition Authority, their positions within the undertaking and any effort given by the undertaking to enable these persons' co-operation. In practice, therefore, it is in the Competition Board's discretion to decide whether or not it will apply a reduction.

Criminal liability

7. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

Circumstances

While the Turkish cartel regime is administrative and civil in nature, certain anti-trust violations, such as bid-rigging in public tenders, may also trigger criminal consequences. Immunity or leniency does not close the door on leveraging criminal procedures on the basis of a Competition Board decision.

Proceedings against employees

Cartel conduct will not result in imprisonment against the individuals implicated unless the investigated act amounts to a criminally-prosecutable conduct, such as bid-rigging in public tenders or illegal price manipulation. There have been cases where the matter had to be referred to a public prosecutor before or after the relevant competition law investigation was completed. Employees/managers of an offending company may face criminal liability, even in cases where the company benefits from immunity or leniency.

Employees' interests

The current employees of a cartel member also benefit from the same level of leniency or immunity that is granted to the entity (see [Question 6](#)).

Application proceedings

8. When should an application for leniency be made?

To benefit from immunity or a reduction in administrative fines, the applicant must make a leniency application either:

- Before the opening a preliminary investigation.

- After the preliminary investigation has opened but before the "investigation report" is officially served (where the Competition Authority has no evidence proving the cartel).

9. What are the procedural rules for leniency applications?

Relevant authority

Leniency applications must be made to the Competition Authority.

Applicant

The application can be made by the company, a representative on behalf of the relevant company, employees and managers of the company or by an individual employee or manager personally.

Informal/confidential guidance

Under the Leniency Regulation, anyone wanting to benefit from the leniency programme can obtain information on a confidential basis, on whether the applicant would receive full immunity or fine reduction. However, the prospective applicant must provide enough information for the Competition Authority to evaluate whether the applicant will qualify. The amount of information required will be determined on a case-by-case basis.

Form of application

Applications can be made in person, via e-mail, fax or phone, orally or in writing.

Markers

The Competition Authority can grant a grace period to applicants to submit the necessary information and evidence under the Leniency Regulation to complete their applications. For the applicant to be eligible for a grace period, it must provide minimum information concerning the:

- Affected products.
- Duration of the cartel.
- Names of the parties.

Information/evidence

See [Question 4](#)

Oral statements

There is no legal obstacle against conducting a leniency marker application orally. The Leniency Regulation provides that information required for making a leniency application (see [Question 4](#)) can be submitted verbally. In such a case, the submitted information should be put into writing by the administrative staff of the Competition Authority and confirmed by the relevant applicant or its representatives.

Short-form applications

Not applicable.

10. What are the applicable procedures and timetable?

The Leniency Regulation and the Leniency Guidelines do not refer to any timetable for the Competition Board's decision on the leniency application. The Competition Board should decide on the leniency application before the investigation is completed.

Withdrawal of leniency

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

Although the relevant legislation does not explicitly set out rules, leniency applications can be withdrawn. However, the Competition Authority can continue the investigation *ex officio* after the withdrawal.

Scope of protection

12. What is the scope of leniency protection after it has been granted?

In principle, leniency protection is limited to the specific investigation it is part of. If the Competition Authority discovers further evidence of the investigated act, this does not deprive the applicant of the benefits of the leniency protection, to the extent the applicant continuously complies with the Leniency Regulation.

The leniency protection in a specific investigation does not spill over to other violations investigated in other proceedings.

An offending company that is not eligible for immunity in an ongoing investigation can receive a one fourth reduction in the ongoing investigation on top of the reduction it is already entitled to, if it provides the information/documents sought by the Leniency Regulation concerning another cartel.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

An applicant that does not qualify for full immunity under an ongoing investigation, but discloses another cartel before the initiation of a preliminary investigation, will receive a one-fourth fine reduction under the Regulation on Fines.

14. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

Under Article 57 of Competition Law, real or legal persons who/which suffer losses due to distortion of competition can claim compensation for the loss from the parties causing the loss. The damages amount is the difference between the cost the injured parties paid and the cost they would have paid if competition had not been limited (*Article 58/1, Competition Law*). Further, Article 58(1) of the Competition Law stipulates that the competitors who were not involved in the competition law violation and suffered due to the violation can claim compensation for both actual damages and loss of profit.

