

# **Turkish Leniency Programme: What Not To Do**

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# Turkish Leniency Programme

- The programme was adopted in 2009, late relatively.
- The programme has not been fully successful both in terms of the application numbers (only nine) and in the way the cases are dealt with.
- There are three major reasons behind this inadequacy:
- First, the concept of leniency has been misinterpreted/mistranslated. Second, the secondary legislation has not been designed properly. Third, the Turkish Competition Authority has been too tolerant with respect to leniency applicants.

- The TCA implemented the Regulation on Active Cooperation for Detecting Cartels/**Regulation of Regrets** on February 2009 after 10 years of cartel enforcement.
- In 2013 the Guidelines on Active Corporation for Detecting Cartels (**Guidelines of Regrets**) were enacted.
- A specific division was designated for the implementation of the Regulation, which was later named the Cartel and On-Site Inspections Division

- **Misperception of Leniency:**

- The foundations of all leniency programmes, whether they are applied to criminal or administrative offences, are similar: In exchange for obtaining immunity or reduction in fines, the cartel member confesses the wrongdoing to the antitrust authorities. This process involves a mutual understanding. The cartel member cooperates genuinely and submits supporting evidence concerning its past illegal cartel activities, hoping for an amnesty to be awarded.
- However, this mutual lenient attitude is misunderstood in the Turkish context. The word “lenient” is translated and interpreted into Turkish competition regime as being “regretful.” It is expected from the cartel member to feel “regret” and to disclose its participation in the cartel to the Authority. This misinterpretation manifests itself into the secondary legislation and into cartel enforcement. The secondary legislation is officially named “Regulation of Regrets” and “Guidelines of Regrets.” Similarly, the leniency applications are named applications of regrets.
- The (mis)perception of leniency leads to only detecting cartels, not penalising them in the way they would otherwise have been.

- In addition, not only the name but also the design of the secondary legislation is problematic – such as setting up the evidential threshold too low, not seeking a proper and continuous cooperation, etc. These issues lead to enforcement problems.
- The rationale behind the adoption of a leniency programme in Turkey was to increase the detection of clandestine cartels with a contemporary approach. The Authority has been criticised for its high number of dawn-raids (103 in 2011). By giving incentive to those who confess the wrongdoing, the Authority targeted to decrease its number of dawn-raids and to enhance its capacity to combat cartels. But, in some cases, dawn-raids were carried out even into the lenient undertakings.

- Before the entry into force of the Leniency Programme, the Law on the Protection of Competition did not provide for an immunity programme. However, there had been four cases decided on the basis of cooperation with a mitigation in fines.
- The 2008 amendments enacted to Article 16 of the Law paved the way for a leniency programme. The previous version of Article 16 only made it possible to mitigation in fines. Since the Law set a minimum fine amount for competition infringements in the form of cartels, total amnesty from fines was not possible.
- As the Regulation and the Guidelines of Regrets state, the leniency programme is available only for cartels. Cartels are defined 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.
- Turkish leniency programme is open not only to undertakings but also to individuals who have engaged in cartel activities.

- A cartelist may apply for leniency until the investigation report is officially served. Total immunity or a reduction in fine may be offered depending on the application order. The regulation envisages a three-way race between (i) undertakings, (ii) managers and employees and (iii) undertakings and their managers and employees acting in concert. Managers or employees of the lenient undertaking do also benefit from waivers or reduction in fines even if the application is made by the undertaking.
- According to Turkish competition enforcement procedures, a two-step investigation is envisaged. The first step is called preliminary investigation and the relevant report that is served accordingly is named preliminary report. The second step is called investigation process, and the relevant report is named investigation report. Investigation report is the equivalent of the Commission's statement of objections.

- ***Conditions for full immunity***

- To be valid only for the first self-reporter:

- (i) Application [by an undertaking] received by the Authority before the decision of preliminary investigation is taken

- (ii) Application [by an undertaking] received within the period of the preliminary investigation decision to the serving of the investigation report provided that the Board does not have evidence addressing that Article 4 of the Law has been violated

- (iii) Application [by a manager or an employee] (independent from the undertaking) received by the Authority before the decision of preliminary investigation is taken

- (iv) Application [by a manager or an employee] (independent from the undertaking) received within the period of the preliminary investigation decision to the serving of the investigation report provided that the Board does not have evidence addressing that Article 4 of the Law has been violated

- Article 4 of the Act on the Protection of Competition, is the equivalent of Article 101 TFEU.



