LENIENCY PROGRAMS: FEATURES, COMPONENTS AND HOW THEY APPEAR IN EU AND TURKEY

PİŞMANLIK PROGRAMLARI: ÖZELLİKLERİ, UNSURLARI VE AB VE TÜRKİYE'DEKİ GÖRÜNÜMLERİ

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Abstract

This paper considers the leniency programs, which is an investigative tool in fighting against cartels, in terms of its benefits, challenges and preconditions for its successful application. While doing this, the paper analyzes EU 2006 Leniency Notice within the framework of the theoretical basis and then examines and evaluates the recently introduced Turkish Leniency Program in a comparable way with that of the EU. Ultimately, this paper finds that Turkish leniency program includes provisions so as to provide transparency and predictability in a stronger way than the EU leniency program; however this may cause the appearance of the negative sides of the program in the long term if the provisions are interpreted so generously for a long time. Moreover, the efficiency of the Turkish Competition Authority and the new Turkish Regulation regarding fines against cartels, support the leniency program by providing heavier sanctions compared to past applications of the Authority and this makes the Turkish program closer to the EU leniency program.

Keywords: *Cartel, Leniency Programs, Cooperation, Fine Reduction, Immunity.*

Öz

Bu çalışma, kartellerle mücadelede bir soruşturma aracı olarak kullanılan pişmanlık programlarını yararları, zorlukları ve başarılı uygulamasının önkoşulları çerçevesinde ele almaktadır. Bunu yaparken de, AB 2006 Pişmanlık Yönetmeliği'ni temel teorik çerçeve içerisinde analiz edip, sonrasında, yakın zamanda mevzuata giren Türk Pişmanlık programını, AB programıyla karşılaştırmalı bir biçimde inceleyip değerlendirmektedir. Sonuç olarak bu çalışma, Türk pişmanlık programının AB pişmanlık programına nazaran daha güçlü bir şekilde şeffaflık ve öngörülebilirliği sağlayan hükümler içerdiğini,

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fakat bu durumun, yönetmelik maddelerinin uzun dönemde çok cömert bir şekilde yorumlanması halinde programın negatif sonuçlarının ortaya çıkmasına yol açacağını tespit etmektedir. Bununla birlikte, Türk Rekabet Kurumu'nun etkinliği ve kartellere yönelik ceza yaptırımlarını öngören Yönetmeliğin mevzuata girişi, Kurumun eski uygulamalarıyla karşılaştırıldığında karteller için çok daha yüksek cezalar getiriyor olması nedeniyle pişmanlık programını desteklemektedir ve bu da Türk pişmanlık programını AB programına daha da yaklaştırmaktadır.

Anahtar Kelimeler: *Kartel, Pişmanlık Programları, İşbirliği, Ceza İndirimi, Bağışıklık.*

1. INTRODUCTION

Cartel conduct is described as 'the most serious form of anti-competitive practice and/or breach of competition law that involves two or more competing undertakings, businesses or individuals seeking to limit or reduce competition'[1] by fixing prices, limiting output or sales, sharing markets or rigging bids.

Price increase, reduction in innovation, increase of inflation, social problems arising from cartel formation, which results in the inability of buying a more qualified product at a lower price are just some of the outcomes of cartels which cause them to be defined as 'the cancers on the open market economy[2].'

Compared with other violations of the law which may have both positive and negative consequences that can be evaluated together to reach a finding accordingly, cartels have no positive side that can be balanced against their negative sides[3]. Cartels therefore are acknowledged by the competition authorities as the prime antitrust violation to fight against[4].

However, this is not an easy task as cartels have the fundamental characteristic of being hard to detect due to the difficulty to 'penetrate their cloak of secrecy'[5] on the one hand and the resource constraints of the

[1] ICN (2010), "Cartel Case Initiation Subgroup 2: Enforcement Techniques", *Anti-Cartel enforcement Manual Chapter 4*, http://www.icnistanbul.org/Upload/Materials/Cartel/CartelWG_CH4%20CartelCaseInitiation.pdf, Date Accessed: 04.07.2010.

[2] MONTI, M.(2001), "Why Should We Be Concerned with Cartels and Collusive Behaviour?" in *Fighting cartels-why and how?,* Swedish Competition Authority, Konkurrensverket, , p.14.

[3] Monti, p.14.

[4] OECD (2002), *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, http://www.oecd.org/dataoecd/41/44/1841891.pdf, Date Accessed: 10.07.2010, p.11

[5] OECD 2002, p.7.

competition authorities that make their investigatory powers limited, on the other[6].

Furthermore, cartels have some other fundamental elements that may make them vulnerable. The collective and illegal character of cartel conduct causes problems between the cooperators such as free-riding, hold-up, moral hazard in teams or opportunism[7]**.** Moreover, 'continuity'[8] and 'cooperation' between wrongdoers which are other features of cartels mean that the members to have information on each others' wrongdoings which they can potentially use against themselves[9]. These problems can affect the success of the cartels since the maintenance of a cartel implies that 'some strong psychological assumptions exist among the cartel's members about their reciprocal behavior[10]**.** As the economic theory of cartels suggests, cartels are unstable as they have the incentive to deviate from the cartel agreements by selling above agreed quotas, or below cartel prices, and this vulnerability of cartels increase the cost of cartel formation in order to discourage the incentives to defect[11].

