FINES IN TURKISH COMPETITION LAW: HAS THE LOTTERY ENDED?

TÜRK REKABET HUKUKUNDA PARA CEZALARI: PİYANGO BİTTİ Mİ?

Harun GÜNDÜZ[*]

Abstract

Monetary fines are one of the most important weapons at the competition authorities' disposal. Their main task is to deter undertakings from engaging in anti-competitive behaviour. In determining the appropriate level of fines in order to achieve this task, competition authorities encounter wide range of issues. In the advanced competition law regimes, adoption of a secondary legislation as to the method for setting fines is a crucial step in dealing with these issues. Recently introduced Fining Regulation in Turkish competition law clearly reflects this idea. Apart from aiming at providing transparency, consistency, and objectivity as to the methodology for setting fines, the Fining Regulation also allows for the imposition of more deterrent level of fines compared to pre-regulation era. Within this context, it is primarily questioned in this paper whether the Fining Regulation has fulfilled its objectives of providing transparency, consistency, and objectivity in the determination of fines. In doing so, a comparative approach will be adopted to consider both the EU and Turkish competition law.

Keywords: *Fines, Guidelines, Statements of Reasons, Relevant Turnover, Recidivism.*

Öz

Temel amaçları, teşebbüsleri rekabete aykırı davranışlarda bulunmaktan caydırmak olan para cezaları, rekabet otoritelerinin elindeki en önemli araçlardan bir tanesidir. Söz konusu amacın gerçekleştirebilmesi için gerekli

[*] Competition Specialist at the Turkish Competition Authority. All views expressed here are strictly personal. The title of this paper is inspired from VAN BAEL, I. (1995), "Fining a la Carte: The Lottery of EU Competition Law", *ECLR*, 16(4), p. 237-243. This paper is based on the dissertation written at the King's College London within the framework of LLM in Competition Law programme during the 2011-2012 academic year. The author gratefully acknowledges the precious comments and contributions made by Professor Richard Whish as the supervisor of the dissertation, and would like to thank Wouter Wils for his views on an earlier draft of this paper, and is particularly indebted to his colleague Gökşin Kekevi for his support and understanding.

olan ceza miktarının belirlenmesi sürecinde, rekabet otoriteleri birçok sorunla karşılaşmaktadırlar. Gelişmiş rekabet hukuku sistemlerinde, para cezalarına ilişkin ikincil mevzuatların kabul edilmesi, söz konusu sorunların çözümünde kritik bir öneme sahiptir. Türk rekabet hukukunda, yakın zamanda kabul edilen Para Cezaları Yönetmeliği, bu yaklaşımın bir ürünü olarak görülmektedir. Söz konusu Yönetmelik, para cezalarının belirlenmesi sürecinde şeffaflık, tutarlılık ve nesnellik sağlamayı amaçlamasının yanı sıra daha caydırıcı para cezalarının uygulanabilmesine de olanak tanımaktadır. Bu çalışmada temel olarak, anılan Yönetmeliğin bahsi geçen şeffaflık, tutarlılık ve nesnellik amaçlarını ne ölçüde gerçekleştirdiği ve beklentilere ne oranda karşılık verdiği, Avrupa Birliği rekabet hukuku uygulamasıyla karşılaştırmalı olarak irdelenmektedir.

Anahtar Kelimeler: *Para Cezaları, Yönetmelik, Gerekçe Gösterme, İlgili Ciro, Tekerrür.*

INTRODUCTION

Competition authorities around the world have various tools at their disposal in their fight against anti-competitive conduct. Monetary fines, in this regard, are one of the tools to ensure that undertakings do not engage in anti-competitive conduct. However, the determination of right level of fines is a very daunting task considering the wide range of factors together with achieving deterrence and preserving financial viability of firms. Additionally the emergence of financial crisis can make this task even immensely difficult.

A further point in the determination of fines is that it needs to be provided a certain degree of transparency, consistency, and objectivity to the firms in this process due to the fundamental principles of law such as equal treatment and legal certainty. Knowing the likely fine for infringements is also essential for achieving deterrence[1]. Given the need to consider wide range of factors and diversity of cases, providing some degree of discretion to the authorities is almost inevitable in this process as well[2].

Competition authorities have been sometimes unable to develop consistent decisional practice with respect to taking into account aforementioned considerations and thus their fining policy is criticised harshly. One of the most famous criticisms as to the decisional practice of the Commission was made by Van Bael who assimilated the methodology of setting

[1] CALVINO, N. (2007), "Public Enforcement in the EU: Deterrent Effect and Proportionality of Fines", in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, p. 317-335, Eds. Ehlermann and Atanasiu, Hart Publishing, USA, p. 321.

[2] WILS, W.P.J. (2007), "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis", *World Competition*, 30(2), p. 197-229, p. 204.

fines in EU competition law to a lottery[3]. The Turkish Competition Authority (the TCA) is not free from similar defects in this respect as well[4].

Business community as well as academics and practitioners call for secondary legislations as to the methodology of fixing fines to remedy these issues. Competition authorities generally take these calls into account and adopt secondary legislations in relation to fines, which is welcomed by all industry participants at the outset. However things may not turn out as anticipated since these authorities consistently implement secondary regulations and impose hefty fines by following the principles laid down. Eventually complaints start to be voiced by these circles again but this time they are about large fines[5]. Coupled with the financial crisis, demands for lenient application of these secondary legislations emerge. The whole of this course is reminiscent of the following quote: Be careful what you wish for, you might get it[6].

On the other hand, secondary legislations on fines may not always provide transparency, consistency, and objectivity. Criticisms in relation to the fining Guidelines issued in 1998 in EU competition law clearly exemplify the situation[7]. The position is very similar in Turkish competition law after the adoption of the Fining Regulation[8].

The secondary legislation in Turkish competition law in relation to fines was adopted in February 2009. It was considered both as the beginning of a new era and the end of the criticisms with regard to past practices of the Turkish Competition Board (the TCB) in relation to fines. In 2011, the level of fines imposed on undertakings reached its peak level totalling 460 million Turkish liras[9] (equivalent of nearly 210 million Euros), which is nearly three fold of the

[3] Van Bael 1995, p. 237.

[4] KEKEVİ (2008), *The Fight Against Cartels in the US, in the EU, and in the Turkish Competition Law*, Publication of the Turkish Competition Authority, Ankara, p. 169; ARI, H. and E. AYGÜN (2009), "Regulation on Fines Adopted by Turkish Competition Authority: Footsteps of the New Era", *Competition Journal*, 10(4), p. 7-71, p. 10.

[5] On the other hand, there have also been calls for the increase in corporate fines. See The Economist, "Fine and Punishment", 21.07.2012, Available at: http://www.economist.com/node/21559315, Date Accessed: 22.08.2012.

[6] The ideas expressed here are mainly based on the lectures given by Prof. Richard Whish in "Recent Developments in Competition Law" in 2011-2012 academic year at King's College London.

[7] See text accompanying notes 49-54 below.

[8] Available at http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik11.pdf, Date Accessed: 22.08.2012.

[9] The leading fines imposed in three cases, namely Banks, Car Dealers, and Turkcell. Around 90 million Turkish liras imposed on Turkcell, which is the largest GSM operator in Turkey, have been the biggest fine levied on a single company.

fines imposed between 2007 and 2011. This trend has also enhanced the discussions on the application of the Fining Regulation.

However more than three years of experience has also showed that things did not seem to quite turn out as anticipated especially in terms of transparency, consistency, and objectivity that are the main goals for the adoption of the Fining Regulation[10]. This is in particular due to the inadequate statements of reasoning as to the methodology of setting fines, the debate on whether the fine should be based on the aggregate worldwide turnover of undertakings or the turnover in the relevant market, and the decisional practice in relation to the recidivism[11].

Within this framework, this paper examines the enforcement of soft law instruments with regard to fines in Turkish competition law with a view to ensuring transparency, consistency, and objectivity. In other words, the query will be whether these secondary legislations do, in reality, provide guidance to the undertakings that commit substantive infringements. Before delving into the main issue, the rationale for imposing fines on undertakings will be considered in section 2, which provides a conceptual framework for setting fines. This is followed in section 3 by a brief overview of the Guidelines in EU competition law. Section 4 of the paper then considers the position in Turkish competition law. After a brief review of how these soft law instruments work in theory, Section 5 then examines the decisional practice of the TCB in relation to fines, in particular following the adoption of the secondary legislation in relation to fines, by comparing it with EU practice where necessary. The paper will conclude by considering whether the secondary legislation in relation to fines in Turkish competition law has met its goals of ensuring transparency, consistency, and objectivity, and whether this 'revolution' has been a success.

1. THE OBJECTIVES OF FINES

It may well be useful to remember first the objectives of fines to understand better the justification for adopting secondary legislation as regards fines. The central task of the competition law enforcement is to prevent infringements of competition rules[12]. In order to do so, opportunity, willingness, and incentives of

[10] See text accompanying note 102 below.

[11] There are also other contentious issues in relation to the application of the Fining Regulation such as applying the maximum rate of reduction in almost every case, not qualifying explicit cartels as a cartel, reducing the duration of infringements, and inconsistencies as to the imposition of fines on individuals. See also explanations following Annex-1.

[12] Pursuant to Article 103(2)(a) of TFEU, the purpose of fines is to ensure compliance with the prohibitions laid down in Article 101 and 102 TFEU.

violators to commit infringements must be reduced[13]. In this regard, monetary fines imposed on undertakings are essential and the most commonly used, though not unique[14], instrument to prevent violations.

In order for fines to perform their role in the enforcement of competition law, they should be set at the right level to ensure sufficient deterrence. In this respect, fines should not only deter undertakings that commit the infringement (specific deterrence), but also deter other potential violators from anti-competitive conduct (general deterrence). Accordingly deterrence is considered as the main purpose of the fines by vast majority of competition authorities[15], including the European Commission and the TCB[16].

Fines also have other roles that are intermingled with the deterrence objective. For instance, a well-designed fining policy can make the tasks of setting up and running cartels more difficult by imposing higher fines to cartel members playing active roles, by offering immunity from fines to deviators[17]. The imposition of fines also has a moral effect since it sends a message to spontaneously law-abiding, and thus reinforces their commitment to antirust prohibitions[18]. Moreover it can reward cooperation and compliance through the use of aggravating and mitigating factors[19]. Lastly it may contribute to the corrective justice in the form of disgorgement of illicit gains[20].

At this point, the question of what should be the optimal level of fine in order to achieve the deterrence objective needs to be addressed. The traditional economic framework suggests that potential violators make a rational trade-off

[13] WILS, W.P.J. (2006), "Optimal Antitrust Fines: Theory and Practice", *World Competition*, 29(2), p. 183-208, p. 185-187.

[14] On the question of desirability of individual sanctions, in particular the imprisonment, see WILS, W.P.J. (2002), *The Optimal Enforcement of EC Antitrust Law*, Kluwer Law International, Hague, Netherlands, p.188-237.

[15] ICN (2008), *Setting of Fines for Cartels in ICN Jurisdictions*, Report to the 7th ICN Annual Conference, Kyoto, Japan, p. 7. However, in some jurisdictions deterrence is not the sole objective and additional goals such as retribution, punishment, and recovery of illicit gains are pursued. See ICN 2008, p. 7.

[16] See text accompanying notes 56 and 102 below. As consistently held by EU Courts, purposes of fines are to suppress illegal conduct and to prevent any reference. See, *e.g.*, Case 41/69, ACF Chemiefarma v. Commission, [1970] ECR 661, para. 173-174; Case C-289/04 P, Showa Denko v Commission, [2006] ECR I-5859, para. 16.

[17] WILS, W.P.J. (2012), "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis", *World Competition*, 35(1), p. 5-26, p. 11.

[18] Wils 2006, p. 189; Wils 2007, p. 201.

[19] VELJANOVSKI, C. (2011), "Deterrence, Recidivism and European Cartel Fines", *Journal of Competition Law & Economics,* 7(4), p. 871-915, p. 871.

[20] Wils 2006, p. 190; Wils 2007, p. 201.

between the rewards of the illegal conduct and the risk of being caught[21]. Therefore it is generally accepted that in order for fines to be deterrent, they should create sufficient threat of being fined that weighs sufficiently in the balance of expected costs and benefits. This is achieved, in theory, only if the expected fine exceeds the expected ***gain*** from the violation multiplied by the inverse of the likelihood of detection[22]. As a result, the balance of potential violators' profit calculation will be altered and they will perceive that likely costs of committing an infringement exceed the anticipated rewards[23].

However, the link between theory of optimal fines for deterrence, and actual methodologies used for setting fines is often weak, since the information needed (amount of excess profit gained and likelihood of detection) is very hard to obtain[24]. Furthermore it is also not desirable to calculate fines on the basis of these figures that are difficult to calculate. The likely outcome will be under-deterrence since the burden of proof will always rest on competition authorities. Nevertheless, this theoretical framework provides helpful insights and remains useful as general guidance in the determination of the amount of fines[25].

A further important factor when calculating a deterrent level of fine is whether fines are the only sanction against infringements or part of the other sanctions in the arsenal of the authorities. If fines are the only penalty, they bear the entire the burden of deterrence and thus need to be higher than in jurisdictions where fines are combined with other penalties such as sanctions on individuals[26]. However, merely imposing higher and higher corporate fines can also be counterproductive because of the inability of undertakings to pay, the proportionality of punishment, and social costs of high fines, namely their harm to shareholders, employees, and consumers[27].

---

[21] NIELS, G., H. JENKINS and J. KAVANAGH (2011), *Economics for Competition Lawyers*, Oxford University Press, New York, US, p. 475. For the first theoretical studies on the subject see BECKER, G.S. (1968), "Crime and Punishment: An Economic Approach", *Journal of Political Economy*, 76(2), p. 169-217; LANDES, W.M. (1983), "Optimal Sanctions for Antitrust Violations", *University of Chicago Law Review*, 50(2), p. 652-678.