- ***Conditions for full immunity (cont)***

- Contrary to the Commission's Leniency Notice, in the Turkish leniency regime, to obtain full immunity, there is **no liability** to submit information and evidence **to enable the Authority to carry out a targeted inspection or to find an infringement of the Law**. In the regime, possibility of full immunity relates only to submitting information and evidence that are listed in the regulation: namely, (i) products affected by the cartel, (ii) duration of the cartel, (iii) names of the undertakings that are party to the cartel, (iv) dates, locations, and participants of cartel meetings, (v) information and evidence regarding the cartel.
- Timing is, to a certain extent, more important than substance to obtain full immunity. Such that, a cartelist may obtain immunity if the application is made before the preliminary decision is taken (**even if the Board possesses evidence addressing an infringement of Article 4 of the Law**). However, according to the Commission's Leniency Notice, in order to qualify for immunity, the undertaking is under the obligation of submitting information and evidence to enable the Commission to find an infringement of Article 101 TFEU /to carry out targeted inspections in connection with the alleged cartel.
- When evidence requirements are concerned, the Turkish Leniency Programme sets the standards lower than the ECN Model Programme.

- ***Conditions for reduction in fines***

- Two groups of undertakings and individuals :
- The first group consists of applicants who are the first in the application-queue, but could not qualify for waivers. In this case, full immunity is not possible because the preliminary investigation decision is already taken, and the Board has sufficient evidence to prove that Article 4 of the Law is infringed.
- The second group consists of the undertakings and individuals who are not the first ones to approach the Authority. In exceptional circumstances, it is also possible to speak of a third group of applicants, which are the coercers of a cartel and are not able to obtain full immunity as a result.

**Table: 1. Immunity/Reduction in Fine**

Time and order of application	Immunity/reduction rate
1 <sup>st</sup> applicant before the preliminary investigation decision	Full immunity
1 <sup>st</sup> applicant through the investigation stage (provided that the Board does not possess sufficient evidence or information to prove the existence of the infringement)	Full immunity
1 <sup>st</sup> applicant through the investigation stage (but the Board possesses sufficient evidence or information to prove the existence of the infringement)	1/2 - 1/3
2 <sup>nd</sup> applicant	1/3 - 1/4
3 <sup>rd</sup> applicant and others	1/4 - 1/6

- ***Conditions for reduction in fines (cont)***

- To qualify for immunity or a reduced fine, the applicants are required to submit information and evidence about (i) the products affected by the cartel, (ii) the duration of the cartel, (iii) the names of the cartelists, (iv) the dates, locations, participants of the cartel meetings. In contrast to the Commission's Leniency Notice/ECN Model, Turkish secondary legislation does not oblige the cartelists to submit "significant added value" evidence to obtain a reduction in fines. Furthermore, paragraph 26 of the Guidelines of Regrets openly talks of this "non-liability:"
- In order to benefit from a reduction in fines, information and evidence related to the products affected by the cartel, duration of the cartel, undertakings who took part in the cartel, the dates, locations, participants of the cartel meetings and other information and documents should be submitted. Conversely, there is **no liability of submitting evidence that could significantly add value** to the evidence already possessed by the Board. Consequently, once the conditions set out in Article 6 and 9 of the Regulation are fulfilled, a reduction in fines will be granted automatically.

- The Commission's Leniency Notice, gives the list of information and evidence necessary to be submitted to the Commission at the time of application to be rewarded with full immunity. To the complete contrast to the Commission's Leniency Notice, Guidelines of Regrets gives "some parts of the same" list of information and evidence as **"not" to be submitted to the Authority** at the time of application to receive a lenient fine. The list involves information on geographic area and the volume of trade affected by the cartel, addresses of the other cartel participants, and other competition agencies approached by way of leniency.
- The Authority targets to increase the number of applications by lowering the evidence requirements.

- ***Coercers of a cartel***
- Turkish leniency programme is tolerant also towards coercers of a cartel.
- if the applicant coerced other undertakings to join the cartel, it cannot benefit from full immunity but may still be subject to a reduction in fines. Inspired largely by the OFT's guidance note, Guidelines of Regrets narrow the definition of a coercer into two specific conditions. Physical violence or serious economic pressure, which could result in market disclosure such as a mass boycott, will count as coercion.
- Furthermore, guidelines give the list of activities that cannot be interpreted as coercion. There would be no coercion if the applicant: leads the cartel alone or with other companies; has the largest market share; threatens to start a price war in case of not joining the cartel; reduces prices that would result in decreasing profits; establishes mechanisms to punish undertakings that do not comply with the agreement.

- **Leniency Cases:**

- *Gas* case:

- Bid-rigging in public procurement, 55 firms, Berk Gaz applies for leniency, receives full immunity.
- But the lenient firm, along with other cartel members and the findings of the case is transmitted to the public prosecutor. Although cartels are subject to administrative fines, bid-riggings also constitute criminal offence in Turkey.
- The lenient firm's managers, although obtained full immunity, has served sentence of imprisonment !

