

The Turkish competition board introduces two new regulations on leniency and calculation of fines

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On 15 February 2009, two new Regulations, Regulation on the Calculation of Fines and the Leniency Regulation entered into force in Turkey. The Leniency Regulation which is modeled upon the EC Competition Law introduces a totally new procedure to the Competition Law enforcement which aims at an efficient investigation of cartels and the Regulation on the Calculation of Fines sets forward the grounds of calculation of the fines applicable. The Leniency Regulation empowers the Competition Authority (the "Authority") to establish a division to implement the Leniency Regulation and to deal with leniency applications and this division has been established on 19 February 2009.

What has been brought with the Leniency Regulation ? Prior to the amendment of Article 16 of Law n° 4054 on the Protection of Competition (the "Law"), the Law has not provided a leniency procedure. However, after the amendment in the Law in 23 January 2008, the Law introduced a leniency process and the procedure and principles of leniency will be governed by a Leniency Regulation to be issued. Following this amendment which introduced leniency but before the relevant Regulation has been issued, the Turkish Competition Board (the "TCB") in one of its decisions [1] decided that fine shall not be imposed to an undertaking which has been investigated due to a cartel agreement in traffic signalization equipments market, by taking into consideration the active cooperation of the undertaking with the Authority in the investigation process. Upon the authority provided in the amended Law, the Leniency Regulation only applies for cartels but not for other competition infringements and the basic principles of the Leniency Regulation are transparency and interpretation in favor of those who are in cooperation with the Authority.

The incentive set forth by the Regulation is either non-imposition or reduction of fines for the undertakings which cooperate with the Authority by revealing information regarding the existence of cartels before the notification of the investigation report or for the undertakings which can provide additional information that can assist to speed up the investigation process.

To benefit from the leniency procedure, an undertaking shall apply to the Authority prior to the notification of the investigation report to the undertaking concerned. Depending on the timing of the application (before or after the decision of the TCB to carry out preliminary inquiry) there may be a non-imposition or a reduction of fine.

For full immunity from the fines :

The undertaking should be the first undertaking to denounce the existence of a cartel by submitting the relevant documents and information to the Authority before the TCB takes a decision to carry out a preliminary investigation. The first coming prior to a preliminary investigation decision shall be granted full immunity from fines. Employees and managers of this undertaking will also be granted immunity.

If the undertaking denounces, where there is not sufficient proof on the violation of Article 4 of the Law, from the preliminary investigation decision of the TCB up until the final decision then it may be granted full immunity from the fines. Employees and managers of this undertaking may also be granted immunity.

For reduction of fines :

The fine to be imposed to the first undertaking (as it does not qualify for an immunity) that denounced the existence of a cartel following the preliminary investigation decision of the TCB shall be reduced by one third to half of the fine. In that case at least one third of the fine may be reduced or fine may not be imposed at all for the employees/managers of the undertaking who accepts the violation of the Law and actively cooperates.

The fine to be imposed to the second undertaking that denounced the existence of a cartel shall be reduced by one fourth to one third. In that case at least one fourth of the fine may be reduced or fine may not be imposed at all for the employees/managers who accepts the violation and actively cooperates.

The fine to be imposed to other undertakings that denounced the existence of a cartel shall be reduced by one sixth to one fourth and at least one sixth of the fine may be reduced or fine may not be imposed at all for the employees/managers.

An employer or a manager of an undertaking can also apply for the leniency procedure prior to the notification of the preliminary investigation report. The reduction rates and conditions for immunity are the same for employers/managers and undertakings.

Effectiveness of the Leniency Regulation

The Leniency Regulation applies also to the pending preliminary investigations which have started before the Regulation has entered into force and where the investigation report has not been served yet. After the Regulation entered into force, within one month two applications are submitted to the Authority in order to benefit from the non-imposition or reduction of fine.

What has been brought with the Regulation on the Calculation of Fines ?

Pursuant to the Regulation on the Calculation of Fines, first a basic fine shall be calculated. However, the fine which will be determined pursuant to the Regulation on the Calculation of Fines shall not exceed 10% of the undertaking's turnover generated at the end of the fiscal year preceding the final decision, if that cannot be calculated then the turnover at the end of the fiscal year closest to the date of the final decision shall be taken into account.

While the basic fine is being calculated a percentage :

for cartels, between two percent and four percent, for other violations, between five per thousand and three percent

of the undertaking's turnover generated at the end of the fiscal year preceding the final decision, if that can not be calculated then the turnover at the end of the fiscal year closest to the date of the final decision shall be taken as a basis.

After the calculation of the basic fine, the aggravating/mitigating factors shall be taken into account. Accordingly the basic fine shall be increased or decreased by certain ratios with respect to the aggravating/mitigating factors.

In addition to the active cooperation with the Authority which is set forth in Article 16 of the Law, the aggravating/mitigating circumstances are such as repetition of the violation, time period of the cartel after the notification of the investigation report, commitments for the elimination of the competition problems, failure to assist during the investigations, forcing other companies into the violation, cooperation, voluntary compensation to aggrieved parties, incentive by public authorities or coercion by other companies concerning the violation, ceasing other violations and the amount of the turnover obtained from activities which are the subject to the violation.

The Regulation on the Calculation of Fines applies also to the employees/managers that had a determining effect on the violation, and also provides certain reductions in favor of these persons. However, the fine that is imposed on the employees/managers shall not exceed 5% percent of the fine imposed on the undertaking.

In the light of the above mentioned facts it is clear that these two regulations are highly significant for all the undertakings as the first one introduces a totally new procedure to the Competition Law Enforcement and the second one sets forward the grounds of the fines applicable.

Nevertheless despite the commencement of enforcement, academic discussions will continue to take place on the legal reasoning and constitutionality of these Regulations among the academic and business circles.

[1] Turkish Competition Board, 27 March 2008, decision n° 08-26/283-91.

Dr. Gamze Öz | METU, Çakmak Avukatlık Bürosu | agamze@metu.com.tr
Göknil Emdi | Çakmak Avukatlık Bürosu (Ankara) | g.emdi@cakmak.av.tr