[22] Wils 2006, p. 190-191; ICN 2008, p. 5; Niels *et al*. 2011, p. 475-476. However Becker (1968) and Landes (1983) have argued that the optimal fine equals the net ***harm*** caused to persons other than the offender.

[23] ICN 2008, p. 12.

[24] ICN 2008, p. 5 and 7; OECD (2012b), *Roundtable on Promoting Compliance with Competition Law*, DAF/COMP(2011)4, http://www.oecd.org/officialdocuments/displaydocument/?cote=daf/comp(2011)4&doclanguage=en, date accessed: 22.08.2012, para. 22.

[25] Wils 2006, p. 207-208.

[26] ICN 2008, p. 9.

[27] OECD 2012b, p. 7-8; Wils 2006, p. 196-199.

Additionally, the relationship between deterrence and transparency is another essential issue that needs to be considered, on which there are widely divergent opinions. As explained by the ICN; "the issue of transparency is not only related to good enforcement practice and openness of information but also to other factors such as the relationship between the predictability of sanctions and deterrence. If a company could determine in advance the amount of the fine that would be imposed on it for any particular violation, it could take a rational decision about whether or not to commit an infringement. In jurisdictions where there is a threat of severe sanctions coupled with a significant fear of detection, the higher the degree of certainty with respect to how fines are determined, the less likely companies and their executives will engage in anti-competitive conduct and the more likely they will self-report such conduct after it has occurred because their knowledge of their potential exposure to penalties will be more predictable"[28]. It is argued, however, that full predictability of fines is not desirable owing to the adverse effects on deterrence[29]. On the other hand, this view is only valid if undertakings are naturally risk-averse. Otherwise an unclear fining system appears just as likely to encourage rather than dissuade undertakings from infringing competition rules[30]. In addition to that there will be a certain degree of uncertainty since the agencies necessarily have discretion when setting fines. Furthermore private damage actions can also provide sufficient degree of uncertainty. All in all, transparency should be provided so far as possible as to the likely fines. In this regard, most commonly used way is to adopt secondary legislations as regards fixing of fines since the decisions of the authorities can be regarded as inadequate[31].

Lastly, a couple of points need to be emphasized on whether the process of calculation of fines should be defined as arts or science[32]. If the methodology is transparent and based on precisely defined factors, the process will become a fairly empirical task. Thus it can be simply regarded as a science. If the agencies enjoy discretion, however, this brings creativity, and thereby some art, into the

[28] ICN 2008, p. 12. See also Calvino 2007, p. 321.
[29] Wils 2007, p. 204-206. See also Case T- 279/02, *Degussa v. Commission* [2006] ECR II- 897, para. 83.
[30] GERADIN, D. (2011), "The EU Competition Law Fining System: A Reassessment", TILEC Discussion Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937582,
Date Accessed: 22.08.2012, p. 32.
[31] Veljanovski 2011, p. 902.
[32] ORTIZ BLANCO, L., A. GIVAJA SANZ and A. LAMADRID DE PABLO (2008), "Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law", http://antitrustlair.files.wordpress.com/2011/05/fine-arts-in-brussels-final-comp-41.pdf,
Date Accessed: 22.08.2012, p. 1.

process of calculation of fines[33]. Given the diversity of facts and the factors that need to be considered, it is inevitable to give discretion to the authorities[34], thereby the process is necessarily away from being regarded as a pure science.

2. OVERVIEW OF THE FINING GUIDELINES IN EU COMPETITION LAW

2.1. Background

The legal basis of fines imposed by the European Commission in relation to substantive infringements of competition rules is contained in Article 23 of Regulation 1/2003[35]. Pursuant to Article 23(2) of Regulation 1/2003, the European Commission can impose fines[36] up to 10 per cent of an undertakings' annual worldwide turnover in the year which precedes the one in which the decision is adopted[37]. It is settled case law that the turnover referred here is not only the turnover in the relevant market[38]. Article 23(3) of Regulation 1/2003 also requires the European Commission to take into account both the gravity and the duration of the infringement in fixing the amount of the fine.

Apart from these provisions and the ones about the imposition of fines on association of undertakings, Regulation 1/2003 does not contain any other rules that give guidance on the determination of the level of fines[39]. Therefore the only limitation on fining policy of the European Commission is a possible judicial review by EU Courts, which have unlimited jurisdiction in relation to fines[40]. Hence it is noteworthy that the European Commission's discretion is not unlimited and it has to observe general principles of EU law such as proportionality, equal treatment, giving sufficient reasoning when imposing fines[41]. Nevertheless in the light of the argument that the EU Courts clearly gave

[33] Ibid p. 1.
[34] Wils 2007, p. 204; DE LA TORRE, F. C. (2010), "The 2006 Guidelines on Fines: Reflections on Commission's Practice", *World Competition*, 33(3), p. 359-416, p. 406-407.
[35] Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1/1.
[36] The European Commission can normally impose fines on firms: not on directors or employees of undertakings. It can, however, impose fines on individuals in those rare circumstances where they act as an undertaking.
[37] If there is no data, the year immediately preceding is taken into account.
[38] Joined Cases 100-103/80, Musique Diffusion Française v. Commission, [1983] ECR 1825, para. 119.
[39] JONES, A. and B. SUFRIN (2011), *EU Competition Law*, Fourth Edition, Oxford University Press, New York, US, p. 1098.
[40] RICHARDSON, R. (1999), "Guidance without Guidance - A European Revolution in Fining Policy? The Commission's New Guidelines on Fines", *ECLR*, 20(7), p. 360-371, p. 361.
[41] Jones and Sufrin 2011, p. 1102.

green lights to raise the level of fines[42], it can be suggested that the European Commission has very wide discretion in relation to the determination of fines[43].

Nevertheless, EU Courts did not abstain from criticizing the European Commission for the lack of transparency with respect to method of calculating fines[44]. The European Commission was also consistently criticized by practitioners for not maintaining a coherent fining policy and not giving sufficient information as regards setting fines[45]. Against this backdrop, it can be submitted that these developments paved the way for the adoption of two sets of Guidelines[46], both of which basically are built upon the idea of enhancing transparency of the method for setting fines, and ensuring the consistency of the European Commission's decisions in relation to fines, while maintaining deterrence[47].

2.2. Reasons for the Adoption of the Fining Guidelines

Until 1998, the European Commission's fining policy had been evolved through its decisional practice. Being aware of the criticisms made by the EU Courts and practitioners, the European Commission adopted its first fining Guidelines in 1998[48]. As stated in the preamble of 1998 Guidelines, it aimed to "*ensure transparency and impartiality of fining decision … while upholding discretion … which must follow coherent and non-discriminatory policy".*

Despite its promising statements, 1998 Guidelines could not escape from criticisms for its imprecise language[49], lack of indication as to start amount that was based on a lump sum[50], unnecessary step of classifying the

[42] KERSE, C.S. and N. KHAN (2005), *EC Antitrust Procedure*, Fifth Edition, Sweet & Maxwell, London, p. 384; See Joined Cases 100-103/80, Musique Diffusion Française v. Commission, [1983] ECR 1825, paras. 108-9.

[43] WHISH, R. and D. BAILEY (2012), *Competition Law*, Seventh Edition, Oxford University Press, New York, US, p. 276. See e.g. Case C-189/02 P etc, Dansk Rorindustri A/S and others v. Commission, [2005] ECR I-5425, para. 172. In fact, it was argued that the only consistency in the European Commission's fining policy is its wide discretion. See Van Bael 1995, p. 237.

[44] Case T-148/89, Trefulnion v. Commission, [1995] ECR II-1063, para. 142.

[45] Van Bael 1995, p. 238 and 243; GERADIN, D. and D. HENRY (2005), "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments", *European Competition Journal*, Volume 1, No 2, p. 401-473, p. 407-408.

[46] De La Torre 2010, p. 405.

[47] De Broca 2006, p. 1.

[48] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, 1998 O.J. C9/3 (hereafter "the 1998 Guidelines").

[49] Richardson 1999, p. 365; Jones and Sufrin 2011, p. 1103.

[50] Geradin and Henry 2005, p. 413; Jones and Sufrin 2011, p. 1103 and 1110. Cf. DE BROCA, H. (2006), "The Commission Revises Its Guidelines for Setting Fines in Antitrust Cases", *Competition Policy Newsletter*, Autumn 2006, Number 3, p. 1-6, p. 1.

infringements and negligible impact of duration on the level of fine[51], lack of flexibility that may lead to incoherent adjustments[52]. Therefore it was characterised by some commentators as a failure, not a revolution[53]. Apart from that, the European Commission itself was aware of the shortcomings of the 1998 Guidelines as it led to fines that were too low for large undertakings, especially for long-lasting cartels covering a large volume of products, as well as for repeat offenders[54].

To remedy these drawbacks, the European Commission published its revised Guidelines in 2006[55]. As mentioned before, both Guidelines share the common goals: to enhance transparency and ensure consistency, which in turn also provide legal certainty for undertakings as to the fining policy of the European Commission, while reaching a sufficiently deterrent effect[56]. A consequence flowed from these objectives can be, as stated by Killick[57], reduction in the number of appeals by making it easier for undertakings to comprehend underlying reasons for the amount of fine. A further point is that consistency may support the moral commitment to abide by the antitrust prohibitions[58].

Before starting to look at the method of setting fines in 2006 Guidelines, two points must be emphasized about the Guidelines: Firstly, although they aim to increase transparency and consistency of the European Commission decisions, their objective is not full foreseeability. It is asserted that if fines are easily foreseeable, this may reduce the deterrent effect of fines by allowing

[51] De Broca 2006, p. 1.
[52] Calvino 2007, p. 325.
[53] Richardson 1999, p. 371.
[54] EUROPEAN COMMISSION (2011), "Factsheet: Fines for breaking competition law", http://ec.europa.eu/competition/antitrust/compliance/factsheet_fines_nov_2011_en.pdf, Date Accessed: 22.08.2012, p. 2. The Commission also stated in its 28th Report on Competition Policy that although it was relatively satisfied with 1998 Guidelines, it accepted that certain aspects should be reviewed. See EUROPEAN COMMISSION (1999), "XXVIIIth Report on Competition Policy", http://ec.europa.eu/competition/publications/annual_report/1998/en.pdf, Date Accessed: 22.08.2012, p. 41.
[55] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 O.J. C210/2 (hereafter "the 2006 Guidelines").
[56] De Broca 2006, p. 1. See also paragraph 3 of the 2006 Guidelines that refers to the 1998 Guidelines. Although there is no explicit reference to increase legal certainty, it was also an objective. See De La Torre 2010, p. 407.
[57] KILLICK, J.R.M. (2006), "The 2006 Fining Guidelines: Two Steps Forward but One Step Back?", http://www.whitecase.com/publications/detail.aspx?publication=1053, Date Accessed: 22.08.2012.
[58] Wils 2007, p. 204.

undertakings to predict likely fines and to compare them with expected gains from infringement[59]. Secondly, these Guidelines are not regarded as rules of law that the European Commission is always bound to observe. However, they form rules of practice from which the European Commission cannot depart without giving reasons[60]. Therefore, the 2006 Guidelines has limited the discretion enjoyed by the European Commission[61].

2.3. Main Elements of the 2006 Guidelines

Both of the 1998 and 2006 Guidelines adopt a similar approach[62] and establish a two-step method for the setting of fines: determination of the basic amount and then adjusting it upwards and downwards in the light of aggravating and mitigating factors.

The basic amount is now determined by reference to the percentage of annual sales in the relevant sector that is directly or indirectly affected by the infringement (hereafter value of sales). The European Commission *normally*[63] takes the sales made by undertaking during the last full business year of its participation to infringement[64]. Up to 30 per cent of the value of sales can be taken into account, depending on the degree of gravity of the infringement[65]. When determining the gravity of the infringement, factors such as nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has

[59] Wils 2007, p. 204; Case T-15/02, BASF v. Commission, [2006] ECR II-497, para. 250; Case T-53/03, BPB plc v. Commission, [2008] ECR II-1333, para. 336.

[60] Case C-189/02 P etc, Dansk Rorindustri A/S and others v. Commission, [2005] ECR I-5425, para. 209.

[61] DE LA SERRE, E. B. and C. WINCKLER (2012), "A Landmark Year for the Law on Fines Imposed in EU Competition Proceedings", *Journal of European Competition Law & Practice,* 3(4), p. 351-370, p. 353.

[62] There are three main changes brought about by the 2006 Guidelines: introduction of entry fee mechanism, giving more weight to duration of infringement, and increase for repeated offenders. See the European Commission's press release, IP/06/857 on 28.06.2006.

[63] In some exceptional cases, the figure for that year may not be representative. Therefore, average of the sales during the affected period can be taken as a basis. See Case COMP/39406, Marine Hoses, 28.01.2009, para. 422; Case COMP/39402, E.ON/GDF, 08.07.2009, paras. 350-3. For detailed explanations, see DE LA SERRE, E. B. and C. WINCKLER (2010), "Legal Issues Regarding Fines Imposed in EU Competition Proceedings", *Journal of European Competition Law & Practice,* 1(4), p. 327-347, p. 328 and 331-332. See also para. 18 of the 2006 Guidelines. However, there are also limits to this approach. See De La Serre and Winckler 2012, p. 353.

[64] The 2006 Guidelines, para. 13.

[65] Ibid, para. 21.

been implemented are considered[66]. Afterwards the amount thus determined is multiplied by the number of years of participation in the infringement[67].

One of the new features of the 2006 Guidelines is the introduction of "entry fee" mechanism. According to this mechanism, between 15 and 25 per cent of the value of sales will be included in the basic amount for cartels, and may also be done so for other infringements, in order to achieve deterrence[68].

