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I. INTRODUCTION

In February 2008, an amendment in "The Act on the Protection of Competition" ("the Act") substantially changed the enforcement policy of Turkish Competition Board ("the Board") by providing effective tools such as leniency and sanctions against individuals. In line with this amendment, the Board adopted two regulations, Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (the "Regulation") and Regulation on Active Cooperation for Detecting Cartels ("Leniency Regulation"), which were published in the *Official Gazette*.[2] These were the first steps of the beginning of a new era in the enforcement of Turkish Competition Law as more rigorous fines for infringements and a generous leniency program replaced the older system. This article aims to summarize the nature and characteristics of these regulations together with criticisms of the past practices of the Board.

II. THE BEGINNING OF THE NEW ERA: THE AMENDMENT

The amendment has brought four important changes enabling the Board to follow a more effective and transparent policy against violations of competition law.

The first change was replacing fixed amounts of procedural fines (for instance regarding provision of incorrect or misleading information or documents) with fines calculated based on annual gross revenue, provided they are at least 10,000 Turkish liras This amount is re-determined each year and announced by the communiqués of the Board. Also, it is now possible for the Board to assess periodic fines on a percentage basis instead of fixed amounts set by the Act.

Second, the amendment provided an important weapon for the Board to use which is particularly important for fighting against cartels: responsibility of individuals

[1] Competition Expert at TCA. The views expressed in this paper do not necessarily represent the views of the TCA.
[2] Official Gazette #27142 (Feb 15, 2009).

for substantive infringements. It is now possible to impose a fine on executives or employees of the undertaking or association of undertakings which is detected to have had a determining impact on the violation of up to 5 percent of the substantive fine imposed on the undertaking or association of undertakings. In combination with fines imposed on undertakings, these individual fines will enhance deterrence.

Third, the amendment provides that undertakings or associations of undertakings or their executives and employees which actively cooperate with the Turkish Competition Authority ("TCA") to uncover a violation of the Act may be held immune from the relevant fines, or be granted reductions of the relevant fines, taking into account the nature, effectiveness, and timing of the cooperation and with the reasoning thereof clearly represented. Therefore, as an important part of effective enforcement policy against cartels, a clear provision was included in the Act to adopt full and partial leniency for both corporations and individuals by also abolishing the minimum limit of substantive fines.

The last amendment that should be noted here is that the requirement that the Board should adopt secondary legislation for fines and leniency.

To sum up, these amendments are all welcome additions to the arsenal of tools in the fight against competition law infringements, in particular against cartels.

III. TCA'S ENFORCEMENT POLICY AND FINING PRACTICES

A. Legal Framework

Fines, which are administrative in the nature, are the main tools in TCA's enforcement of competition law. Unlike some other countries such as the United States, the United Kingdom, and Ireland, the Act does not provide any criminal penalties for infringements and none exist elsewhere in Turkish law with the exception that bid rigging during state tenders is a criminal offence. Moreover, private enforcement of Turkish competition law is still minimal. Therefore, fines are the only instrument the Board possesses to sanction and deter violations of competition law.

The Act establishes two types of fines. Article 16 specifies a one-time fine for committing various procedural wrongful acts and substantive infringements of the Act, while Article 17 sets the main principles for periodic penalty payments for ongoing violations.

Acts specified in the first paragraph of Article 16 are minor or more procedural acts, in comparison with the third paragraph. In cases where administrative fines mentioned in paragraph three are imposed on undertakings or associations of undertakings, an administrative fine of up to five percent of the undertakings' penalty shall be imposed on managers or employees of the association or association of

undertakings who are determined to have had a decisive influence in the infringement.

According to the paragraph 5 of Article 16, when setting the amount of fine, the Board has to consider factors such as the repetition and duration of the violation, the market power of the undertakings or associations of undertakings concerned, their determining impact on the occurrence of the violation, whether they conform to the commitments made, whether they assist with the inspection, and the gravity of the damage which has occurred or is likely to occur. Although the Act does not include any indication as to how these different factors should be applied in order to determine the level of the fine, the last paragraph of Article 16 requires the Board to issue the relevant secondary regulations with a view to describing the points taken account of in the determination of fines.

On the other hand, under Article 17 of the Act, the Board may also impose on undertakings and associations of undertakings periodic fines per day, which is deemed as necessary to force undertakings to terminate the infringements as soon as possible.