Further, for damages exceeding the amount of the claimant's loss, the most distinctive feature of the Turkish competition law regime is the rule of triple damages (also known as "treble damages"). For the treble damages rule to apply:

- The damage must be the result of an agreement or decision of the parties, or an act of gross negligence by them.
- Only the material damages (and not moral damages) are relevant.
- The damage must be actual damages (*Article 58/2, Competition Law*).

However, the enforcement method of Article 58(2) is controversial in practice. It has been argued that the judge can only order treble compensation if the conditions are fulfilled, thus preventing a different multiplier being used.

However, the prevailing legal opinion and the practice of local courts conclude that the judge has discretion to order "up to" treble compensation and thus can use any multiplier up three times the standard amount of compensation.

For example, decisions of courts of first instance where the relevant court followed the opinion that only treble compensation can be ordered or followed the opinion that the court has discretion to order "up to" treble compensation are provided below:

- One-fold compensation (*Istanbul 12th Consumer Court, 06 June 2017, 2016/82 E., 2017/220 K*).
- Two-fold compensation (*Istanbul Anatolian 4th Commercial Court of First Instance, 12 December 2017, 2015/1008 E. 2017/1325 K*).
- Three-fold compensation (*Marmaris 1st Civil Court of First Instance in the capacity of Consumer Court, 14 November 2017, 2017/17 E., 2017/494 K*)

Most of the civil courts wait for the decision of the Competition Board before making their own decision on the Competition Board's decision (*see 11th Civil Chamber of the Court of Appeals, October 5, 2009, 2008/5575 E., 2009/10045 K*).

Since the courts usually wait for the Competition Board to render its decision, the court decision can be obtained more quickly in follow-on actions. Immunity or leniency does not have a binding effect on the court, so third parties that are aggrieved by the violation can sue offending parties before a civil court despite the existence of an immunity or leniency.

Confidentiality and disclosure

15. What are the rules relating to confidentiality during a leniency application?

Identity disclosure

Under the principles set out in the Leniency Regulation, the applicant (the undertaking or employees/managers of the undertaking) must keep the application confidential until the investigation report is officially served, unless it is otherwise requested by the authorised unit.

Articles 6 and 9 of the Leniency Regulation provide that unless otherwise stated by the authorised division, the principle is to keep leniency applications confidential until the service of the investigation report. However, to the extent the confidentiality of the investigation will not be harmed, the applicant undertakings can provide information to other competition authorities or institutions, organisations and auditors. Under paragraph 44 of the Leniency Guidelines, if the employees or personnel of the applicant undertaking disclose the leniency application to the other undertakings and breach the confidentiality principle, the Competition Board will evaluate the situation on a case-by-case basis, based on the criteria of whether the person at issue is a high-level manager, or whether the Competition Board was notified promptly enough after the breach.

Applicants can request anonymity until the legal service of the investigation report.

Information disclosure

See above, [Identity disclosure](#).

Confidentiality requests

Leniency applicants can request anonymity until the investigation report is officially served. Leniency applicants can also request confidentiality of trade secrets for up to five years within the scope of Communiqué No. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets.

16. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic submissions and domestic discovery

The Turkish courts can subpoena documents/information from all public or private authorities and bodies, including the Competition Authority. The Competition Authority is constitutionally required to submit all information/documents requested by a Turkish court. Information/documents submitted as part of a leniency application can be subject to discovery orders in the Turkish courts, which can consider them if and to the extent they amount to legitimate evidence. Failure to provide the information/documents requested by the court may trigger criminal consequences on the part of the relevant Competition Authority official(s).

Domestic submissions and foreign discovery

Turkey is a party to the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970, together with bilateral treaties with many other countries on similar matters. Subject to the terms and conditions of the applicable conventions and treaties, the competent authorities (Turkish courts and/or the Competition Authority) may be required to provide information/documents, if the court in a foreign jurisdiction sought judicial assistance under the applicable convention/treaty.

Foreign submissions and domestic discovery

Subject to the terms and conditions of the applicable conventions and treaties, a Turkish court can seek judicial assistance to request information and/or documents from the competent authority in a foreign jurisdiction.

Inter-agency co-operation

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

Article 43 of Decision No. 1/95 of the EC–Turkey Association Council (*Decision No. 1/95*) authorises the Turkish Competition Authority to notify and request the European Commission to apply relevant measures if the Competition Board believes that cartels organised in the EU adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the EU and Turkey), and therefore the European Commission has the authority to request that the Competition Board apply relevant measures to restore competition in the relevant markets.

