

Unclassified

English - Or. English

18 December 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 18 December 2023**

**Global Forum on Competition**

**Alternatives to Leniency Programmes – Contribution from Türkiye**

**- Session II -**

7-8 December 2023

This contribution is submitted by Türkiye under Session II of the Global Forum on Competition to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: [oe.cd/atlp](https://oe.cd/atlp).

Please contact Ms Lynn Robertson if you have questions about this document  
[[Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)]

**JT03534982**

## *Alternatives to Leniency Programmes*

### *- Contribution from Türkiye –*

#### **1. Report on Alternatives to Leniency Programs – Türkiye**

1. In Türkiye agreements and concerted practices between undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal according to the Act No 4054 on the Protection of Competition (“**Competition Act**”). Cartels are illegalized in Competition Act however they are defined separately in Regulation on Active Cooperation for Detecting Cartels (“**Leniency Regulation**”) as: *“Agreements restricting competition and/or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotes, and bid rigging.”*

2. Difficulty in detecting cartels, which are more secretive in nature compared to other antitrust violations, makes cartel detection an existential problem for competition authorities. Leniency is one of the answers to that problem.

#### **1.1. Turkish Leniency Program**

3. The leniency program was introduced to Turkish competition law with the Leniency Regulation in 2009 which was followed by a relevant guideline which was published in 2013. The main goal of the Leniency Regulation is to start a race between undertakings, that are part of a cartel, to be the first maverick.

4. The scope of the Leniency Regulation is limited to cartels. In other words, undertakings which violates Competition Act with vertical anti-competitive agreements or undertakings which abuse their dominant position cannot apply for leniency.

5. In practice Turkish Competition Authority (TCA) follows two main principles while reviewing leniency applications: “transparency” and “interpretation in favour of the applicant”. With those principles TCA aims “i) Ensuring legal certainty, ii) Enabling undertakings to predict whether they will receive full immunity, iii) To encourage applications, iv) Not to put the applicant at a disadvantage”.

6. The first undertaking to apply before the decision to conduct a preliminary investigation, independent of its competitors, the undertaking's managers or employees gains full immunity. The first applicant who applied after the decision to conduct a preliminary investigation and before the notification of the investigation report, if there is not enough evidence to reach a conclusion of infringement, also gains full immunity.

7. Leniency Regulation also allows undertakings to apply after the first applicant whose application is accepted. Such undertakings may receive various reductions to their fines depending on the order in which they applied and which time frame they applied.

8. Applicants are obligated to not hide documents related to the cartel, stop being a part of the cartel, keeping the application confidential until the notification of the investigation report and continue to actively cooperate with TCA until the final decision.

Undertakings that force<sup>1</sup> other undertakings to the infringement cannot benefit from leniency.

## 1.2. Settlement

9. Settlement is a procedural mechanism whereby, in certain antitrust violations, undertakings can obtain a reduction in their penalty in return for shortening the process of investigation by accepting the infringement and waiving some of their rights. This mechanism was added to the Competition Act with the amendment made in 2020.

10. Settlement is not a cartel detection method. However, Turkish competition law allows settlement and leniency to be accepted simultaneously. In such cases undertakings can get an additional 25% decrease to their fines. Additionally, undertakings that pay their fines quickly receive an additional 25% discount. TCA keeps the admission standard low to encourage both settlements and leniency applications. Downside of this is that fines might get so low that it might not be rational for some undertakings to apply for leniency, since they can also apply for leniency while the investigation is still ongoing. This is especially true if the cartel is too lucrative. In 2000, Motto and Polo showed this problem using econometrics. In their paper, they claimed “*if the resources available to the competition authority are sufficient to prevent collusion using full fines, Leniency Programs should not be used.*”<sup>2</sup>

11. This problem partially is being dealt with an amendment to the Leniency Regulation, which will be discussed down the line.

## 1.3. Statistics on Cartel Detection

12. TCA’s main method for cartel detection is complaints. Complainants are often the ones who faces direct harm of the infringements. However, this method is not flawless.

