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## **Global Forum on Competition**

### **SANCTIONS IN ANTITRUST CASES**

**Contribution by Turkey**

**-- Session IV --**

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## SANCTIONS IN TURKISH COMPETITION LAW

### -- Turkey --

1. Turkish Competition Act (Act) was enacted in 1994 and Turkish Competition Authority (TCA) began functioning in 1997. TCA is an autonomous administrative body which only imposes administrative fines for the infringement of the Act. Article 16 and Article 17 of the Act are the basic articles that cover fines.

2. According to Article 16; those who commit behavior prohibited in the Act, an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision.

3. Individuals (managers or employees of fined undertakings) shall also be fined if they are determined to have a decisive influence in the infringement.

4. TCA takes into consideration following issues when deciding on the amount of the fine;

- the repetition of infringement,
- its duration,
- market power of undertakings or associations of undertakings,
- decisive influence in the realization of infringement,
- whether undertakings comply with the commitments given,
- whether undertakings assist with the examination,
- the severity of damage that takes place or is likely to take place.

5. The last point we can make about determining the fines according to Article 16 is that the proportionality principle is neither implicitly nor explicitly provided under any laws, regulations or guidelines for determining fines.

6. In order to ensure transparency, objectivity, consistency and deterrence in fining process and to manage and promote undertakings' assistance with examinations and active cooperation, TCA has also prepared the Regulation on Fines (Regulation) in 2009. This regulation provides procedures and principles relating to the fines.

7. Article 5 of the Regulation provides the basis for the calculation of the base fine for the infringement of the law. The base fine is determined based on market power of undertakings and gravity of the damage caused by the violation. Accordingly;

- For the undertakings that are determined to form a cartel the base fine will be between two percent and four percent of annual gross revenues.
- For the undertakings that engage in other violations the base fine will be between five per thousand and three percent of annual gross revenues.

8. The amount of the shall be increased by half for the violations lasted longer than one year and shorter than five years, and by one fold for the violations lasted longer than five years.

9. Article 6 and Article 7 of the Regulation, provides a method for aggravating and mitigating factors. Aggravating factors are applied before mitigating factors. Repetition, continuing cartel after notification of investigations decision, not meeting commitments, assistance, coercing other undertakings are taken in to account as aggravating factors and the base fine shall be increased by up to one fourth to one fold based on which factor is realized. Each situation is met with a different aggravating rate.

10. On the other hand, provision of assistance to the investigation process beyond the fulfillment of legal obligations, admission of violation and making active cooperation, existence of encouragement for violations by public authorities, existence of coercion by other undertakings, voluntary payments of damages to those harmed, termination of violations as soon as possible, occupation of very small share by practices subject to violation within annual gross revenues are all taken into consideration as mitigating factors and undertakings shall be awarded discount in the fine with different rates.

11. Aggravating and mitigating factors shall be applied to individuals with similar method set forth above as well.

12. During the 2005 – 2015 period, TCA had concluded 161 investigations. The breakdown of the factors that TCA Board had used to aggravate the amount of fine is listed below:

<b>Aggravating Factor</b>	<b>Number of Cases Used</b>
Recidivism	1
Maintaining the Cartel After Notification of the Investigation Decision	1
Not Following Commitments	0
Refusal to Assist/Cooperate	1
Coercing	1
Other Factors	11

(Please note that more than one factor may be used to aggravate the amount of fine in an investigation)

13. The other factors used to aggravate the amount of fines and the number of cases that they had been used is stated below:

- Characteristics of the infringement (1 case),
- Economic power of the firm(s) (1 case),
- Having a leading role in cartel (4 cases),
- Active participation to the meetings (1 case),
- Intentionally violating the Competition Act (1 case),
- Market power of the colluders (2 cases) and
- Intentionally exchanging sensitive information (1 case)

14. During the 2005 – 2015 period, TCA had concluded 161 investigations. The breakdown of the factors that TCA Board had used in mitigating the amount of fine is listed below:

Mitigating Factor	Number of Cases Used
Assistance beyond fulfillment of legal obligations	8
Existence of encouragement by public authorities	8
Coercion by other undertakings in the violation	1
Voluntary payment of damages to those harmed	0
Termination of other violations	3
Occupation of a very small share by practices subject to the violation within annual gross revenues	7
Other Factors	31

(Please note that more than one factor may be used to mitigate the amount of fine in an investigation)

15. The other factors used to mitigate the amount of fines and the number of cases that they had been used is stated below:

- Limited/no effect on the market (8 cases),
- Not adhering to cartel's decisions all the time (4 cases),
- Not effectively participating the meetings and implementing cartel's decisions (4 case)
- Short duration of the cartel conduct (1 cases),
- Joining the cartel at a later stage (1 case),
- Not imposing the sanction decision taken by the cartel (1 case),
- Identification of the cartel at a very early stage ( 1 case),
- Sellers' (cartel participants) limited power against buyers (1 case),
- Fragile nature of the sector (1 case),
- Small market share (1 case),
- Acceptance of being part of the cartel (1 case),
- Being exposed to external shocks (1 case),
- No public harm (1 case),
- Not directly effecting the prices (1 case),
- Not diverting sales to only one firm (1 case),
- Limited role in the cartel (1 case),
- Having most of its income from exports (1 case) and
- Having a small market power (1 case),

16. The other important facts about the sanctions of the TCA is as follows:

- The inability to pay is not considered as a factor in imposing the fines, however TCA Board has the discretion on determining the amount of fine,
- TCA does not keep the tract of whether the fines are collected or not since collecting the fine is Ministry of Finance's duty,
- Undertakings can reduce their fine by 25% if they pay all of it in cash, however the reduction in fines does not preclude a firm to appeal the decision,

- Any undertaking which are fined by the TCA Board can appeal to courts to overrule TCA Board's decision,
- Undertakings can appeal to a decision of the TCA Board which imposes a sanction but the appeal does not bring an automatic suspension on the fine,
- TCA Board can only impose fines for individuals,
- To this date no court has awarded private damages any individual or an undertaking,

17. The last paragraph of Article 16 of the Act provide legal basis for leniency. Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation) is the secondary legislation that define the procedure and provide principles for leniency system in Turkey. Accordingly, undertakings and individuals revealing their cartel behavior and making active cooperation with TCA may be awarded full immunity from fining or reduction from fines. In this case, the quality, efficiency and timing of cooperation are all taken into consideration in assessing the leniency application.

18. Specifically, the first undertaking which apply for leniency before the TCA carry out a preliminary inquiry and meet requirements, shall be granted full immunity from fines. Immunity shall be granted to the first comer, coming after the preliminary inquiry decision until the investigation report is issued, provided that the TCA does have sufficient evidence to unclear the cartel.

19. Other undertakings after the first comer, shall benefit from reduction, if they submit their application before the notification of investigation report.

20. Leniants are expected to;

- submit information and evidence in respect of the alleged cartel including
  - the products affected, the duration of the cartel, the names of the undertakings party
  - to the cartel, specific dates, locations and participants of cartel meetings,
- not conceal or destroy information or evidence related to the alleged cartel,
- end its involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated,
- keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit,
- maintain active cooperation until the Board takes the final decision after the investigation is completed.

21. Individuals (managers and employees of undertakings) shall benefit from leniency within a similar method.