Having determined the basic amount, it is increased and decreased in the light of aggravating and mitigating circumstances, which gives the 'adjusted basic amount'[69]. Aggravating circumstances that are listed non-exhaustively in the 2006 Guidelines are repeated infringement, non-cooperation or obstruction of the investigation, and the role of leader, instigator or coercer[70]. As is the case for aggravating circumstances, the 2006 Guidelines provide a non-exhaustive list of mitigating circumstances: termination of infringement[71], negligence, limited role in the infringement, cooperation outside the scope of the Leniency Notice, authorization or encouragement of public authorities or legislation[72].

In order to promote 'specific deterrence'[73], the European Commission can apply a further percentage uplift to the adjusted basic amount on the grounds that undertakings have a particularly large turnover in comparison to the sales to which the infringement relates and/or the need to raise the fine in order to exceed the illicit gains, where it can be estimated[74].

As pointed out before, final amount of the fine cannot exceed 10 per cent of the group's aggregate turnover[75]. In a surprisingly large number of occasions, fines come close to this 10 per cent ceiling. From 2006 to 2010, the fines imposed on 22 of the 150 undertakings were in the range of 9 to 10 per

[66] Ibid, para. 22. The European Commission has started to attribute different gravity percentages, instead of applying the same percentage to all firms involved in the violation. See DE LA SERRE, E. B. and C. WINCKLER (2011), "A Survey of Legal Issues Regarding Fines Imposed in EU Competition Proceedings (2010)", *Journal of European Competition Law & Practice,* 2(4), p. 356-370, p. 359.

[67] Ibid, para. 24. On the European Commission's new practice as to duration, see De La Serre and Winckler 2011, p. 360.

[68] Ibid, para. 25.

[69] Veljanovski 2011, p. 874.

[70] The 2006 Guidelines, para. 28.

[71] This factor is not applied to secret agreements in particular to cartels.

[72] Ibid, para. 29.

[73] Veljanovski 2011, p. 875.

[74] The 2006 Guidelines, paras. 30-31. See also text accompanying notes 21-23.

[75] De La Serre and Winckler 2012, p. 362. See Case T-122/07, Siemens and Others v. Commission, not yet reported, para. 186.

cent[76], which can give rise to an interesting policy discussion whether this cap should be revisited in order to levy on deterrent level of fines[77].

In exceptional cases, the European Commission may take into account undertakings' inability to pay in a specific social and economic context[78]. In this regard, the post-leniency fine can be reduced if it would otherwise irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value[79]. Although the European Commission accepts inability to pay fines very rarely in its past decisions[80], it has become a topical issue due to hefty fines imposed by the European Commission and the coincidence with the financial crisis[81].

Finally, it should be mentioned about the European Commission's 'calibrated approach' in applying the 2006 Guidelines, which means that it adapts this methodology to the particularities of a case[82]. Provisions that allow the European Commission to apply this approach and fine-tune this methodology are contained in paragraphs 18 and 37 of the 2006 Guidelines[83]. However, this flexibility does not mean that it lay the way open for a lenient or arbitrary approach since the European Commission hit the 10 per cent cap in these cases[84]. Within this framework, it can be suggested that these rules, by

[76] Whish and Bailey 2012, p. 275.

[77] CONNOR, J. M. (2011), "Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines", *ECLR*, 32(1), p. 27-36, p. 31. This trend may be the result of the financial crisis as the aggregate worldwide turnover of undertakings shrank, the possibility of exceeding 10 per cent cap increases. See GERADIN, D. (2011), "The EU Competition Law Fining System: A Reassessment", TILEC Discussion Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937582, Date Accessed: 22.08.2012, p. 39.

[78] The 2006 Guidelines, para. 35.

[79] Veljanovski 2011, p. 875.

[80] See e.g. Case COMP/38069, Copper Plumbing Tubes, 03.09.2004, paras. 816-834.

[81] In 2010, the European Commission granted nine reductions on this basis, thereby taking into considerations the financial crisis. See De La Serre and Winckler 2012, p. 364; Whish and Bailey 2012, p. 279. The European Commission also issued an information note clarifying the process and conditions. It is available at: http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-737-EN-2-0.Pdf, Date Accessed: 22.08.2012

[82] De La Serre and Winckler 2010, p. 328 and 332; De La Torre 2010, p. 414. Cf. De La Serre and Winckler 2012, p. 353.

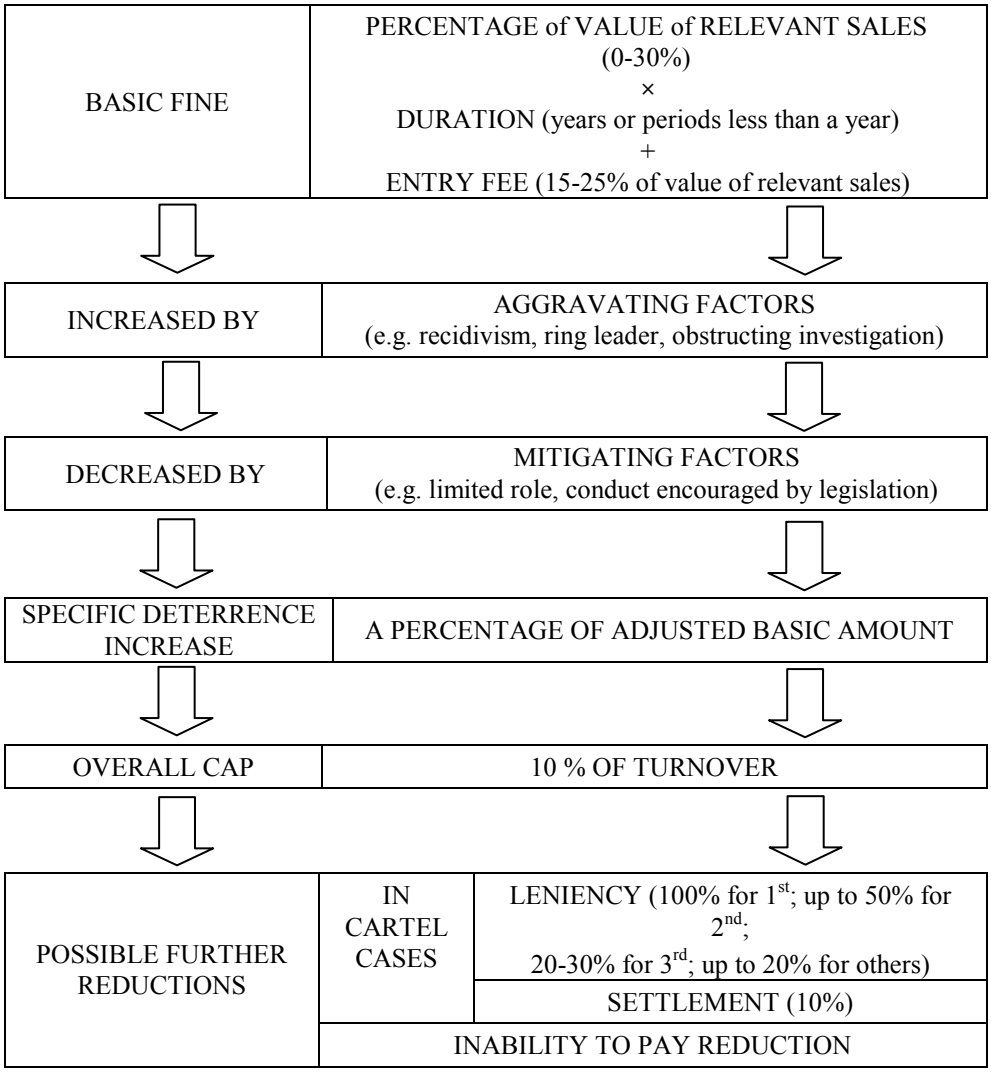
[83] For instance, the European Commission takes into account the mono-product nature of the companies and exercises its discretion, albeit exceptionally, in accordance with point 37 of the Guidelines. See e.g. Case COMP/39452, *Mountings for Windows and Window-doors*, 28.03.2012. See also note 63 above.

[84] De La Serre and Winckler 2010, p. 328.

giving discretion to the European Commission, bring some arts into the process of calculation of fines, which is not necessarily a pure science[85].

Within this framework, Figure 1 below sets out the sequence of steps in the determination of fines based on the 2006 Guidelines:

Figure 1: Determination of Fines in EU Competition Law



Source: European Commission 2011, p. 2; Veljanovski 2011, p. 876.

[85] Cf. Ortiz Blanco *et al* 2008, p. 1.

3. OVERVIEW OF THE FINING REGULATION IN TURKISH COMPETITION LAW

3.1. Background

The Act on the Protection of Competition[86] (the Act), which entered into force in 1994, prohibits agreements, concerted practices and decisions that have as their object or effect of restriction of competition (Article 4), abuse of a dominant position (Article 6) and mergers creating or strengthening a dominant position which would result in significant lessening of competition (Article 7). Pursuant to Article 16(3) of the Act, TCB, the decision-making body of the TCA, can impose monetary fines[87] on undertakings that commit behaviour prohibited in these provisions up to 10 per cent of the undertaking's annual gross revenue in the year preceding the decision.

In February 2008, important amendments were made in Article 16 of the Act, which can be summarised in four headings[88]: Firstly, the TCB was required to adopt regulations in relation to fines and leniency[89]. Secondly, the TCB has been empowered to impose fines on individuals such as directors or employees of undertakings up to 5 per cent of the fine imposed on the undertaking, where these individuals have a decisive influence in the infringement[90]. This is a distinct feature of Turkish competition law from the EU practice. Thirdly, a provision that clearly provides a basis for leniency was adopted[91]. Fourthly, fixed amount of fines for procedural infringements was replaced with fines that are based on a percentage of annual gross revenue of undertakings.

These amendments were considered as the beginning of a new era in Turkish competition law in that the new rules provided effective tools such as leniency and sanctions against individuals as well as more transparent policy in relation to fines[92]. In accordance with these amendments, the TCB adopted two regulations: the Fining Regulation[93] and the Leniency Regulation[94]. Both of the

[86] Published in the Official Gazette, numbered 22140, dated 13.12.1994. Available at http://www.rekabet.gov.tr/index.php?Sayfa=sayfaicerik&icId=165&Lang=EN, Date Accessed: 22.08.2012.
[87] In Turkish law, there is no rule providing criminal sanctions for the breaches of competition law apart from bid rigging in public tenders.
[88] ARI, H. (2009), "Recent Developments in the Enforcement of Turkish Competition Law: Fines and Leniency Regulation", *Antitrust Chronicle*, Spring 2009, Volume 6, Number 1, p. 2-3.
[89] See Article 16(7) of the Act.
[90] See Article 16(4) of the Act.
[91] See Article 16(6) of the Act.
[92] Arı 2009, p. 2.
[93] Published in the Official Gazette, numbered 27142, dated 15.02.2009. Available at http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik11.pdf,

regulations were expected to enhance the arsenal of the TCB in its fight against violations of competition law, in particular to cartels[95].

3.2. Reasons for the Adoption of the Fining Regulation

Apart from Article 16(3) of the Act, which sets out 10 per cent limit, a number of factors that have to be taken into account by the TCB when setting fines are listed non-exhaustively in Article 16(5) of the Act. These factors are recidivism, duration of the infringement, market power of undertakings, their decisive influence in the infringement, compliance with the commitments, assistance with the examination, and the severity of damage that takes place or is likely to take place[96]. However, the Act does not articulate how much weight should be given to these factors in the determination of fines. On the other hand, Article 16(7) stipulates that the TCB shall issue regulations on these factors and Article 27 of the Act gives the TCB the duty and power to make necessary regulations as such.

When we look at the decisional practice of the TCB before the adoption of the Fining Regulation, it generally listed these factors in its decisions without giving any explanation about how these factors affect the amount of the fine. Alongside the lack of transparency arisen from this practice, the TCB could not manage to develop a consistent approach as well[97]. Therefore, it was highly criticised for its imprecise fining policy. A further criticism articulated about the fining policy of the TCB is that it did not ensure deterrence especially in relation to cartels[98].

Decisional practice of the TCB on the calculation on fines was also criticised by the OECD over the lack of transparency[99]. As recognised by the OECD transparency is important to "ensure citizens' confidence and belief in a fair legal system and in those applying the law"[100]. Hence, there is a broad

---

Date Accessed: 22.08.2012. Note that the regulation does not cover fines to be imposed in cases where Article 7 of the Act is infringed.

[94] Published in the Official Gazette, numbered 27142, dated 15.02.2009. Available at http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik10.pdf,
Date Accessed: 22.08.2012.

[95] Arı 2009, p. 3.

[96] Prior to the amendment, these factors were the existence of intent, the severity of fault, the market power of undertakings, and the severity of potential damage.

[97] Arı 2009, p. 4.

[98] Kekevi 2008, p. 173-176.

[99] OECD (2005), *Competition Law and Policy in Turkey*, OECD, Paris, p. 41.

[100] OECD (2012a), *Procedural Fairness and Transparency*, Key Points, http://www.oecd.org/competition/mergers/50235955.pdf,
Date Accessed: 22.08.2012, p. 5.

consensus on the need and the importance of transparency in competition enforcement [101], as well as in the area of fining policy.

Against this backdrop, apart from the legal requirements contained in Article 16(7) of the Act, there were sufficient reasons for the promulgation of a secondary legislation in relation to methodology for setting fines. The goals to be accomplished by the Fining Regulation are set out in its preamble as three fold[102]:

- Ensuring transparency, objectivity and consistency in fining process,
- Incentivising the cooperation with the TCB during investigations by taking into account it when setting fines,
- Ensuring that the level of fines provide general and specific deterrence.

It can be inferred from these objectives that the TCB paid attention to the above criticisms on its fining policy.

