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Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by Türkiye

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This document reproduces a written contribution from Türkiye submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. With the increased enforcement efforts against cartels, competition agencies have adopted and revised their leniency programs over the years. Leniency programs are an important instrument in the fight against cartels since competition authorities can more easily uncover and sanction cartel participants by protecting the first applicant immune from punishment or by giving other applicants reduced sanctions. Information or evidence can be obtained “first-hand” and faster by competition agencies. They also form a deterrence mechanism for those who plan to be a part of cartel arrangements.
2. On the other hand, there are also some challenges that might prevent effective and efficient leniency programs such as private enforcement and regulatory interventions. Furthermore, the globalization of business and the consequent rise in the number of cartels with international scope together poses new difficulties and challenges in the investigation, in light of the proliferation of leniency systems among competition authorities, highlighting the importance of increased co-operation on both procedural and substantive issues.
3. Detection and punishment of hardcore cartels has been a priority of antitrust enforcement since many years. With technological developments in recent years, cartels have become more easily concealed and it has become difficult for competition authorities to prove cartels with evidence obtained by traditional methods. So, leniency program is very important to detect the cartels.
4. Leniency programmes around the world offer cartel members the opportunity to report their illegal conduct and provide information and evidence of the infringement in exchange for full immunity or a reduction of antitrust fines.
5. In this respect, it would be beneficial to use the active cooperation mechanism more effectively in terms of revealing the cartels that are hidden by nature. In this context, it is important to develop new tools to increase the attractiveness of leniency program for undertakings and to prevent the loss of welfare caused by the presence of cartels.
6. In this context, first of all, the application of leniency program, which is currently included in the Act No. 4054 On The Protection of Competition (Act no 4054) and the relevant regulation, will be mentioned, and then possible development areas will be discussed.
7. Compared to other countries, the leniency program can be considered relatively new in Türkiye. It started to be implemented in Türkiye in 2009. Undertakings can benefit from the leniency program either by gaining full immunity and not receiving a fine, or by obtaining a reduction in the fine. There are two conditions for an undertaking to be immune from fines under the Leniency Program. First of all, it must be the first undertaking to submit information and documents before the Turkish Competition Board (TCB) makes a preliminary investigation decision. Secondly, while TCB does not have any evidence, it must be the first undertaking to submit information and documents from TCB decision to conduct a preliminary investigation until the notification of the investigation report. The documents, which are presented in the scope of active cooperation by the undertakings, should include the duration of the cartel, the names of the undertakings, the dates, places, participants of the meetings related to the cartel and other information and documents related to the cartel.
8. With the latest amendments made on Act No 4054 as a part of the efforts to align Türkiye’s competition policy legislation to the EU and introducing the settlements

procedure, undertakings had the opportunity to apply to both the leniency program and the settlement procedure simultaneously.

9. Leniency Program implemented in Türkiye differs from the European Union (EU) in some aspects. First of all, in Türkiye, unlike the Commission, the managers of undertakings are also responsible for the violation.

10. Secondly, if the TCB determines that the application does not meet the immunity conditions, there is no regulation as to whether the evidence presented will be used against the applicant in a case.

11. The third difference is that if the evidence presented to the undertaking does not meet the necessary conditions, the possibility of withdrawal is not offered. In Türkiye, the number of cartels discovered through the leniency program and penalized by the TCB is quite limited.

12. In recent years, 80-90% of the cartels in the EU have been revealed with a leniency application. On the contrary, the fact that this rate is quite low in Türkiye shows that the leniency program is not implemented effectively enough and there is still room for improvement.

13. In this context, so as to increase the effectiveness of the leniency program, the examination powers of the TCB should be expanding and establishing mechanisms for the protection of whistle-blowers.

14. In addition to the active cooperation mechanism, which has an important place in the detection of cartels, in some cases, the price or other competitive parameters of the undertakings are subjected to economic analysis and it is examined whether the numerical data show similarities' with the market structure where competition is prevented, distorted or restricted, are restricted. However, there is no tool that monitors the markets independently of any preliminary inquiry or investigation process to detect the cartels. On the other hand, the TCB has the competence to examine, investigate and investigate ex officio.

15. In addition to these during the preliminary inquiry or investigation process, it is possible to make interviews with the witness to obtain evidence. As a result, it is possible to say that there are not any tools or cartel monitoring method, except leniency program, designed to detect cartels or other anti-competitive practices in Türkiye. However, setting an effective cartel screening system will be useful to detect and uncover cartels. In addition to the cartel screening method, allowing the competition authorities to benefit from surveillance, consensual recording, wiretapping and rewarding the whistle-blower methods will increase the chance of detecting the cartels.

16. The numbers of the leniency program applications to the Turkish Competition Authority (TCA) from 2009 to 2023 are 2; 1; 2; 4; 4;3; 4; 1;4; 3; 3 and 1 respectively. So it can be inferred that the number of the application to the TCA in the scope of active cooperation is not a desired level when it is compared with the EU and application trends has not changed in appreciable manner in times.

17. In these phases, some important decisions in which the leniency program was implemented by the TCB will be analysed. The first decision was the SunExpress/ Condor decision dated 2011, which is about the activities of the airline companies. The undertakings have involved anti-competitive behaviour for a certain time period in flights between Germany and Türkiye through agreements. The first applicant undertaking SunExpress gains full immunity. Second Condor gets a 50% discount.

18. Another decision is the Arçelik-Vestel decision. These two undertakings sell white goods. Arçelik applied for a leniency program and stated that it violated the competition law by exchanging information sensitive to competition. However, TCB decided that the exchange of information was carried out by leaking sensitive information to the Vestel through an ARÇELİK employee without any knowledge or approval of ARÇELİK, and it was not seen as a breach of competition law by the TCB.

19. At last but not least, the first decision where leniency and settlement procedures are implemented together have been announced through press release recently¹ and the investigation concerning Beypazarı and Kınık was concluded. Aforementioned undertakings violated article 4 of the Act no 4054 by means of price fixing through information exchange with a competitor in terms of current and future prices, price change dates and raised prices and thus by means of forming a cartel.

20. When all the information explained in detail above is evaluated together, there are some crucial reasons need to be handled to increase the efficiency and effectiveness of leniency program in Türkiye.

21. Firstly, if the competition authorities have sufficient resources to detect large numbers of active cartels without leniency program, conversely effectiveness of the leniency program will be increased. So quantitative and qualitative capacity of the TCA should be increased gradually to attain these purposes.

22. Secondly, the fines must be deterrent. From 2009, when the leniency program started in Türkiye, to 2023 on cartels were at most 5, the fines imposed %. It was well below the 10% fine that could be applied in theory and far from being deterrent for undertakings.

23. The third topic that may increase the effectiveness of leniency programs is the awarding of rewards to whistle-blowers. However, the reward system also carries a risk that may increase unfounded claims and this means the waste of resources. So, it should be applied with a good balance. Additionally, limiting the compensation liability of the undertakings applying for the leniency program will increase the number of leniency applications.

24. The fourth reason to be highlighted is that other and final reason is that undertakings are not very willing to apply for a leniency program since they avoid paying compensation after a leniency program.

25. The other and final reason is that international cooperation related to detect the cartels or any other anti-competitive practice is quite limited and should be improved to uncover the cartels.

¹<https://www.rekabet.gov.tr/en/Guncel/the-first-decision-where-leniency-and-se37df2acde4dcec11a22000505685ee05>.