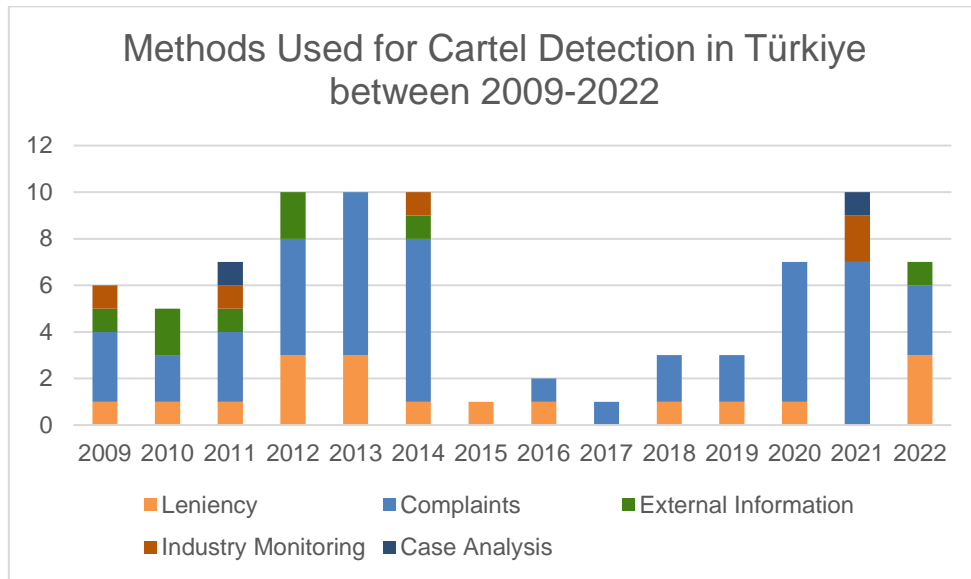
13. Many consumers and even some competitors are relatively insensible to competition law. And if the cartel is well organized there might not be any competitors outside the cartel and consumers might not even notice that prices are coordinated. Therefore, alternative methods for complaints are necessary.

---

<sup>1</sup> The “force” here is interpreted narrowly.

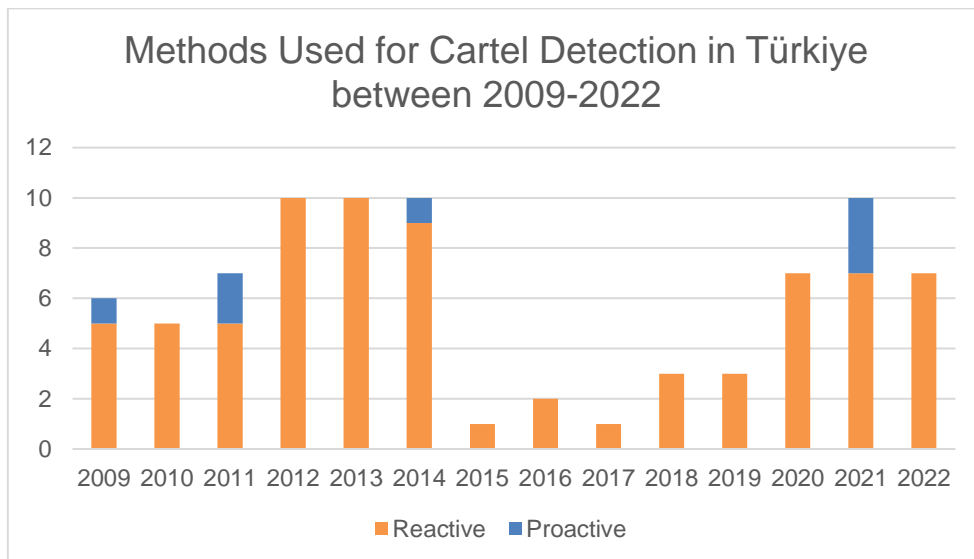
<sup>2</sup> MOTTA, M. and POLO, M. (2000), “Leniency Programs and Cartel Prosecution”, International Journal of Industrial Organization, No: 21(3), p. 371.

Figure 1. Methods Used for Cartel Detection in Türkiye between 2009-2022



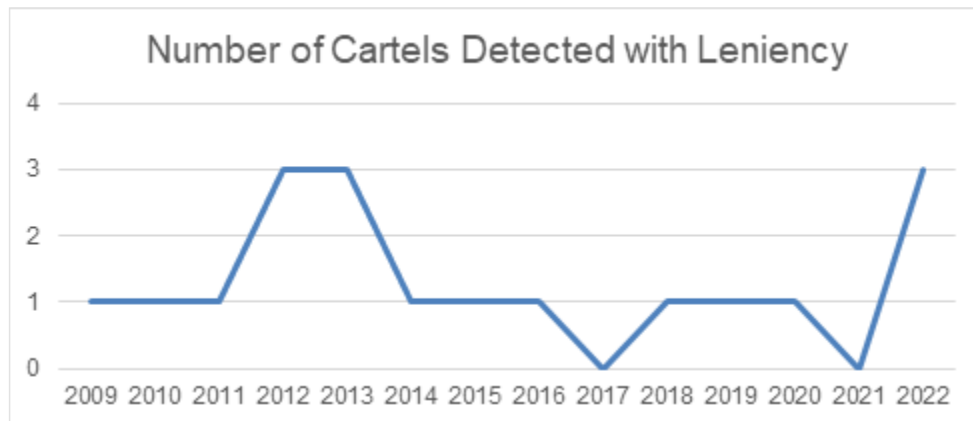
14. As cartels are more secretive in nature compared to other antitrust violations the effectiveness of proactive methods are rather low. Generally speaking, complaints and information provided by informants have a higher probability to guide TCA to a real cartel. Considering that TCA's resources are limited, it is not surprising that proactive methods are given more importance than reactive methods. More industry monitoring means that there will be less time to open cases based on complaints.