3.3. Main Elements of the Fining Regulation

The method of setting fines in Turkish competition law is very similar to that of EU practice. The Fining Regulation also adopts two-step methodology: calculation of basic amount and then making adjustments to it by considering aggravating and mitigating factors. Although the methods are very similar, there are two main differences between the EU and Turkish regime. Firstly, the European Commission starts the calculation from the value of sales affected by the infringement while the TCB frequently takes the total turnover as a starting point[103]. Secondly the European Commission enjoys very wide discretion in comparison to the TCB[104].

As a starting point, the basic amount is calculated on the basis of a percentage of the annual gross revenues of undertakings. In doing so, a percentage between two and four per cent for cartels, and between five per thousand and three per cent for other infringements are taken as a basis[105]. When determining this percentage, factors such as the market power of the undertakings and the gravity of the damage that occurred or is likely to occur as

[101] Ibid. p. 23.
[102] See Preamble of the Regulation on Fines, para. 4.
[103] Cf. ERDEM, E. (2012), "Turkey: Regulation On Fines, An Illusion or A True Harmonization With The EU Law?", http://www.mondaq.com/article.asp?article_id=181436, Date Accessed: 22.08.2012.
[104] De La Serre and Winckler 2012, p.352.
[105] Article 5(1) of the Regulation on Fines. It is argued that the Fining Regulation constitutes nonconformity with the EU Guidelines since it includes the term cartel. See Erdem 2012.

a result of the violation will be considered[106]. The amount thus determined then increased, similarly to the 1998 Guidelines, by half for infringements that lasted more than a year but less than five years, and increased by one fold for infringements lasted more than five years[107].

Having determined the basic amount, it will be adjusted according to aggravating and mitigating factors. As is the case with the 2006 Guidelines, these factors are applied to the basic amount[108]. Pursuant to Article 6(1) of the Fining Regulation, the basic amount of the fine will be increased by half to one-fold in cases of repetition of infringement, and maintaining the cartel after the notification of investigation decision. Although these factors are mandatory to be taken into account, the TCB may consider the second category of factors such as coercion of other undertakings, or providing no assistance with the examination as an aggravating factor[109]. In parallel with the provision in the Act, these factors are listed non-exhaustively.

On the other hand, mitigating factors that are listed non-exhaustively in the Fining Regulation are coercion by other undertakings, termination of infringements other than cartels, encouragement by public authorities, and the fact that sales affected by infringement have a small share within annual gross revenues. As distinct from the EU practice, voluntary payment of damages is listed as another mitigating factor as well.

Unlike EU competition law, the Fining Regulation also provides leniency plus mechanism. Pursuant to Article 7(2) of the Fining Regulation, the fine to be imposed on an undertaking that cannot get immunity under Leniency Regulation will be reduced where it provides necessary information as to another cartel to which it is a party. This distinct feature of the Fining Regulation can be regarded as a device to destabilise cartels, and thus help bring more cartels into light and punish them[110].

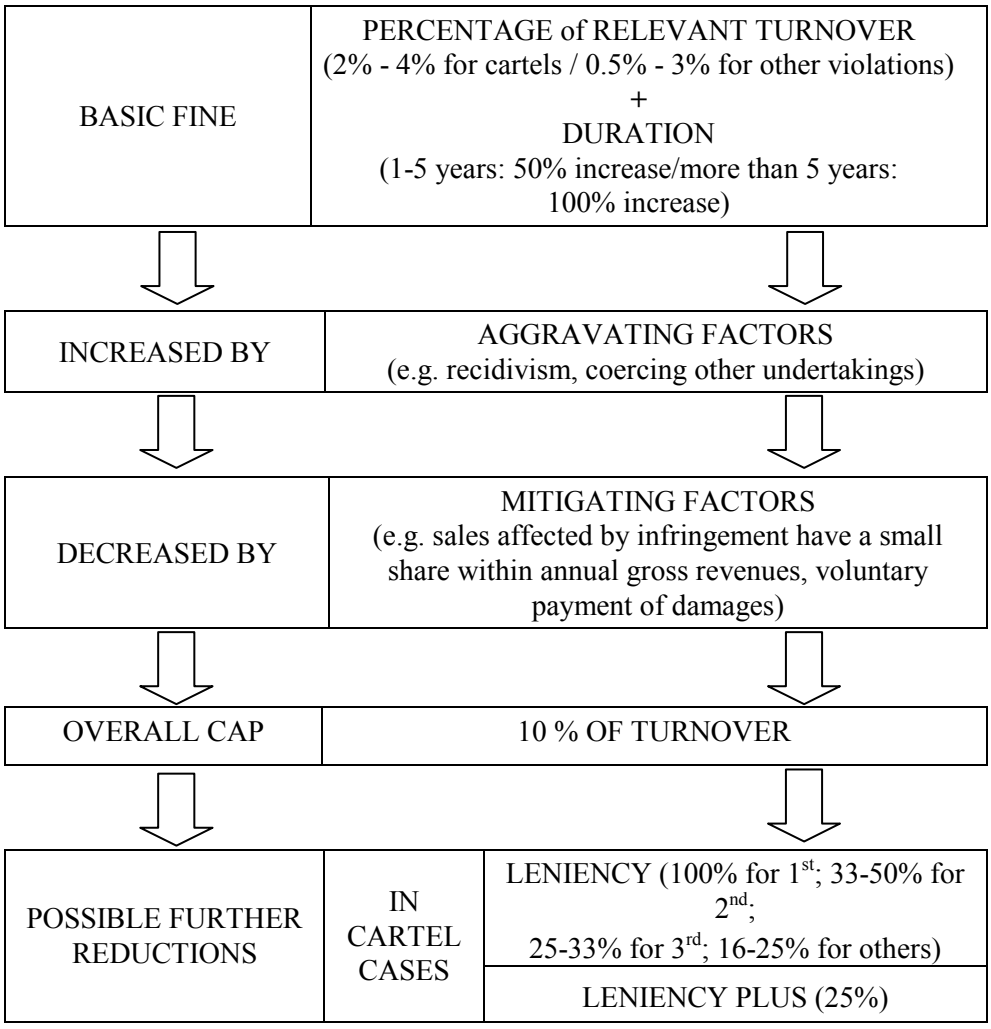
As mentioned before, a further different feature of the Turkish competition law enforcement with that of the EU is the possibility of imposing fines on individuals. Therefore, there are specific rules in the Fining Regulation in relation to this issue. Pursuant to Article 8(1) of the said Regulation, directors or employees of undertakings who have decisive influence on the *cartel* shall be

[106] Article 5(2) of the Regulation on Fines.
[107] Article 5(3) of the Regulation on Fines.
[108] In practice, however, the TCB applies the mitigating factors to the amount that is reached after the aggravating factors are applied to the basic amount. This practice is clearly contrary to the explicit wording of the Fining Regulation.
[109] Article 6(2) of the Regulation on Fines.
[110] Arı and Aygün 2009, p. 55; Arı 2009, p. 6.

fined between three per cent to five per cent of the fine imposed on the undertaking by taking into account issues such as active cooperation. As is understood from this provision, there is a three per cent minimum limit for cartel participants whereas there is no minimum limit for other individuals[111].

Within this framework, Figure 2 below sets out the sequence of steps in calculating fines in Turkish competition law[112].

Figure 2: Determination of Fines in Turkish Competition Law



[111] Arı 2009, p. 6.
[112] Please note the explanations made in note 108 above.

In the light of remarks that have been made up till now, three points must be noted in relation to the Fining Regulation. Firstly, it brings a transparent method and thus provides important guidance for undertakings when the TCB determines fines[113]. Secondly, it provides more specific rules for cartels such as two per cent minimum limit for the starting point of calculation, aggravating factor for continuing cartel, and three per cent minimum limit for individuals in cartel. These rules clearly reflect the consensus that cartels should be sanctioned severely in that they are the most inimical, and profitable infringements as well as less likely ones to be detected[114]. Thirdly, as stated earlier, the TCB's discretion is limited in comparison to the European Commission and there is not any provision that is equivalent to paragraphs 18 and 37 of the 2006 Guidelines. The underlying reason for that approach can be the result of an idea that decision-makers' discretion should be reduced by adopting detailed rules in order to deal with cartels effectively[115].

4. EVALUATION OF THE ENFORCEMENT OF THE FINING REGULATION IN TURKISH COMPETITION LAW: A BRIEF COMPARISON WITH EU PRACTICE

4.1. Criticisms against Decisions of the TCB Regarding Fines in the Pre-Regulation Era

Competition authorities in jurisdictions with uncertainty as to how fines are determined may face public criticism of their fining system as subjective or arbitrary[116]. As mentioned above, the TCA was one of these authorities and was consistently criticised both by practitioners and international bodies before the adoption of the Fining Regulation[117]. These criticisms concentrated on the points summarised below.

Firstly, decisions of the TCB showed lack of transparency with regard to the methodology of setting fines and the reasoning behind it. Although there were factors listed in the Act, which must be taken into account when setting the amount of fines, the decisions of the TCB did not generally contain any reasoning as regards how much weight was given to these factors in the calculation of fines[118]. Consequently, "random figures simply magically appeared at the end of the decisions"[119].

[113] Arı 2009, p. 6.
[114] Kekevi 2008, p. 173
[115] Kekevi 2008, p. 180.
[116] ICN 2008, p. 12.
[117] OECD 2005, p. 41; Kekevi 2008, p. 169; Arı 2009, p. 6; Arı and Aygün 2009, p.10-11.
[118] Arı and Aygün 2009, p. 10-11.
[119] Cf. Geradin and Henry 2005, p. 407.

On the other hand, in a questionnaire performed by the ICN, it was asked to agencies that whether the actual reasoning that leads to the final amount of a fine is explained or published in their decisions. The TCA replied to this questionnaire that the reasoning of the fine is made public. The response by the TCA continues as follows: "In Turkey, the Competition Board decisions include explanations on how the existence of intent, the severity of fault, the market power of the undertaking(s) upon which a penalty is imposed are taken into account. These decisions also cite aggravating and mitigating factors"[120]. As it can be seen from the decisions assessed below, this statement is clearly erroneous.

Secondly, decisions of the TCB showed lack of consistency and objectivity as well[121]. A related issue with this criticism was the low level of fines imposed to hard-core restrictions in particular to cartels. Therefore, it was very difficult to ascertain that sufficient level of deterrence was achieved with regard to cartels[122].

Within this framework, it can be suggested that there was no discernible methodology in setting the amount of fines and hence the TCB seemed to "pluck the figure from the air"[123]. In this regard, a similarity can be drawn between EU and Turkish competition laws. Hence it is possible to call this era as the lottery of Turkish competition law, similar to that of EU competition law enforcement prior to the adoption of fining Guidelines.

As stated by the ICN, in order to remedy these defects some countries choose to adopt secondary legislation whereas others do not publicise their methodology of setting fines and leave the issue to decisions[124]. The TCB, as the majority of competition authorities, chose the former way and issued the Fining Regulation in the hope of solving these problems outlined above with regard to its fining policy.

4.2. Decisional Practice of the TCB Concerning The Fining Regulation: The So-called New Era

In relation to EU competition law enforcement, it can be suggested that the European Commission's fining method has reached maturity since the overall practice shows a high degree of consistency[125]. Therefore, it may well be the

[120] ICN 2008, p. 13-14.
[121] Arı and Aygün 2009, p. 11-12.
[122] Kekevi 2008, p. 173-176.
[123] Jones and Sufrin 2011, p. 1102.
[124] ICN 2008, p. 12. It is argued by Veljanovski (2011, p. 902) that decisions are not sufficient in this regard.
[125] De La Serre and Winckler 2010, p. 327; De La Torre 2010, p. 415.

case that criticisms made by Van Bael can hardly be regarded as valid in these days[126]. However, it is difficult to put forward a similar argument as to the fining policy of the TCB, even though very promising secondary legislation has been adopted.

Although the Fining Regulation can be heralded like a revolution in the TCB's fining policy, very similarly to the 1998 Guidelines in EU competition law, it has yet to be seen whether an 'enlightened age' has emerged from this revolution[127]. As articulated by some commentators, the adoption of the Fining Regulation in Turkish competition law was regarded as 'the footsteps of the new era'[128]. Nevertheless, similar problems, if not greater ones, continue in the decisional practice of the TCB as regards methodology for fixing fines.

In this so-called new era, three main problematic and very contentious areas in the decisional practice of the TCB appear to be the inadequate statements of reasons, the determination of relevant turnover that is the starting point in setting the amount of fines, and the application of recidivist uplift. Accordingly, these issues will be addressed in the rest of the paper[129]. In analysing these issues, some comparisons will also be made between EU and Turkish practice where necessary. It should be also recalled that the assessments that will be made here are based on the publicly available information and decisions of the TCB.

4.2.1. Inadequate Statements of Reasons

Pursuant to Article 52 of the Act, the TCB is required to provide the grounds of its decisions. This provision is related to good enforcement practice and openness of information as well as ensuring transparency[130]. Therefore, it enables undertakings to use their rights of defence more effectively and prevent the agency from taking arbitrary decisions. Meanwhile, in EU competition law enforcement, the Statement of Objections includes a section on fines. In this section, the European Commission indicates the essential facts and matters of law which may result in the imposition of a fine and also mentions in a sufficiently precise manner that certain facts may give rise to aggravating and attenuating circumstances. In order to increase transparency, the European Commission also endeavours to include further matters relevant to any

[126] De La Serre and Winckler 2010, p. 327. However there are still criticisms as to the fine calculation process. See e.g. Geradin 2011.
[127] Richardson 1999, p. 360.
[128] Arı and Aygün 2009, p. 7.
[129] As mentioned before, however, these are not the only problems as to the application of the Fining Regulation. See note 11 above and the explanations following Annex-1.
[130] ICN 2008, p. 12.

subsequent calculation of fines, such as the relevant sales figures and the year(s) that will be considered for the value of such sales[131].