B. The Regulation on Fines

Prior to the promulgation of the Regulation, the Board did not adopt a consistent approach, since the criteria followed were not predetermined but explained in the decision case-by-case. In its decisions imposing fines the Board generally listed a number of factors which were taken into account in fixing the fine amount, but never explained how they had used these factors to reach the precise figure of the imposed fine. Thus, the factors taken into account while determining the fines by the Board showed diversity and the fining practice lacked consistency and transparency.

During this period, the Board was consistently criticized for the vague and nebulous criteria used in determining the fines imposed. The Board had also been criticized for imposing relatively low fines, generally less than 3 percent of turnover of undertakings concerned. Critics had been particularly unhappy with the level of fines in cartel cases. Although in some cases, some of the fines represented up to 3 percent of total turnover and in an extreme example up to 6 percent of total turnover of the undertaking concerned, fines faced by firms that were determined to have violated the Act were on average less than 1 per cent of turnover of undertakings concerned.

Following the amendment which made it mandatory to issue a secondary legislation, on February 15, 2009 the Board published Regulations on Fines as an answer to the above criticisms. This regulation explains the method the Board will use to set fines on undertakings and their managers and employees who have decisive influence in the infringement. The Regulation introduced a fining system which is a mix of old and new Commission guidelines on fines.

As stated in the general preamble of the Regulation, the goal the Regulation on

Fines intends to accomplish is ensuring transparency, objectivity, and consistency in the fining process, taking into account of such points as assistance with examinations and active cooperation while determining the fines—thus promoting cooperation and ensuring special and general deterrence. However, the regulation is not free of ambiguities and continues to maintain some degree of uncertainty as to the calculation of fines.

The Regulation sets out a two-step methodology for the setting of fines. First, the Board determines the basic amount of the fine according to the gravity and duration of the infringement. In the second step, the Board adjusts the basic amount to take account of aggravating and/or mitigating factors.

The determination of fines to be applied to undertakings and associations of undertakings or members of such associations starts with the calculation of the basic fine which is determined by both the gravity and the duration of the violation. According to the Regulation, there is a basis for the fines: between two percent and four percent for cartels; and between five in one thousand and three percent of the annual gross revenues of the undertakings and associations of undertakings or the members of such associations for other violations. Within these ranges, issues such as the market power of the concerned undertakings or associations of undertakings and the gravity of the damage which occurred or is likely to occur as a result of the violation is to be taken into account when determining the percentages.

It is worth noting here that, as in the previous practices of the Board, under Article 5 of the Regulation, fines are calculated on the overall turnover of the relevant undertakings while in the EU the calculation is based on the turnover of the undertakings in the relevant market. But if the Act's provisions, the Board decisions, and decisions of Council of State are taken into account, it can be inferred that it is necessary to consider total turnover.

The time period of the violation is also significant. The basic fine amount is increased by half for violations which lasted longer than one year but shorter than five years, and is increased by one-fold for violations which lasted longer than five years.

Following the first step, the Board considers aggravating and mitigating factors within the framework of Articles 6 and 7 of the Regulation. So, as in the EC Guidelines, aggravating and mitigating factors are applied to the basic amount.

Repetition of the violations, such as continuing a cartel after the notification of the investigation decision, acting contrary to commitments made according to article 4 and article 6 of the Act, not providing assistance with the examination, or coercing other undertakings into the violation are accepted as aggravating factors. For the first three aggravating factors, the increases are mandatory; for others, increases are at the

discretion of the Board.

On the other hand, providing assistance with the examination apart from just fulfilling legal obligations, the existence of incentives by public authorities, coercion by other undertakings concerning the violation, voluntarily indemnifying those who were damaged, ceasing other violations, and the degree to which activities that are the subject of the violation are a low share of the undertakings' annual gross revenues are mitigating factors.

One of the most notable points of the Regulation is the introduction of a new program to TCA's enforcement: leniency plus, as described in the second paragraph of Article 7 of the Regulation. In an ongoing investigation, the fine to be given to an undertaking which cannot benefit from an arrangement under the Leniency Regulation not to impose a fine shall be reduced by one fourth if the undertaking presents the information and documents specified under Article 6 of the Leniency Regulation before the Board decides to conduct a preliminary inquiry. Although similar applications of this program exist in some countries such as the United States, Portugal, and Brazil, there is no leniency plus policy in the Commission enforcement. So this is a remarkable advantage of the new enforcement policy that should help detect and punish more cartels.