There are also a number of bilateral co-operation agreements between the Turkish Competition Authority and the competition agencies in South Korea, Bulgaria, the Russian Federation, Egypt, Ukraine, Serbia, Albania and the EU, among others. These cooperation agreements are signed and implemented for various purposes, such as:

- Enhancing cooperation in applying competition law rules to increase the efficiency of product and service markets.
- Exchanging documents and information on certain topics between authorities.
- Improving cooperation and facilitating the exchange of information between the authorities with respect to competition law enforcement and policy.

The Turkish Competition Authority also faces various issues where international co-operation is required. In this respect, there have been various decisions in which the Competition Authority has requested co-operation on dawn raids, information exchange, notifications and collection of monetary fines from the competition authorities in other jurisdictions via the Ministry of Foreign affairs and the Ministry of Justice. The Competition Authority has, however, been unsuccessful in these requests.

The research department of the Competition 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 Competition Board. A co-operation protocol was signed on 14 October 2009 between the Competition Authority and the Turkish Public Procurement Authority to procure a healthy competition environment with regard to public tenders by co-operating and sharing information.

However, the interplay between jurisdictions does not materially affect the handling of the Competition Board in cartel investigations. The principle of comity is not an explicit provision of the Turkish Competition Law. A cartel conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on non-Turkish markets.

Proposals for reform

18. Are there any proposals for reform?

In 2013, the Competition Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was under discussion in the Turkish parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The Draft Law proposed various changes to the current legislation; in particular, to provide efficiency in time and resource allocation in terms of procedures set out under the current legislation. The Draft Law became obsolete due to the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure for the Draft Law, as noted in the 2015 Annual Report of the Competition Authority. However, at this stage, there is no indication on whether the Draft Law is expected to be renewed or when.

Contributor profiles

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Areas of practice. Regulatory and compliance; competition law; white collar irregularities; internet law; general corporate/contracts; litigation.

Recent transactions

- Represented Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. (Sahibinden) in an investigation conducted by the Turkish Competition Authority in order to determine whether Sahibinden has violated Article 6 of Law No. 4054 by excessive pricing conducts in the markets for online platform services towards vehicle and estate sale / rental services.
- Merger control filing with the Competition Board for the merger of Luxottica Group S.p.A. and Essilor International (Compagnie Générale d'Optique) S.A.
- Merger control filing with the Competition Board for the acquisition of sole control of Time Warner Inc. by AT&T Inc.

Languages. English

Professional associations/memberships. Istanbul Bar Association (since 1998); New York Bar Association (since 2002); American Bar Association (since 2002); Law Society of England and Wales (since 2004); Brussels Bar Association (since 2003).

Publications

- *"Testing Justification for Segment Based Relevant Product Market Definition in Merger Control: Evidence From Turkey"*, by Gönenç Gürkaynak, Esq. and Dr. Ekrem Kalkan, *Journal of Competition Law and Economics*, Oxford University Press, June 2017.
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Areas of practice. Compliance with competition law rules; cartel agreements; abuse of dominance; mergers and acquisitions; incorporation of joint ventures.

Recent transactions

- Represented Media Saturn İstanbul İç ve Dış Tic. Ltd. Şti., the Turkish subsidiary of Media-Saturn-Holding GmbH, in an investigation conducted by the Turkish Competition Authority against seven companies active in the consumer electronics market.
- Merger control filing with the Competition Board for the acquisition of sole control by The Walt Disney Company over certain businesses of Twenty-First Century Fox, Inc. including its film and television studios, cable entertainment networks, and international television businesses.

- Merger control filing with the Competition Board for the acquisition of Gemalto N.V. by Thales S.A.

Languages. English, German

Professional associations/memberships. Istanbul Bar Association (since 2005).

Publications

- *"Complainant's Position in Competition Law Investigations: Considerations on the Balance Between Parties' Interests and Finding the Truth"*, by Gönenç Gürkaynak, Esq., Hakan Özgökçen, Esq., Sinan Diniz and Zeynep Ortaç, *Rekabet Derneği, Rekabet Forumu*, Issue 72, March 2013.
- *"A Discussion on Proof Matters in Turkish Competition Law Focusing on Proof of Concerted Practices"*, by Gönenç Gürkaynak, Esq., K. Korhan Yıldırım, M. Hakan Özgökçen and A. Buğra Aydın, *Competition Journal*, Volume 12, Number 4, October 2011.
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