As mentioned earlier, the TCB was criticised for not giving statement of reasons in its decisions before the Fining Regulation was issued. In its first five decisions[132] after the adoption of the Fining Regulation, the TCB provided reasons, albeit not detailed, explaining how the amount of fines was calculated. Although it is difficult to consider these explanations as sufficient from the perspective of giving adequate reasoning, it can be regarded to some extent that the TCB was willing to address the criticisms that were raised before the adoption of the Fining Regulation.

Subsequent to these decisions, however, the TCB started not to give any reasons at all for the calculation of the fine in some of its decisions. For instance in *Turkish Pharmacists' Association* and *Metro Coach* decisions[133], there were even no section evaluating the calculation of fines. In *Turkish Pharmacists' Association* decision, moreover, the TCB seemed not to implement the Fining Regulation at all, since it referred to the relevant provisions in the Act, citing the Fining Regulation only in the conclusion though. Therefore, figures related to the amounts of fines just again magically appear at the end of these decisions[134].

The decisions adopted afterwards[135] again contain explanations, although some of them are very brief. In summary, of twenty decisions adopted

[131] Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:308:6:0032:EN:PDF, Date Accessed: 22.08.2012, paras. 84-86. See also the speech of the Commissioner Joaquin Almunia, "Cartels: the Priority in Competition Enforcement", SPEECH/11/268, 14.04.2011, p. 3.

[132] See *Bodrum Ferries*, decision no 09-51/1245-314, dated 03.11.2009; *Poultry Industry*, decision no 09-57/1393-362, dated 25.11.2009; *Turkcell-II*, decision no 09-60/1490-379, dated 23.12.2009; *Izocam*, decision no 10-14/175-66, dated 08.02.2010; *Sivas Driving Schools,* decision no 10-25/350-124, dated 22.03.2010.

[133] See *Turkish Pharmacists' Association*, decision no 10-49/912-321, dated 08.07.2010; *Metro Coach*, decision no 10-68/1445-545, dated 28.10.2010.

[134] On the inadequacy of statement of reasons in relation to methodology of setting fines, see also dissenting opinion of Reşit Gürpınar in *Industrial and Medical Gases* case.

[135] See *Peugeot Dealers I*, decision no 10-53/1057-391, dated 06.08.2010; *Cargo*, decision no 10-58/1193-449, dated 03.09.2010; *Citroen Dealers*, decision no 10-60/1274-480, dated 23.09.2010; *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010; *Dialysis Devices*, decision no 10-80/1687-640, dated 23.12.2010; *Banks*, decision no 11-13/243-78, dated 07.03.2011; *Doğan Media*, decision no 11-18/341-103, dated 30.03.2011; *Car Dealers*, decision no 11-24/464-139, dated 18.04.2011; *Turkcell-III*, decision no 11-34/742-230, dated 06.06.2011; *Anadolu Electronics & Samsung*, decision no 11-39/838-262, dated 23.06.2011; *Efes*, decision no 11-42/911-281, dated 13.07.2011; *Construction of Dicle University Hospital*, decision no 11-52/1343-474, dated 13.10.2011; *Sun Express*, decision no 11-54/1431-507, dated 27.10.2011.

by the TCB while implementing the Fining Regulation, in two of them there is no section on the reasoning that leads to the final amount of the fine. In other decisions, even though there are some explanations, they are far from being regarded as including sufficient reasoning in relation to the underlying reasons of fines. Consequently it is suggested that the TCB has seemed not to accomplish one of its goals since it suffers from inadequate statements of reasons and thus ensuring transparency.

In this regard, a recent judgment of the Supreme Administrative Court, which is the competent body to review decisions of the TCB, provides essential insight to the determination of fines. In *Turkish Pharmacists' Association* judgment[136], the Supreme Administrative Court held that the Act explicitly gives discretion to the TCB in determining the level of fine. In the Court's view, however, this discretion must be exercised within the limits determined by the relevant legislation, in accordance with the objectives set out in the Act, and it should rely on objective criteria and thus enable the Court to review legality of the contested decision. The Court went on to say that the Fining Regulation limits this discretion by specifying objective factors that must be taken into account when setting fines.

Within this framework, the Court established that there is no indication at all as to how the level of fine was determined in the contested decision. Although there are considerations as to the gravity of infringement, how these considerations were taken into account in the determination of fine could not be understood. Accordingly, the Court concluded that the TCB had failed to comply with the principles set out in the Fining Regulation and thereby granted a stay of execution[137].

In the same vein, opinion of the Advocate General in *Marin Towage* judgment[138] reaffirms that the TCB must exercise its discretion in an objective and impartial way, and implement the general administrative guidelines consistently. These considerations undoubtedly show that the Supreme Administrative Court has sent a clear message to the TCB to give more detailed reasoning in its decisions as to the setting of fines.

[136] Case docket no 2010/4769, *Turkish Pharmacists' Association v. Turkish Competition Authority,* dated 02.04.2012.
[137] Cf. Case T-148/89, Trefulnion v. Commission, [1995] ECR II-1063, para. 142.
[138] Case docket no 2011/4117, *Marin Towage v. Turkish Competition Authority*, dated 21.03.2012.

4.2.2. Relevant Turnover: Starting Point of the Calculation

As opposed to the European Commission's practice, in which the turnover affected by the infringement was taken as a starting point when calculating fines, a different approach is adopted in Turkish competition law. Pursuant to Article 16(3) of the Act, if the substantive provisions of the Act is infringed, the TCB shall impose a fine up to 10 per cent of *annual gross revenues* of undertakings, which are generated by the end of the business year preceding the infringement decision, or which is generated by the end of the business year closest to the date of infringement decision if it would not be possible to calculate it and which would be determined by the TCB.

Decisional practice of the TCB with regard to this provision shows that annual gross revenues are understood as the net sales of companies[139]. In *Aegean Cement I* decision[140], for instance, the TCB adopted this approach and continued to use it in the vast majority of decisions[141]. Accordingly, annual gross revenue is defined in Article 3(1)(g) of the Fining Regulation as the net sales[142] in the uniform chart of accounts, or if this cannot be calculated, the revenue closest to the net sales, which is to be determined by the TCB.

On the other hand, the concept of net sales may not serve the purpose in some circumstances. For instance, associations of undertakings do not have the net sales since they collect contributions from their members. Another example is the banks or financial institutions, calculation of whose gross revenues has special features. Lastly, it is not mandatory for some companies, such as partnership companies, to have a uniform chart of accounts. Therefore, only if it is not possible to determine annual gross revenue in the preceding year, the Act empowers the TCB to determine it. In accordance with this provision, the Fining Regulation articulates that the TCB will determine the revenue closest to the net sales where calculation of net sales is not feasible[143].

Within this framework, aggregate worldwide turnover of undertakings should be taken into account when calculating the amount of fines as well as applying the 10 per cent cap. Accordingly this appears to be the case in the vast

[139] Kekevi 2008, p. 170; Arı and Aygün 2009, p. 17.
[140] *Aegean Cement I*, decision no 99-30/276-166(a), dated 17.06.1999.
[141] See *Cine 5*, decision no 99-46/500-316, dated 11.10.1999; *İGTOD*, decision no 99-53/575-363, dated 24.11.1999; *Advertising Spaces I*, decision no 00-4/41-19, dated 01.02.2000; *Ceramic*, decision no 04-16/123-26, dated 24.02.2004.
[142] In practice, 'turnover' is used overwhelmingly in reference to the net sales. Therefore, turnover will be used hereafter in this paper.
[143] Arı and Aygün 2009, p. 18.

majority of TCB's decisions[144]. However, the crucial point here is that the TCB takes into account the total turnover of the legal entity that is the addressee of decision, not the aggregate worldwide turnover of the undertaking. This is a further and crucial difference with the EU practice in which the aggregate worldwide turnover is taken into account when considering the 10 per cent ceiling[145]. On the other hand, in some decisions taken before the adoption of the Fining Regulation, the TCB based on the turnover generated in the relevant market[146]. This inconsistency appears to continue in the new era as well.

In *Industrial and Medical Gases* decision[147], for instance, the TCB took the turnover in the industrial and medical gases market for its calculation of basic fine as understood from the dissenting opinion of one of the TCB members[148]. However, some of the violations in this case were only in the medical gases market. Therefore, it is more accurate to say that the TCB did not take into account just the turnover generated in the relevant market or the sales affected by the violation.

In *Dialysis Devices* decision[149], on the other hand, the TCB rejected the argument raised by the parties that the turnover generated in the relevant market should be taken as basis[150]. Nearly three months later from this decision, the TCB held in *Banks* decision[151] that the total turnover should not be taken as a basis for the calculation of basic fine since the turnover generated in the relevant market is very high by comparison to total turnover of the firms. The TCB went on to say that the fine should be reduced on the grounds of the fact that the turnover generated in the relevant market constitutes a small share within the gross revenues, which is adopted as a mitigating factor in the Fining Regulation. A further interesting point of the decision is that the TCB took into account the turnover generated in the personal banking market. However, it is very contentious whether this is the relevant market defined in the contested decision

[144] Arı and Aygün 2009, p. 23; Erdem 2012. See also dissenting opinion of Cevdet İlhan Günay in *Industrial and Medical Gases* decision.
[145] On the criticisms against this practice see Geradin 2011, p. 38-40.
[146] See *Enamelled Wire*, decision no 07-56/672-209, dated 04.07.2007; *Fire Insurance*, decision no 03-70/844-366, dated 30.10.2003, *Kastamonu Coach*, decision no 06-11/43-33, dated 09.02.2006; *TTNet*, decision no 08-65/1055-411, dated 19.11.2008.
[147] *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010
[148] See dissenting opinion of Cevdet İlhan Günay in the decision mentioned.
[149] *Dialysis Devices*, decision no 10-80/1687-640, dated 23.12.2010.
[150] In *Sun Express* decision (decision no 11-54/1431-507, dated 27.10.2011), the TCB again rejected the argument of the parties that only the turnover in the Turkish market should be taken into account.
[151] *Banks*, decision no 11-13/243-78, dated 07.03.2011.

since the definition of the relevant product market was left open on the grounds of not changing the outcome of the assessment.

It is not clear whether there are other decisions in which the turnover generated in the relevant market was taken as a basis, as a result of inadequacy, or absence, of statements of reasons in these decisions. Whatever the case might be, the TCB's inconsistent body of decisions in relation to this issue continues in the new era as these decisions clearly indicate.

The decisional practice of the TCB as to the imposition of fines in case of gun-jumping and providing incomplete, false or misleading information is also relevant in this regard since the wording of these provisions is nearly the same with that of the provision regulating the substantive infringements of the Act. Pursuant to Article 16(1) of the Act, the TCB shall impose a fine where mergers and acquisitions that are subject to authorization are realized without the authorization of the TCB and where incomplete, false or misleading information is provided. The amount of the fine mentioned here is one per thousand of annual gross revenues generated by the end of the financial year preceding the decision, or by the end of the business year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the TCB.

In the vast majority of cases in which the TCB imposed a fine for gun-jumping, fines are calculated on the basis of total turnover of the legal entity concerned[152]. Contrary to this decisional practice, however, there are some decisions as to gun jumping, in which calculation of the fine is based on the turnover generated in the relevant market[153]. Similarly, the TCB takes the turnover generated in Turkey or in the relevant market within the Turkey as a basis in the determination of fines due to providing incomplete, false or misleading information[154]. In the EU competition law, on the other hand, fines imposed in case of procedural infringements or gun-jumping, are based on the aggregate worldwide turnover of undertakings[155]. Consequently, as these

[152] See text accompanying notes 144-146 above. But there are other decisions in which the undertakings' whole turnover is based on. See e.g. *Ajanspress & Interpress*, decision no 10-66/1402-523, dated 21.10.2010.

[153] See *Sarten Packaging*, decision no 10-31/471-175, dated 15.4.2010; *Selçuklu Holding & Gül Packaging*, decision no 09-57/1355-348, dated 25.11.2009. See also SANRAH, G. D. (2010), "The Turkish Competition Board considers only the turnover in the relevant product market when calculating the monetary fine for failure to notify a concentration (Sarten Ambalaj)", *e-Competitions*, No: 34802.

[154] See *Omya I*, decision no 08-54/847-338, dated 18.09.2008; *Omya II*, decision no 08-62/1017-393, dated 07.11.2008; *CNR II*, decision no 09-46/1154-290, dated 13.10.2009; *Akzo Nobel*, decision no 10-24/339-123, dated 18.03.2010.

[155] De La Serre and Winckler 2010, p. 343.

decisions clearly show, the TCB has not succeeded in developing a consistent decisional practice in relation to fines imposed in case of gun jumping and providing incomplete, false or misleading information as well.

In the light of these considerations, it can be argued that the basic amount of the fine should be calculated on the basis of the turnover affected by the infringement, which is the case in the EU practice. It is also noteworthy in this regard that in the determination of 10 per cent ceiling the aggregate worldwide turnover should be based on. This approach, which is also coherent with the concept of undertaking, is adopted in the majority of the jurisdictions including the EU. Taking the turnover affected by the infringement as a basis in the calculation of fines can be regarded as reflecting a fair approach since it relies on the gains obtained by undertakings. On the other hand, there may be some difficulties in determining the turnover affected by the infringement as well[156]. The key issue, however, is not only about whether the approach adopted in the EU or in Turkey is the right one. Rather, incoherent practice of the TCB is the vital one.

In the author's view, it is accepted that relying on the aggregate worldwide turnover of the undertaking may lead to unfair or disproportionate fines, particularly for multi-product firms. Even though the fact that the turnover generated in the relevant market constitutes a small share within gross revenues is adopted as a mitigating factor, the maximum level of reduction in the amount of fine for this reason can be at most 60 per cent of the basic amount[157]. Hence, the reduction in fine may not be sufficient to resolve the issue of unfair fines. In the current legal framework, however, the TCB should base on the total turnover of undertakings, neither the turnover generated in the relevant market nor the turnover of the legal entity, as it appears to be the approach adopted by the Act and by the Fining Regulation. The underlying reasons for this view and the legal assessment can be summarised as follows.