Figure 2. Methods Used for Cartel Detection in Türkiye between 2009-2022



15. Not all leniency applications result with cartel detection. As undertakings are capable of applying for leniency both during and after preliminary investigations some of the documents provided by applicants just strengthen the possibility of proving a cartel which is already detected.

Figure 3. Number of Cartels Detected with Leniency



#### 1.4. Alternative Methods Combined With Leniency

16. It can be said that the lack of alternative methods will reduce the number of leniency applications. If the probability of cartel detection is low without leniency, there will be less deterrence. An undeterred undertaking is unlikely to apply for leniency. Leniency is not substitute to alternative methods but rather complementary.

#### 1.5. Recent Revisions to Turkish Leniency Program

17. In September 2023, TCA shared a draft with the public to update the Leniency Regulation. Considering that the Leniency Regulation has been in force for fourteen years and alternative procedural mechanisms, such as settlement, have been introduced into the Competition Act in the last few years, it can be said that such a change is inevitable.

##### 1.5.1. Cartel Facilitator

18. A new definition titled “cartel facilitator” has been added to the draft of new Leniency Regulation (“Draft”)<sup>3</sup>. TCA’s *Chain Markets* decision<sup>4</sup> might have been effective in adding this definition. The infringement type in *Chain Markets* case was a hub and spoke cartel. In the *Chain Markets* case, it was decided that the undertakings that were in a position to facilitate the cartel and served as a ‘hub’ had equal liability with the cartel parties. With the new definition, it will be clearly shown that undertakings who are not direct parties to the cartel can apply for leniency.

<sup>3</sup> Available in Turkish at <https://www.rekabet.gov.tr/tr/Guncel/aktif-isbirligi-yonetmeligi-taslagi-kamu-55b112a30e5eee118ec600505685da39>

<sup>4</sup> Turkish Competition Board’s decision of 28.10.2021, 21-53/747-360.

### *1.5.2. Significantly Added Value*

19. With the Draft, a new definition titled "katma değer yaratan belge"<sup>5</sup> has been added. This definition is parallel to the expression "significantly added value" in the Commission's leniency regulation. Defining the significantly added value provides clarity regarding which documents can be used in applications for leniency. In order for the application for leniency to be accepted, the documents submitted by the applicant must be of a nature that will strengthen the possibility of proving the cartel in comparison to the evidence available to TCA.

20. With this change, undertakings will be prevented from benefiting from both settlement and leniency without contributing to the proof of the cartel.

### *1.5.3. Other Changes*

21. In the Draft, it is envisaged that if the undertaking applying for leniency obtains information and documents following its application, this information and documents will be submitted to TCA and reasonable time limits will be introduced for leniency applications to be made after the TCA decides to conduct a preliminary investigation. These time limits aim to ensure that the investigation processes are not disrupted.

22. In the Draft, it is envisaged to add a provision to the Leniency Regulation stating that the information and documents submitted by an undertaking whose leniency application is not accepted will be excluded from the case and this information and documents cannot be used as a basis for the final decision. This can provide assurance to potential applicants.

23. In the Draft, there is also an article stating that the provisions of the Leniency Regulation will be applied even if the violation is not evaluated as a cartel by the TCA at the end of the investigation process. This is another assurance to potential applicants.

### *1.5.4. What Comes Next*

24. Thanks to the new definitions in the Draft and the assurances provided to applicants, it is anticipated that the number of parties likely to apply for leniency will increase. In addition, regulating the application periods quantitatively and indicating which documents are meaningful for leniency applications in the Leniency Regulation will increase legal certainty.

25. As a natural consequence of these, the opportunity to access evidence with the highest probative power provided by leniency may expand and deterrence in terms of the formation of cartels may increase.

---

<sup>5</sup> Direct translation of "katma değer yaratan belge" is "document that creates added value"