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**REGULATION ON ACTIVE COOPERATION FOR DETECTING
CARTELS AND REGULATION ON FINES TO APPLY IN CASES OF
AGREEMENTS, CONCERTED PRACTICES AND DECISIONS
RESTRICTING COMPETITION, AND ABUSE OF DOMINANT
POSITION**

This article aims to provide brief information and update our clients on the recent developments in Turkish Competition Law regarding the Regulation on Active Cooperation for Detecting Cartels (the “Leniency Regulation”) and the Regulation on Fines in Cases of Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position (the “Regulation on the Calculation of Fines”).

I. EXECUTIVE SUMMARY

The Leniency Regulation and the Regulation on the Calculation of Fines became effective on February 15, 2009.

Prior to the amendment of Article 16 of Law No. 4054 on the Protection of Competition (“the Law”) with Law No. 5728 on 23 January 2008, the Law did not provide a leniency mechanism. However, after the amendment, the Law introduced a leniency process, the procedures and principles of which are governed by the new Leniency Regulation. The Leniency Regulation, modeled upon the EC Competition Law, strives to set the procedures, principles, and the consequences (non-imposition and/or reduction of fines) of active cooperation with the Competition Authority for the detection and investigation of cartels. The Leniency Regulation only applies to cartels and not to other competition infringements.

The Leniency Regulation empowered the Competition Authority to establish a division to implement the Leniency Regulation and to deal with leniency applications. This division was established on 19 February 2009.

The Regulation on the Calculation of Fines is only applicable to the fines to be imposed on companies that engage in Agreements, Concerted Practices and Decisions and Abuse of Dominant Position cases.

The purposes of the Regulation on the Calculation of Fines are as follows:

- Ensuring transparency, objectivity and consistency in the fining process;

- To take into account points such as assistance with investigations and active cooperation while determining the fines; and
- To ensure special and general deterrence.

II. LENIENCY REGULATION

1. Principles introduced by the Leniency Regulation

Leniency can be defined as the active cooperation of firms with the Competition Authority for the earlier detection of cartels, encouraging more efficient enforcement of the Law. The incentive provided by the Regulation is non-imposition or the reduction of fines for companies that cooperate with competition authorities by revealing information regarding the existence of cartels before the notification of the investigation report, or for the companies that provide additional information that may assist in accelerating the investigation process.

Cooperation of any type does not alone provide a guarantee for relief from the fines. Non-imposition or the reduction of fines for companies who cooperate with the Competition Authority in detecting cartels is assessed by the quality, efficiency and timing of cooperation and by means of explicit demonstration of the grounds.

To benefit from the leniency mechanism, a company shall apply to the Competition Authority prior to receipt of the notification of the investigation report. Depending on the timing of the application (before or after the decision of the Competition Board to carry out preliminary inquiry), a non-imposition or a reduction of fine may be granted.

Pursuant to the Leniency Regulation:

For full immunity from fines:

- The company should be the first company to denounce the existence of a cartel by submitting relevant documents and information to the Competition Authority before the Competition Board makes a decision to carry out a preliminary investigation. The first to do so, prior to a preliminary investigation decision, shall be granted full immunity from fines. Employees and managers of this company will also be granted immunity.
- If a company denounces, where there is not sufficient proof of the violation of Article 4 of the Law, starting with the preliminary investigation decision of the Competition Board up until the final decision, then it may be granted full immunity from the fines. Employees and managers of this company will also be granted immunity.

For the reduction of fines:

- The fine to be imposed on the first company (if it does not qualify for immunity) that denounced its participation in a cartel following the preliminary investigation decision of the Competition Board, shall be reduced by one-third to one-half of the fine. In such a case, at least one-third of the fine may be reduced or a fine may not be imposed

at all on the employees/managers of the company who acknowledge its violation of the Law and actively cooperate.

- The fine to be imposed on the second company that denounces participation in 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 a fine may not be imposed at all on the employees/managers who accept the violation and actively cooperate.
- The fine to be imposed on other companies that denounce participation in a cartel shall be reduced by one-sixth to one-fourth. At least one-sixth of the fine may be reduced or a fine may not be imposed at all on the employees/managers.

2. Managers and Employers' Application For Leniency

An employer or a manager of a company may also apply for leniency prior to receiving notification of the preliminary investigation report. This application is totally independent from the application of the company. The reduction rates and conditions for immunity are the same for employers/managers and companies.

Pursuant to Article 6 of the Leniency Regulation, the conditions for managers and employers to benefit from the leniency procedure are as follows:

- The applicant must submit information and evidence of the alleged cartel including the products affected, the duration of the cartel, the names of the companies party to the cartel, specific dates, locations and participants of cartel meetings;
- The applicant must avoid concealing or destroying information or evidence related to the alleged cartel;
- Unless otherwise agreed by the Leniency Unit, the applicant must end its involvement in the alleged cartel;
- Unless otherwise requested by the Leniency Unit, the applicant must keep the application confidential until the end of the investigation; and
- The applicant must continue to actively cooperate with the Competition Authority until a final decision has been rendered.

3. Effectiveness of the Leniency Regulation

The Leniency Regulation also applies to the pending preliminary investigations which began before the Regulation was issued and where the investigation report has not yet been served.

III. REGULATION ON THE CALCULATION OF FINES

Pursuant to the Regulation on the Calculation of Fines, first a basic fine shall be calculated and then the aggravating and mitigating factors shall be taken into account for increasing or decreasing the basic fine. However, the fine shall not exceed 10% of the company'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.

The basic fine is calculated as a percentage:

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

of the company'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 used as a basis.

While calculating the "basic level," the Competition Board will weigh other factors such as the market power of the company within the relevant market. The amount of the fine shall be increased by one-half for violations that lasted longer than one year and shorter than five years and shall be increased by one-fold for violations that lasted longer than five years.

The basic fine shall be increased by one-half to one-fold for each repetition in the case of repetitive violations and also where a cartel continues its infringements after notification of the investigation decision. The basic fine may be increased: a) by one-half to one-fold where the commitments made for the elimination of the competition problems raised within the scope of Agreements, Concerted Practices and Decisions and Abuse of Dominant Position are not met; b) by up to one-half where no assistance is provided during the investigations; or c) by up to one-fourth where other undertakings are forced into the violation.

Mitigating circumstances include cooperation, voluntary compensation to aggrieved parties, etc. If mitigating circumstances are established by the violator, the basic fine may be reduced by one-fourth to three-fifths.

The fines that will be imposed on a company, which would not benefit from the non-imposition of fines pursuant to the Leniency Regulation, shall be reduced by one-fourth if the company presents information and documents specified in the Leniency Regulation before the Competition Board decides to conduct a preliminary inquiry regarding another cartel. In cases where the companies that are engaged in other violations acknowledge their bad acts and actively cooperate, the fine shall be reduced by one-sixth to one-fourth.

The Regulation on Calculation of Fines also applies to employees and managers that had a determining effect on the violation and provides certain reductions in favor of these persons.

IV. CONCLUSION

These two regulations are highly significant for all companies as the first one introduces a totally new procedure to the Competition Law enforcement and the second one sets forth the grounds of applicable fines. The Regulation the Calculation of Fines seeks to provide objective sets of principles while still leaving discretion with the Competition Board. The message of the Leniency Regulation is straightforward, "*First come, first served.*" ⊕