Firstly, the Act does not make any separation between the elements of gross revenue such as domestic and non-domestic sales or turnover generated in the relevant market[158]. Accordingly the Act does not explicitly refer to the turnover generated in the relevant market. Secondly, the TCB articulated its interpretation of the Act and general practice with regard to annual gross revenue in the Fining Regulation. Furthermore the fact that sales affected by the infringement constituting a small share within annual gross revenues has been adopted as a mitigating factor in the Fining Regulation. Thirdly, we should also

[156] See Arı and Aygün 2009, p. 23.
[157] See Article 7 of the Fining Regulation.
[158] Arı and Aygün 2009, p. 22.

pay regard to EU enforcement since it is the source of this provision. In the EU competition law, the European Commission bases on the aggregate worldwide turnover when calculating the 10 per cent cap. This approach indicates the idea that only the total turnover reflects the size and influence of the undertaking[159]. Otherwise it can be impossible to achieve deterrence especially with regard to a conglomerate company that has worldwide operations.

Last but not least, it may be argued that the Act empowers the TCB to base on the turnover in the relevant market by stating that the turnover would be determined by the TCB. However, this statement clearly refers to determination of the year if it is impossible to find out the turnover in the year preceding the decision. An alternative interpretation of this provision can be that if the turnover in the year preceding the decision does not reflect the undertaking's true economic situation, the TCB should be allowed to adapt their method to the particularities of the case[160]. Even if it is accepted that this provision gives discretion to the TCB, it cannot be used in an arbitrary way. Therefore, the TCB must explain its grounds and establish principles, while applying it objectively.

A recent judgment of the Supreme Administrative Court clearly confirmed this view and put an end to the discussions[161]. In the appeal against *Enamelled Wire* decision of the TCB, the Court clearly established that the fine must be imposed on the basis of total annual gross revenues of the undertaking in question. The Court's reasoning was that the Act does not make any separation between the elements of gross revenue such as domestic and non-domestic sales or turnover generated in the relevant market[162].

4.2.3. Recidivism: Usual Suspects of Infringements

As stated in section 2, prevention of violations is the main task of competition law enforcement and fines have very important role in this regard to ensure deterrence[163]. Recidivism, as the most frequently used aggravating factor in fixing the amount of fine[164], is "not only a relevant factor but also a particularly important factor for the purposes of assessing the amount of the fine in the

[159] Jones and Sufrin 2011, p. 1100. Joined Cases 100-103/80, Musique Diffusion Française v. Commission, [1983] ECR 1825, para. 119.
[160] Cf. De La Serre and Winckler 2011, p. 364.
[161] In its previous judgments, the Court adopted the same view. See e.g. Case docket no 2007/9916, decree no 2010/4599, *Siemens v. Turkish Competition Authority*, dated 02.06.2010.
[162] Case docket no 2008/8485, decree no 2012/968, *Hes Electricity v. Turkish Competition Authority*, dated 09.05.2012. See also Case docket no 2008/9080, decree no 2012/965, *Bemka v. Turkish Competition Authority*, dated 08.05.2012.
[163] Wils 2007, p. 185-187; ICN 2008, p. 7.
[164] De La Torre 2010, p. 387.

context of effective deterrence"[165]. Since "recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent"[166]. In other words, repeated infringement clearly indicates that the undertaking did not receive, or even care about, the signal sent by the authority[167].

In recent years, high rates of recidivism are observed throughout the world. Considering the European Commission decisions adopted over the past five years, for instance, the rate of recidivism exceeds 40 per cent in the EU. Similar statistics can be found as to the US antitrust enforcement as well[168]. Hence recidivism remains to be a significant problem in competition law and these statistics raise the question on the effectiveness of fining policy[169].

The underlying reasons for the recidivist uplift, as stated by Wils[170], can be examined in four headings. Firstly, repeat offenders are more inclined to commit infringements and thus higher fines should be imposed on them to achieve deterrence[171]. Secondly higher fines for recidivists articulate increased moral condemnation, thereby offset the effect of weakening the moral commitment to the law[172]. Thirdly, repeat offenders are assumed to learn from first investigation how they can better conceal their violation. Therefore, higher fines should be imposed on recidivist to compensate a lower probability of detection[173]. Fourthly, if the fines imposed are below the illicit gains and there is lack of transparency as to the likely fines, undertakings discover from the first fine that violations are profitable. Hence, higher fines are necessary to reinforce deterrence for repeated offenders[174].

Pursuant to paragraph 28 of the 2006 Guidelines, if an undertaking continues or repeats the same or a similar infringement after the European Commission or a National Competition Authority has made a finding that the undertaking infringed Article 101 or 102 TFEU, the basic amount will be increased by up to 100 per cent for each such infringement established. In the

[165] Case C-3/06 P, Danone v. Commission, [2007] ECR I-1331, para. 47.
[166] Case T-203/01, Michelin v. Commission, [2003] ECR II-4071, para. 293. See also Wils 2012, p. 12.
[167] OECD 2012b, p. 2.
[168] BARENNES, M. and G. WOLF (2011), "Cartel Recidivism in the Mirror of EU Case Law", *Journal of European Competition Law & Practice,* 2(5), p. 423-440, p. 423.
[169] OECD 2012b, p. 2 and 6.
[170] Wils 2012, p. 13.
[171] Case T-38/02, Group Danone v. Commission, [2005] ECR II-4407, para. 349; Case C-3/06 P, Danone v. Commission, [2007] ECR I-1331, para. 39.
[172] Wils 2012, p. 14.
[173] Ibid, p. 14.
[174] Ibid, p. 15.

light of this paragraph and the case law of the EU Courts, particular attention should be given to these points:

- Contemporaneous infringements, where two or more infringements take place during the same time but none of them continues after the date on which first infringement decision is adopted, cannot be taken into account[175]. Because there must be fresh infringements[176], that is to say second infringement after a first infringement decision.

- Infringement of Articles 101 and 102 TFEU cannot be considered as similar infringements[177].

- As distinct from the 1998 Guidelines, the European Commission will take into account not only its own previous decisions, but also those of National Competition Authorities applying Articles 101 or 102 TFEU.

- It is not necessary that a fine has been imposed in the first decision: finding of infringement is sufficient[178]. It seems to be the case that even if an undertaking is granted immunity under Leniency Notice, its fine can be increased on the grounds of recidivism[179].

- As distinct from the 1998 Guidelines, the increase may be up to 100 per cent.

- As distinct from the 1998 Guidelines, each prior infringement will justify an increase of the fine. Therefore, the fine can be quadrupled if there are four previous infringement decisions[180]. The European Commission, however, prefers not taking full advantage of its discretion in this regard. Instead, it generally increases the fine by 50 per cent in cases of one prior infringement, 60 per cent for two, 90 per cent for three, and 100 per cent for four, which has applied only once[181].

- Even if the first decision is still subject to judicial review, the European Commission can take it into account[182].

---

[175] Wils 2012, p. 9.
[176] Case T-141/94, Thyssen Stahl v. Commission, [1999] ECR II-347, para. 617.
[177] Case T-101/05, BASF v. Commission, [2007] ECR II-4949, para. 64; Case T-58/01, Solvay SA v. Commission, [2009] ECR II-4621, paras. 507-511; Case T-66/01, Imperial Chemical Industries v. Commission, [2010] ECR II-2631, paras. 378-381. See also Wils 2007, p. 217.
[178] Case T-38/02, Group Danone v. Commission, [2005] ECR II-4407, para. 363; Case C-3/06 P, Danone v. Commission, [2007] ECR I-1331, para. 41.
[179] Whish and Bailey 2012, p. 278; Barennes and Wolf 2011, p. 428.
[180] De La Serre and Winckler 2010, p. 336; Veljanovski 2011, p. 889.
[181] Barennes and Wolf 2011, p. 434; De La Serre and Winckler 2012, p 357.
[182] Case C-413/08 P, Lafarge v. Commission, [2010] ECR I-5361, para. 81-90.

- There is no apparent limitation period. However, the European Commission must assess case-by-case the time period between infringements and decide whether these infringements show a tendency to violate prohibitions and thus justify a fine increase due to recidivism[183].

- As to the identity of violators, if they are subsidiaries of a parent company and thus form the same undertaking, violations committed by these subsidiaries can be taken into account when considering recidivism[184]. In recent judgments, however, General Court took a stricter stance on the issue and held that the important factor is whether the parent company itself was found liable in the previous decision[185].

- Infringements are not necessarily to be in the same product or geographic market[186].

In the light of aforementioned principles, it can be suggested that requirements and guiding principles for the recidivist uplift have now been extensively defined, without contesting whether it is a right one, in EU competition law enforcement[187]. The European Commission is deadly serious about recidivism and it is the most prevalent aggravating factor in its decisions[188]. The TCB, on the other hand, has not been able to develop a consistent body of principles as to the implementation of aggravating circumstance of recidivism, which is seen explicitly from the decisions assessed below.

In Turkish competition law, likewise the EU law before the issuance of the 1998 Guidelines[189], there was no explicit reference to recidivism as an aggravating factor before the amendments made to the Act. However, the factors that the TCB had to consider were listed non-exhaustively, thereby the TCB

[183] Ibid. paras. 66-75; Case C-3/06 P, Danone v. Commission, [2007] ECR I-1331, paras. 37-39; Case T-343/08, Arkema France v. Commission, not yet reported, para. 68; Wils 2012, p. 17.
[184] Case T-203/01, Michelin v. Commission, [2003] ECR II-4071, para. 290. See Wils 2007, p. 217.
[185] Case T-144/07, ThyssenKrupp v. Commission, paras. 302-323; Case T-206/06, Total v. Commission, para. 213. See also De La Serre and Winckler 2012, p. 357.
[186] Case T-203/01, Michelin v. Commission, [2003] ECR II-4071, para. 282; Case T-101/05, BASF v. Commission, [2007] ECR II-4949, para. 64; Case T-410/03, Hoechst v. Commission, [2008] ECR II-881, para. 474.
[187] Barennes and Wolf 2011, p. 423 and 427. On the arguments that the European Commission's decisional practice as to recidivism is not consistent and that it ignores some previous infringements see Veljanovski 2011, p. 893; Connor 2011, p. 30. But Cf. Wils 2012, p. 9-10. For other criticisms see Geradin 2011, p. 40-41.
[188] Geradin and Henry 2005, p. 447; Veljanovski 2011, p. 888; Geradin 2011, p. 40.
[189] Barennes and Wolf 2011, p. 424.

took into account recidivism as an aggravating factor in some decisions[190]. Nevertheless, it was not the common practice of the TCB to take into account prior infringements committed by undertakings in numerous cases[191].

After the amendments, the Act explicitly refers to recidivism in Article 16(5) as a factor that the TCB must take into account when determining fines. However, there is not any explanation in the provision about how the repeated infringements should be assessed. Pursuant to Article 6(1)(a) of the Fining Regulation, fine shall be increased between 50 to 100 per cent for each repetition. When the decisional practice of the TCB as regards recidivism in the post-regulation era is examined, the noteworthy aspects are as follows.

Firstly, there is not adequate information, if any, in decisions as to the repetition of infringement. Hence it is difficult, if not impossible, to ascertain the conditions of recidivist uplift. Moreover, the TCB indicated the rate of increase only in *Turkcell II* and *Turkcell III* decisions[192], in both of which the basic fine was increased by 50 per cent. Thus, it is inferred from these decisions that the TCB increases the fine by 50 per cent regardless of whether there are one or two previous violations[193].

Secondly, it can be inferred from decisions that the TCB appears not to take into account the infringements committed by other firms within the same undertaking when determining recidivism. In *Car Dealers* case[194], for instance, the TCB did not apply recidivist uplift although some of the fined companies such as Doğuş Auto and Ford Automotive are within the same undertaking with other companies such as Garanti Bank and Yapı Kredi that get fined in *Banks* case[195]. In *Anadolu Electronics & Samsung* and *Efes* cases[196], similarly, the TCB did not take into account previous infringements committed in *Car Dealers* case by the companies within the same undertaking.

On the other hand, in cases such as *Metro Coach*[197] and *Industrial and Medical Gases*[198] the TCB again did not increase the fine owing to recidivism

[190] See *Advertising Spaces II, decision no 06-02/48-9, dated 05.01.2006*; *Akmaya*, decision no 09-23/491-117, dated 20.05.2009.
[191] Arı and Aygün 2009, p. 31.
[192] *Turkcell-II*, decision no 09-60/1490-379, dated 23.12.2009; *Turkcell-III*, decision no 11-34/742-230, dated 06.06.2011.
[193] Indeed these were the third and fourth violations of the Act by Turkcell respectively.
[194] *Car Dealers*, decision no 11-24/464-139, dated 18.04.2011.
[195] *Banks*, decision no 11-13/243-78, dated 07.03.2011.
[196] *Anadolu Electronics & Samsung*, decision no 11-39/838-262, dated 23.06.2011; *Efes*, decision no 11-42/911-281, dated 13.07.2011.
[197] *Metro Coach*, decision no 10-68/1445-545, dated 28.10.2010.
[198] *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010.

although the same legal persons committed infringements previously. For example, Metro Coach had committed multiple infringements before the last infringement decision was adopted.

Thirdly, as accepted in *Akmaya* decision[199], the TCB seems to recognize that a previous violation in the form of concerted practice should be taken into account for the purposes of deciding recidivism when imposing fine on a vertical restriction. This issue of whether a vertical restraint should be considered as a similar infringement to a cartel needs clarification in EU competition law[200]. Furthermore, the TCB appeared to accept in *Advertising Spaces II* case[201] that previous infringements must be similar to the new one. On the other hand, the TCB did not appear to take into account a previous infringement decision as to a concerted practice when fining an abuse of dominance in *Doğan Media* case[202]. Moreover, in *Metro Coach, Industrial and Medical Gases, Anadolu Electronics & Samsung*, and *Efes* decisions[203], the TCB did not increase the fine due to recidivism although there were previous infringements of the same kind by the undertakings concerned.