Finally, the last part of the regulation explains the method for calculating fines for managers and employees. As distinct from corporate fines, here the Regulation follows a one step methodology and each of the managers and employees of the undertaking who are detected to have had a decisive influence on the cartel shall separately be charged between three percent and five percent of the fine given to the undertaking, taking into account factors such as active cooperation. Therefore, for cartel participants the minimum level will be 3 percent of the fine imposed on the undertaking whereas there is no minimum limit for liable individuals of other infringements.

If we take a closer look at the Regulation, we see that in addition to the adoption of a really transparent method of setting fines, there is strong support for a steady increase in fines for cartel cases in order to improve deterrence. For example, for cartels, the Regulation sets a base fine of at least 2 percent of the turnover of the concerned undertaking, whereas for other infringements the minimum amount of the base fine will be five in one thousand of the turnover. Aggravating the fine if the cartel continues and possibly increasing fines for individuals in cartel cases are also other points which are special to cartels. The Regulation therefore creates even stronger incentives for wrongdoers to seek amnesty, given that the first in the door will be immune from fines, no matter how large.

To date there is not any example of a fining decision under the Regulation,

although it applies to all future TCA investigations, except for ongoing investigations where an investigation report has already been submitted.

C. Leniency Regulation

Prior to the amendment, there was no clear provision for leniency in the Act and only partial leniency was available because of the minimum amount of the substantive fine. However, the Board in some cases has reduced the fine or applied the minimum fine to the cooperating undertakings. The amendment in the Act allows applying full leniency and in line with the amendment the Board has adopted the Leniency Regulation. Although the Act does not exclude immunity or leniency for violations other than cartels, the Regulation provides leniency only for the latter.

The Leniency Regulation, which was basically modeled on, although not identical to, the ECN model leniency program, provides for clear procedures and predictable results which are considered to be key factors for a successful leniency program. It provides for both full and partial leniency. Leniency is also applicable also for both corporations (undertakings) and individuals.

With respect to corporate full leniency, only the first undertaking which submits information and evidence before the Board decides to carry out an investigation, shall be granted immunity from fines. It is necessary that there exist no prior individual full leniency application.

If the Board has already initiated an investigation, the first undertaking which submits the information and evidence shall be granted immunity from fines on condition that the TCA does not have, at the time of the submission, sufficient evidence to find a violation of Article 4 of the Act. It is necessary that there does not exist either a prior individual full leniency application or a corporate full leniency application before the Board decides to carry out an investigation.

In case, the undertaking is eligible for full leniency, then managers or employees are also eligible. Similar principles also apply for individual full leniency applications by the managers and employees of the relevant undertakings.

It must be underlined that for corporate and individual full leniency, the TCA should have insufficient knowledge of the cartel. The date at which participants come forward with information is relevant.

Regarding corporate partial leniency, an undertaking which does not qualify for full leniency from a fine may still benefit from a fine reduction. In this case, managers and employees who admit the infringement and cooperate actively may benefit from a reduced fine. Similar principles also apply for individual partial leniency applications by the managers and employees of the relevant undertakings. It should also be noted that

in both partial corporate and individual applications, the Leniency Regulation does not require undertakings or individuals to submit evidence which represents significant added value compared to the evidence already in the TCA's possession (which is a condition in the Commission's Leniency Program). Therefore it is expected that the leniency program may also serve another function which is similar to settlement procedures.

An undertaking which is found to have taken steps to coerce other participants to infringement is not eligible for immunity from fines. However it can still receive a reduction in fines of one third to half under paragraph 6 of Article 6.

It should be noted that when preparing leniency regulation, there was a fear this regulation will not work. However, TCA has accepted two applications in the first three months of the regulation. So it must be accepted that leniency regulation will be an important tool in the Board's hands in the fight against cartels.

IV. CONCLUDING REMARKS

To sum up, this article has traced the recent developments of Turkish Competition Law. Three major tendencies of recent legislation were identified: (a) higher penalties, in particular for cartels, (b) individual fines for managers and employees, and (c) generous leniency schemes. Leniency works only if sanctions are tough enough for violators to want to avoid them, and the benefits of leniency are substantial. On the other hand, the development of a clear fining policy is a necessary preliminary stage for the application of a leniency policy. Therefore, the amendment in which individual fines for managers and employees were also included in the Act—it was a timely moment when both regulations were promulgated on the same day—takes a further step towards increasing the effectiveness of competition law and adding a strong threat to the enforcement policy. It remains to be seen how the new regulations will really help in improving the competition culture in Turkey.