- **CPT case:**
- International cartel, the cartelist obtained full immunity under the condition that it was the first to self-report and that enough evidence was submitted. The Board was unable to find out the cartel. The case was closed at the preliminary stage concluding that there was no infringement of competition.
- The same leniency application was also submitted to the European Commission for two cartels in the sector of cathode ray tubes (CRT): colour display tubes (CDT) and colour picture tubes (CPT). Chunghwa obtained full immunity. Others received a reduction in fines. The two CRT cartels were among the most organised cartels Commission has ever inspected. The total fines imposed were €1.47 billion!
- Joaquín Almunia:
- “These cartels for cathode ray tubes are **‘textbook cartels’**: they feature all the worst kinds of anticompetitive behaviour that are strictly forbidden to companies doing business in Europe. Cathode ray tubes were a very important component in the making of television and computer screens. They accounted for 50% to 70% of the price of a screen. This gives an indication of the serious harm this illegal behaviour has caused both to television and computer screen producers in the EEA, and ultimately the harm it caused to the European consumers over the years.”



- The Authority failed to detect the ‘textbook’ cartel because,
- first, it set the evidence threshold too low to detect the illegal cartel activity. The lenient undertakings only give basic information and leave the rest to the Authority. In return, they obtain immunity/reduced fine but the cost and burden of detecting the cartel is placed on the Authority.
- Second, with respect to multijurisdictional leniency applications, it is difficult to detect international cartels unless official cooperation with international competition agencies exists. As a result, the Authority was unable to detect the lenient cartel.
- ***Refrigeration compressors case:***
- The lenient undertaking, full immunity. No supporting evidence was found to prove a price-fixing cartel. The case was closed at the preliminary stage concluding that there was no necessity to start a cartel investigation.
- The same case in the EU: The lenient company, full immunity and cartel members benefitted from reductions from fine. Total amount of fine was €161 million

- ***Seat-only flights case:***
- SunExpress full immunity, first-in-line to approach the TCA before the preliminary investigation was taken. Second cartel, Condor ½ reduction in fines: without submitting any evidence!
- In any leniency programme, second applicant is required to submit sufficient and significant evidence that could add value to the ongoing investigation in order to be rewarded a lenient sanction. Although the Regulation does not set forth the principle of “significant value added evidence,” in a two party cartel, by definition, the expectation of evidence is even higher. Rewarding 1/2 reduction in fines in return for only a “statement of regrets = no single document” reflects the excessive generosity of the Authority
- ***Traffic security systems case:***
- 3M full immunity, however did not cooperate fully, dawn-raids were carried out even into the premises of the lenient, 3M! , the Board decided that there was no sufficient evidence to prove an infringement of Article 4 of the Law. Hence, no fines were imposed to the undertakings concerned.

- ***Sodium sulphate and raw salt Case:***
- two undertakings (Sodaş and Otuzbir Kimya) subject to a competition investigation regarding cartels in three different relevant markets (powder sodium sulphate, crystal sodium sulphate and raw salt markets). One of the cartelists, Sodaş, applied for leniency for sodium sulphate cartels after the preliminary investigation decision was taken (and only five days before the investigation report was served). The lenient Sodaş could not obtain full immunity but benefited a reduction in fines for two sodium sulphate cartels.
- It also applied for raw salt cartel “after” the investigation report was officially served. The Leniency Regulation makes it clear that in order to qualify for mitigation in fines; the application is to be received until the investigation report is officially served. Final decision: There existed cartels in the two sodium sulphate markets and fines were imposed accordingly; for raw salt market, no cartel was detected. For both sulphate cartels, the lenient Sodaş was given a 1/3 and its manager was given a 1/2 reduction in fines

- ***Steel strap case***
- price-fixing by a two-party cartel in the manufacturing of steel strap. Through the end of the investigation process (only five days before the investigation report was served) MPS, one of the cartelists, applied for leniency. It received a 1/2 reduction in fines with respect to timing.
- ***Car distributors case:***
- price-fixing cartel formed by Hyundai car distributors. The leniency application was made by one of the distributors, who asked for confidentiality. The application was received before the serving of the relevant investigation report, thus it would qualify for a reduction in fines, if the case is decided as cartel.
- ***Private driving schools case:***
- price-fixing cartel in the (local) private driving schools market. The cartel was formed by four schools and three of them applied before the investigation report was served. Although they could have qualified for a reduction in fines in terms of timing, the applications were rejected by the Board relying on the fact that they were no more than “statements of regret.”

## Main problems in enforcement:

- Evidence threshold too low to enable the Authority to reach a conclusion (of a self-confessed cartel)
- Timing of applications
- Too generous in granting full immunity/reduction in fines
- Bid-rigging, also a criminal offence under the Criminal Code!

THANK YOU...