Fourthly, some inferences can be made from the TCB's decisions on the issue of whether a pending appeal against the first infringement decision prevents the application of recidivist uplift in the following decisions. In *Turkcell III*[204], for instance, the TCB raised the fines on the grounds of recidivism although the previous infringement decision was not yet final. Similarly, the TCB applied the recidivist uplift in *Advertising Spaces II* case[205], despite the appeal against first decision was still pending. On the other hand, in *Industrial and Medical Gases* case[206], the TCB did not take into account the recidivism while the Supreme Administrative Court upheld the first infringement decision against Habaş.

Fifthly, in relation to the time period between infringements the TCB held that prior infringement should have been committed 'in the recent past' in *Advertising Spaces II* case[207]. In *Metro Coach* and *Medical Gases* cases[208],

[199] *Akmaya*, decision no 09-23/491-117, dated 20.05.2009.
[200] De La Serre and Winckler 2010, p. 336-337; Barennes and Wolf 2011, p. 428.
[201] *Advertising Spaces II*, decision no 06-02/48-9, dated 05.01.2006.
[202] *Doğan Media*, decision no 11-18/341-103, dated 30.03.2011.
[203] *Metro Coach*, decision no 10-68/1445-545, dated 28.10.2010; *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010; *Anadolu Electronics & Samsung*, decision no 11-39/838-262, dated 23.06.2011; *Efes*, decision no 11-42/911-281, dated 13.07.2011.
[204] *Turkcell-III*, decision no 11-34/742-230, dated 06.06.2011.
[205] *Advertising Spaces II*, decision no 06-02/48-9, dated 05.01.2006.
[206] *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010.
[207] *Advertising Spaces II*, decision no 06-02/48-9, dated 05.01.2006.

however, the TCB did not increase the fines due to recidivism although previous infringement decisions had been adopted less than one year before the second infringement. A further inconsistency can be seen in *Akmaya* decision, where the TCB increased the fine owing to the recidivism although there were nearly 9 years between two decisions.

Lastly, there is not the slightest indication in decisions whether the infringements need to be in the same market. Therefore, it remains to be seen whether the TCB will take into account prior infringements committed in different markets when considering recidivism. If it does not, that would be a very narrow interpretation of recidivisms, especially given the ample discretion recognised by the Act.

In the light of decisions examined above, consequently, it can be suggested that the TCB has no policy on recidivism whatsoever. The decisional practice does not provide transparency as to the conditions and rates of increase in case of single or multiple infringements. Furthermore, the cases in which the recidivism took into account present lack of consistency and objectivity. Therefore, it is considered as one of the most flawed parts of the TCB's decisional practice. Given the extensive level of recidivism, it still poses a substantial problem for the TCB like many of the competition authorities[209]. Accordingly this poor record of the TCB cannot be considered as a practice of an advanced competition regime.

CONCLUSION

There is a broad consensus on the main purpose of fines that their primary objective is to achieve both specific and general deterrence besides punishing wrongdoers. Monetary fines, in this regard, are one of the most commonly used instruments, albeit not unique one. On the other hand, it should not be forgotten that achieving the deterrence is not all about imposing very high fines since there are also problems with it and thus they can become counter-productive. Hence the key point is to achieve sufficient level of deterrence. The quote by Benjamin Franklin plainly articulates the point: laws too gentle are seldom to be obeyed; too severe, seldom executed[210].

In order to ensure sufficient level of deterrence, it is necessary to provide sufficient degree of transparency as to the methodology of fining process since it enables undertakings to conduct a cost-benefit analysis, which

[208] *Metro Coach*, decision no 10-68/1445-545, dated 28.10.2010; *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010.
[209] OECD 2012b, p. 2 and 6.
[210] Calvino 2007, p. 321.

prospectively leads to the adoption of reasonable decisions by undertakings. Providing transparency as well as consistency and objectivity in the process of calculation of fines are also relevant in ensuring legal certainty and equal treatment, which are some of the fundamental principles of legal systems.

One of the ways of doing this is to issue secondary legislation, which is the mostly preferred approach in advanced competition law regimes. Following the other agencies, the TCB has chosen this way and adopted the Fining Guidelines, which is regarded as a very welcomed development by all the stakeholders. Some commentators consider this development as the footsteps of the new era and the culmination of the biggest problem in Turkish competition law[211].

Issuing secondary legislation in relation to the process of setting fines, however, may not always guarantee transparency, consistency and objectivity in the decisional practice. This appears to be the case in Turkish competition law as well, although the Fining Regulation has sufficiently limited the discretion enjoyed by the TCB. Within this framework, main areas of concern are inadequate statements of reasons, determination of relevant turnover and the application of the recidivist uplift.

The lack of transparency surrounding the decisions of the TCB still continues. This mainly stems from inadequate statements of reasons by the TCB. For instance, the TCB continues not to explain in detail how much weight is given to the factors that the Fining Regulation refers. The decisional practice also contains many uncertainties especially as to the determination of the relevant turnover and the conditions on the application of the recidivist uplift. These are clearly not the features seen in the advanced competition law regimes.

Furthermore, the TCB has not achieved a consistent application of the rules in similar situations. This is particularly the case in relation to the determination of relevant turnover and recidivism. Consistency in fining policy is crucial if the TCB wants to continue to be, or to become, a credible competition enforcer. Decisions that may be seen as erratic or arbitrary may undermine the years of work that has helped to build the reputation[212] that the TCB enjoys in other areas of competition law.

The application of different rules in similar situations is not only inimical to the consistency of the decisional practice but also objectivity of it. For instance, the TCB prefers to start the calculation of fines from the turnover in the relevant market in some cases, whereas it bases the fines on the total

[211] Arı and Aygün 2009, p. 60-61.
[212] De La Torre 2010, p. 415.

turnover in the others. Similarly, the TCB does not apply recidivist uplift although there is not any apparent reason to the contrary. This trend creates concerns from the perspective of objectivity of decisions. Hence, decisions of the TCB as it stands bring the quote by George Orwell into minds: All animals are equal but some animals are more equal than others[213].

All in all, the decisional practice of the TCB in relation to the determination of fines can clearly be regarded as a lottery despite the adoption of the Fining Guidelines. Recent judgments of the Supreme Administrative Court explicitly show that it is also critical in this regard. Therefore, it appears that neither a new era nor an enlightened age has emerged from the Fining Regulation up till now.

[213] Calvino 2007, p. 317.

BIBLIOGRAPHY

ARI, H. (2009), "Recent Developments in the Enforcement of Turkish Competition Law: Fines and Leniency Regulation", *Antitrust Chronicle*, Spring 2009, Volume 6, Number 1.

ARI, H. and E. AYGUN (2009), "Regulation on Fines Adopted by Turkish Competition Authority: Footsteps of the New Era", *Competition Journal*, 10(4), p. 7-71.

BARENNES, M. and G. WOLF (2011), "Cartel Recidivism in the Mirror of EU Case Law", *Journal of European Competition Law & Practice,* 2(5), p. 423-440.

BECKER, G.S. (1968), "Crime and Punishment: An Economic Approach", *Journal of Political Economy*, 76(2), p. 169-217.

CALVINO, N. (2007), "Public Enforcement in the EU: Deterrent Effect and Proportionality of Fines", in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, p. 317-335, Eds. Ehlermann and Atanasiu, Hart Publishing, USA.

CONNOR, J. M. (2011), "Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines", *ECLR*, 32(1), p. 27-36.

DE BROCA, H. (2006), "The Commission Revises Its Guidelines for Setting Fines in Antitrust Cases", *Competition Policy Newsletter*, Autumn 2006, Number 3, p. 1-6.

DE LA SERRE, E. B. and C. WINCKLER (2010), "Legal Issues Regarding Fines Imposed in EU Competition Proceedings", *Journal of European Competition Law & Practice,* 1(4), p. 327-347.

DE LA SERRE, E. B. and C. WINCKLER (2011), "A Survey of Legal Issues Regarding Fines Imposed in EU Competition Proceedings (2010)", *Journal of European Competition Law & Practice,* 2(4), p. 356-370.

DE LA SERRE, E. B. and C. WINCKLER (2012), "A Landmark Year for the Law on Fines Imposed in EU Competition Proceedings", *Journal of European Competition Law & Practice,* 3(4), p. 351-370.

DE LA TORRE, F. C. (2010), "The 2006 Guidelines on Fines: Reflections on Commission's Practice", *World Competition*, 33(3), p. 359-416.

ERDEM, E. (2012), "Turkey: Regulation On Fines, An Illusion or A True Harmonization With The EU Law?",
http://www.mondaq.com/article.asp?article_id=181436,
Date Accessed: 22.08.2012.

EUROPEAN COMMISSION (1999), "XXVIIIth Report on Competition Policy",
http://ec.europa.eu/competition/publications/annual_report/1998/en.pdf,
Date Accessed: 22.08.2012.

EUROPEAN COMMISSION (2011), "Factsheet: Fines for breaking competition law",
http://ec.europa.eu/competition/antitrust/compliance/factsheet_fines_nov_2011_en.pdf,
Date Accessed: 22.08.2012.

GERADIN, D. and D. HENRY (2005), "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments", *European Competition Journal*, Volume 1, No 2, p. 401-473.

GERADIN, D. (2011), "The EU Competition Law Fining System: A Reassessment", TILEC Discussion Paper,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937582,
Date Accessed: 22.08.2012.

ICN (2008), *Setting of Fines for Cartels in ICN Jurisdictions*, Report to the 7th ICN Annual Conference, Kyoto, Japan.

JONES, A. and B. SUFRIN (2011), *EU Competition Law*, Fourth Edition, Oxford University Press, New York, US.

KEKEVİ (2008), *The Fight Against Cartels in the US, in the EU, and in the Turkish Competition Law*, Publication of the Turkish Competition Authority, Ankara.

KERSE, C.S. and N. KHAN (2005), *EC Antitrust Procedure*, Fifth Edition, Sweet & Maxwell, London.

KILLICK, J.R.M. (2006), "The 2006 Fining Guidelines: Two Steps Forward but One Step Back?",
http://www.whitecase.com/publications/detail.aspx?publication=1053,
Date Accessed: 22.08.2012.

LANDES, W.M. (1983), "Optimal Sanctions for Antitrust Violations", *University of Chicago Law Review*, 50(2), p. 652-678.

NIELS, G., H. JENKINS and J. KAVANAGH (2011), *Economics for Competition Lawyers*, Oxford University Press, New York, US.

OECD (2005), *Competition Law and Policy in Turkey*, OECD, Paris, http://www.oecd.org/daf/competition/prosecutionandlawenforcement/34645128.pdf,
Date Accessed: 22.08.2012.

OECD (2012a), *Procedural Fairness and Transparency*, Key Points, http://www.oecd.org/competition/mergers/50235955.pdf,
Date Accessed: 22.08.2012.

OECD (2012b), *Roundtable on Promoting Compliance with Competition Law*, DAF/COMP(2011)4, http://www.oecd.org/officialdocuments/displaydocument/?cote=daf/comp(2011)4&doclanguage=en,
Date Accessed: 22.08.2012.

ORTIZ BLANCO, L., A. GIVAJA SANZ and A. LAMADRID DE PABLO (2008), "Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law", http://antitrustlair.files.wordpress.com/2011/05/fine-arts-in-brussels-final-comp-41.pdf,
Date Accessed: 22.08.2012.

RICHARDSON, R. (1999), "Guidance without Guidance - A European Revolution in Fining Policy? The Commission's New Guidelines on Fines", *ECLR*, 20(7), p. 360-371.

SANRAH, G. D. (2010), "The Turkish Competition Board considers only the turnover in the relevant product market when calculating the monetary fine for failure to notify a concentration (Sarten Ambalaj)", *e-Competitions*, No 34802.

VAN BAEL, I. (1995), "Fining a la Carte: The Lottery of EU Competition Law", *ECLR*, 16(4), p. 237-243.

VELJANOVSKI, C. (2011), "Deterrence, Recidivism and European Cartel Fines", *Journal of Competition Law & Economics,* 7(4), p. 871-915.

WHISH, R. and D. BAILEY (2012), *Competition Law*, Seventh Edition, Oxford University Press, New York, US.

WILS, W.P.J. (2002), *The Optimal Enforcement of EC Antitrust Law*, Kluwer Law International, Hague, Netherlands.

WILS, W.P.J. (2006), "Optimal Antitrust Fines: Theory and Practice", *World Competition*, 29(2), p. 183-208.

WILS, W.P.J. (2007), "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis", *World Competition*, 30(2), p. 197-229.

WILS, W.P.J. (2012), "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis", *World Competition*, 35(1), p. 5-26.

DECISIONS OF THE EUROPEAN COMMISSION

- Case COMP/38069, *Copper Plumbing Tubes*, 03.09.2004.
- Case COMP/39406, *Marine Hoses*, 28.01.2009.
- Case COMP/39402, *E.ON/GDF*, 08.07.2009.
- Case COMP/39452, *Mountings for Windows and Window-doors*, 28.03.2012.

JUDGMENTS OF THE EUROPEAN UNION COURTS

- Case 41/69, ACF Chemiefarma v. Commission, [1970] ECR 661.
- Joined Cases 100-103/80, Musique Diffusion Française v. Commission, [1983] ECR 1825.
- Case T-148/89, Trefulnion v. Commission, [1995] ECR II-1063.
- Case T-141/94, Thyssen Stahl v. Commission, [1999] ECR II-347.
- Case T-203/01, Michelin v. Commission, [2003] ECR II-4071.
- Case C-189/02 P etc, Dansk Rorindustri A/S and others v. Commission, [2005] ECR I-5425.
- Case T-38/02, Group Danone v. Commission, [2005] ECR II-4407.
- Case T-15/02, BASF v. Commission, [2006] ECR II-497.
- Case C-289/04 P, Showa Denko v Commission, [2006] ECR I-5859.
- Case T-101/05, BASF v. Commission, [2007] ECR II-4949.
- Case C-3/06 P, Danone v. Commission, [2007] ECR I-1331.
- Case T-410/03, Hoechst v. Commission, [2008] ECR II-881.
- Case T-53/03, BPB plc v. Commission, [2008] ECR II-1333.
- Case T-58/01, Solvay SA v. Commission, [2009] ECR II-4621.
- Case C-413/08 P, Lafarge v. Commission, [2010] ECR I-5361.
- Case T-66/01, Imperial Chemical Industries v. Commission, [2010] ECR II-2631.
- Case T-122/07, Siemens and Others v. Commission, not yet reported.
- Case T-144/07, ThyssenKrupp v. Commission, not yet reported.
- Case T-206/06, Total v. Commission, not yet reported.

- Case T-343/08, Arkema France v. Commission, not yet reported.

DECISIONS OF THE TURKISH COMPETITION BOARD

- *Aegean Cement I*, decision no 99-30/276-166(a), dated 17.06.1999.
- *Cine 5*, decision no 99-46/500-316, dated 11.10.1999.
- *İGTOD*, decision no 99-53/575-363, dated 24.11.1999.
- *Advertising Spaces I*, decision no 00-4/41-19, dated 01.02.2000.
- *Fire Insurance*, decision no 03-70/844-366, dated 30.10.2003.
- *Ceramic*, decision no 04-16/123-26, dated 24.02.2004.
- *Advertising Spaces II*, decision no 06-02/48-9, dated 05.01.2006.
- *Kastamonu Coach*, decision no 06-11/43-33, dated 09.02.2006.
- *Enamelled Wire*, decision no 07-56/672-209, dated 04.07.2007.
- *Omya I*, decision no 08-54/847-338, dated 18.09.2008.
- *Omya II*, decision no 08-62/1017-393, dated 07.11.2008.
- *TTNet*, decision no 08-65/1055-411, dated 19.11.2008.
- *Akmaya*, decision no 09-23/491-117, dated 20.05.2009.
- *CNR II*, decision no 09-46/1154-290, dated 13.10.2009.
- *Bodrum Ferries*, decision no 09-51/1245-314, dated 03.11.2009.
- *Selçuklu Holding & Gül Packaging*, decision no 09-57/1355-348, dated 25.11.2009.
- *Poultry Industry*, decision no 09-57/1393-362, dated 25.11.2009.
- *Turkcell-II*, decision no 09-60/1490-379, dated 23.12.2009.
- *Izocam*, decision no 10-14/175-66, dated 08.02.2010.
- *Akzo Nobel*, decision no 10-24/339-123, dated 18.03.2010.
- *Sivas Driving Schools,* decision no 10-25/350-124, dated 22.03.2010.
- *Sarten Packaging*, decision no 10-31/471-175, dated 15.04.2010.
- *Turkish Pharmacists' Association*, decision no 10-49/912-321, dated 08.07.2010.
- *Peugeot Dealers I*, decision no 10-53/1057-391, dated 06.08.2010.
- *Cargo*, decision no 10-58/1193-449, dated 03.09.2010.
- *Citroen Dealers*, decision no 10-60/1274-480, dated 23.09.2010.
- *Metro Coach*, decision no 10-68/1445-545, dated 28.10.2010.
- *Industrial and Medical Gases*, decision no 10-72/1503-572, dated 23.12.2010.
- *Dialysis Devices*, decision no 10-80/1687-640, dated 23.12.2010.

- *Banks*, decision no 11-13/243-78, dated 07.03.2011.
- *Doğan Media*, decision no 11-18/341-103, dated 30.03.2011.
- *Car Dealers*, decision no 11-24/464-139, dated 18.04.2011.
- *Turkcell-III*, decision no 11-34/742-230, dated 06.06.2011.
- *Anadolu Electronics & Samsung*, decision no 11-39/838-262, dated 23.06.2011.
- *Efes*, decision no 11-42/911-281, dated 13.07.2011.
- *Construction of Dicle University Hospital*, decision no 11-52/1343-474, dated 13.10.2011.
- *Sun Express*, decision no 11-54/1431-507, dated 27.10.2011.

JUDGMENTS OF THE SUPREME ADMINISTRATIVE COURT

- Case docket no 2007/9916, decree no 2010/4599, *Siemens v. Turkish Competition Authority*, dated 02.06.2010.
- Case docket no 2011/4117, *Marin Towage v. Turkish Competition Authority*, dated 21.03.2012.
- Case docket no 2010/4769, *Turkish Pharmacists' Association v. Turkish Competition Authority,* dated 02.04.2012.
- Case docket no 2008/9080, decree no 2012/965, *Bemka v. Turkish Competition Authority*, dated 08.05.2012.
- Case docket no 2008/8485, decree no 2012/968, *Hes Electricity v. Turkish Competition Authority*, dated 09.05.2012.

Annex - 1: Table of Fines Imposed by the TCB in the Post-regulation Era

	Case	Type of Infringement	Starting Rate	Duration	Basic Amount	Aggravating Factors	Mitigating Factors	Final Rate	Fines on Individuals [214]	Leniency
1	Bodrum Ferries	Cartel - Price fixing	2%	50% increase	3%	Continuation of the infringement after the investigation (50% increase)	Cooperation with the TCB (60% decrease)	1,8%	Not accepted by the TCB[215]	
2	Poultry Industry	Cartel - Price fixing, output restriction	2%	Less than a year [216]	2%	N/A	Industry has experienced many external shocks (60% decrease)	0,8%	3%	
3	Turkcell-II	Abuse of dominance - de facto exclusivity and rebates	0,5%	50% increase	0,75%	Recidivism (50% increase)	Sales affected by the infringement occupy small share within gross revenues (60% decrease)	0,45 %		

[214] The percentages here base on the fine imposed on undertakings.
[215] "Not accepted by the TCB" means that opinions of the rapporteurs to the direction of imposition of fines on individuals were not followed.
[216] Although the infringement lasted from 2003 to 2008, the TCB ignored the effect of the duration by stating that the parties occasionally participated in the infringement.

4	Izocam	Anti-competitive agreements and abuse of dominance - Exclusivity	?	?	?	?	?	0,5% [217]		
5	Sivas Driving Schools	Cartel -Price fixing and allocation of customers	2%	? [218]	2%	N/A [219]	Cooperation with the TCB, passive role, coercion by others (60% decrease for 1 party, 25% decrease for 3 parties)	0,8% 1,5% 2%		

[217] Final rate of the fine was stated in the press release, not in the official decision.
[218] It is understood from the decision that the infringement takes place between 1.7.2008 and 15.7.2009, which is slightly over a year. Hence the starting rate should have been increased by 50%.
[219] It is stated in the decision that retaliatory measures were adopted by the conspirators. Therefore, these measures, which are seen as one of the most serious aggravating factors by the European Commission (See Geradin and Henry 2005, p. 444-445), could have been taken into account.

6	Turkish Pharmacists' Association	Collective boycott	?	? [220]	?	? [221]	?	3%		
7	Peugeot Dealers I	Hub & Spoke Cartel - Price fixing, allocation of territories	0,5 - 3 % [222]	? [223]	?	? [224]	Sales affected by the infringement occupy small share within gross revenues (Discount for 2 parties but the rate not disclosed)	0,4% 1%	Not accepted by the TCB	

[220] It is stated in the decision that the evidences belonged to the time period between 9.3.2009 and 3.11.2009 but also they indicated that the infringement covered 2010.

[221] The strength of the Association and continuation of infringement after the investigation were mentioned in the decision. Hence, these factors should have been taken into account when determining the basic amount and aggravating circumstances.

[222] The infringement was not regarded as a cartel, as understood from the dissenting opinions. It is also stated in the decision that limited participation was taken into account for 3 parties.

[223] It is understood from the decision that the infringement lasted more than a year (From 2005 and 14.4.2007 to July 2008). Hence, the starting rate should have been increased by 50%.

[224] Similar to the *Sivas Driving Schools* case, retaliatory measures were adopted by the conspirators. Therefore, it could have been considered as an aggravating factor.

8	Cargo	Cartel	2%	50% increase	3%	N/A	The reasoning not disclosed (50% decrease)	1,5 %	Not accepted by the TCB	
9	Citroen Dealers	Hub & Spoke Cartel - Price fixing	1% [225]	? [226]	?	? [227]	Sales affected by the infringement occupy small share within gross revenues (Discount for 3 parties but the rate not disclosed)	0,5% 1%	Not accepted by the TCB	
10	Metro Coach	Vertical agreement	?	? [228]	?	? [229]	?	0,6%		

[225] It is stated in the decision that since the agreement was made between dealers whose brand has a low market share, 0,5 - 3% per cent range was taken. Limited geographic scope was also taken into account when determining the basic amount.
[226] It is understood from the decision that the infringement lasted more than a year (From January 2007 to the end of 2008). Hence, the starting rate should have been increased.
[227] Similar to the *Sivas Driving Schools* and the *Peugeot Dealers I* cases, retaliatory measures were adopted by the conspirators. Therefore, it could have been considered as an aggravating factor.
[228] It is be inferred from the decision that the infringements began in December 2007 and April 2009.
[229] It is understood from the decision that the infringement continued after the TCB's investigation.

11	Industrial and Medical Gases	Cartel - Bid rigging	2% [230]	50% increase 100% increase	2% 3% 4%	N/A [231]	Coercion by Berk Gaz (60% decrease for all parties)	0,8% 1,2% 1,6%		Berk Gaz - Immunity
12	Dialysis Devices	Cartel	2%	50% increase	3%	N/A	Sales affected by the infringement occupy small share within gross revenues (40% and 60% decrease for 2 parties respectively)	1,2% 1,8% 3%		
13	Banks	Gentlemen's agreement (not regarded as a cartel)	0,5 - 3 % [232]	50% increase for 5 parties. 100% increase for 2 parties.	0,75% 1%	N/A	Sales affected by the infringement occupy small share within gross revenues (60% decrease)	0,3% 0,4%		

[230] The percentage here bases on the turnover in the industrial and medical gases market. However, some infringements were only related to the sales in the medical gases market.
[231] Obstruction of the investigation was not taken into account.
[232] The percentage here bases on the turnover in the personal banking market.

14	Doğan Media	Abuse of dominance - Rebates	0,5%	50% increase	0,75	N/A	N/A	0,75 %		
15	Car Dealers	Exchange of information about future behaviour (price and sales strategies, stock information)	?	50% increase for 4 parties	?	N/A	Sales affected by the infringement occupy small share within gross revenues (Discount for 4 parties but the rate not disclosed)	0,3% 0,5% 0,6% 0,75 % 0,9% 1% 1,5%		
16	Turkcell-III	Abuse of dominance - De facto exclusivity	0,5%	50% increase	0,75%	Recidivism (50% increase)	N/A	1,125 %		
17	Anadolu Electronics & Samsung	Resale price maintenance	0,5%	Less than a year	0,5%	N/A	N/A	0,5%		
18	Efes	Non-compete obligation	0,5%	50% increase	0,75%	N/A	60% decrease	0,3%		

19	Construction of Dicle University Hospital	Cartel - Bid rigging	2%	50% increase	3%	N/A	The reasoning not disclosed (50% decrease)	1,5%		
20	Sun Express	Cartel - Price fixing	2%	50% increase	3%	N/A	N/A	3%		Sun Express (immunity) Condor (50% decrease)
21	Meat Products [233]	Exchange of information	0,5 - 3 %	50% increase	?	N/A	✓	0,6%		
22	Dried Fig[234]	Cartel - Price fixing	2%	N/A	2%	N/A	The reasoning not disclosed (60% decrease)	0,8%		

[233] The decision has not been publicly available yet. The explanations here are based on the press release.
[234] The decision has not been publicly available yet. The explanations here are based on the press release.

23	Cement[235] (East-South East Anatolia)	Cartel - Price fixing	2 - 4 %	?	?	N/A	N/A	2% 3%		
24	Peugeot Dealers II[236]									
25	Sodium Sulfate[237]								✓	✓
26	Bosch Dealers in Kayseri[238]	Price fixing	0,5 - 3 %	?	?	?	?	0,5 %		

[235] The decision has not been publicly available yet. The explanations here are based on the press release.
[236] Neither the decision nor the press release has been publicly available yet.
[237] Neither the decision nor the press release has been publicly available yet.
[238] The decision has not been publicly available yet. The explanations here are based on the press release.

27	Sakarya Ready-Mixed Concrete [239]	Cartel - Price fixing	2 - 4 %	?	?	?	The reasoning not disclosed (60% decrease for one party)	2% 0,8%		

General Observations:

1. Reducing the length of the infringement (See Poultry Industry, Sivas Driving Schools, Turkish Pharmacists' Association, Peugeot Dealers-I, and Citroen Dealers cases).

2. Not qualifying some explicit cartel behaviour as a cartel (See Car Dealers, Banks, Peugeot Dealers-I, and Citroen Dealers cases).

3. Inconsistent application of fines on individuals.

4. Starting the calculation from the minimum rate almost in every case.

5. Not applying the aggravating factors in the vast majority of cases (exceptions: Bodrum Ferrries, Turkcell-II, and Turkcell-III cases).

6. Applying the maximum rate of discount in the vast majority of cases.

7. Applying the mitigating factors to the amount that is calculated by applying the aggravating factors to the basic amount.

Not providing adequate information and reasoning as to the determination of fines.

[239] The decision has not been publicly available yet. The explanations here are based on the press release.