Therefore, despite their secret character, which makes cartels hard to detect, such internal problems that are likely to arise between the cartel members enable competition authorities to produce different tools to fight against cartels by taking advantage of these problems. The worldwide increasing introduction of leniency programs which are acknowledged as 'the greatest investigative tool ever designed to fight cartels'[12] is the indicator of the exploitation of the 'incentive compatibility' problems of cartels by the antitrust officials[13].

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[6] STEPHAN, A.(2008), "An empirical assessment of the European Leniency Notice", *Journal of Competition Law and Economics*, Vol.5 (3), p.537.

[7] SPAGNOLO, G. (2006), 'Leniency and Whistleblowers in Antitrust', *CEPR Discussion Paper*, No. 5794, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936400, Date Accessed: 15.07.2010, p.4.

[8] ZINGALES, N. (2008), "European and American Leniency Programme: Two Models Towards Convergence?' *Competition Law Review,* Vol.5, No.1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101803, Date Accessed: 17.07.2010, p.5.

[9] Spagnolo 2006, p.5.

[10] Zingales 2008, p.6.

[11] EVENETT, S. J., LEVENSTEIN, M. C. and V.Y. SUSLOW (2001), "International Cartel Enforcement: Lessons from the 1990s", http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1092&context=econ_workingpaper, Date Accessed: 07.07.2010, p. 1223.

[12]HAMMOND S. D. (2009), "Using Leniency to Fight Hard Core Cartels: Cornerstones of an Effective Leniency Program'*, Paper presented at the Seventh Meeting of the Latin American Competition Forum, Session I*, *Santiago, Chile, http://www.oecd.org/dataoecd/31/7/43547530.pdf.*, Date Accessed: 10.07.2010, p.3.

[13] Evenett, Levenstein and Suslow 2001, p.1235.

This paper considers the theoretical basis of leniency programs in general, focusing on their benefits and challenges asserted in the literature and the prerequisites of achieving a successful leniency program, then explains the European leniency program in which these theoretical basis become concrete and finally examines the recently introduced Turkish leniency program together with determinations with regard to its differences from the European program, where there is, and with an early evaluation of the entire leniency policy in terms of the components of a successful leniency program.

2. DEFINITION

Leniency is defined in the 'Anti-Cartel Enforcement Manual' of ICN[14] as a 'a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition enforcement agency'[15].

Entitlement to receive immunity from penalties or a reduction from penalties necessitates the cooperation of the cartel member with the antitrust authority. This cooperation can be realized either through the exchange of information and/or evidence with regard to the antitrust violation or through the recognition of the breach and acceptance of the reduced penalty[16].

Considering the fact that leniency programs are now applied in many jurisdictions of the world, the term 'penalties' can refer to any penalties that can be inflicted by the competition agencies in those jurisdictions including 'fines on companies, fines on individuals, director disqualification and/or imprisonment'[17]. Consequently, leniency can mean 'immunity from prosecution' as in the US program where cartels are subject to criminal sanctions or means total immunity or reductions in fines as in the EU program. Lenient treatment can also mean 'not to refer a matter for criminal prosecution, or not to pursue penalties against individuals'[18].

Leniency will be used here to define any programs granting any reduction in sanction in exchange for information and cooperation.

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[14] ICN (2009), "Drafting and Implementing an Effective Leniency Policy Subgroup 2: Enforcement Techniques", Anti-*Cartel Enforcement Manual Chapter 2*, http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf.
Date Accessed: 04.07.2010.

[15] ICN 2009, p.2.

[16] WILS, W. P.J. (2007), "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition*, Vol. 30, issue 1, p. 25.

[17] Wils 2007, p.25.

[18] OECD 2002, p.8.

3. BENEFITS AND CHALLENGES OF LENIENCY PROGRAMS

3.1. Benefits

The positive functions of leniency programs on antitrust enforcement can be seen in providing increased information, reduced prosecution costs and improvement in cartel detection and deterrence.

3.1.1. Higher Level of Information and Reduced Prosecution Costs

Information and evidence received through leniency programs contributes to antitrust enforcement in the way other methods of obtaining information by competition authorities, namely the compulsion and direct force,[19] cannot do[20]. Before all else, leniency programs provide the information and evidences with the highest conclusive force[21]. This is because the information is directly given by the cooperator which was a member of the cartel activities and familiar with the type of the information that is necessary for establishing a violation of law. Moreover, as it is possible for the cooperator to be given immunity within the framework of the leniency program, it does not have any incentive to give unreliable evidence[22]. Therefore, the traces of the violation that are left behind by the cartel can be provided through the reliable information given by an insider informant[23].

Another advantage of providing information and evidence through leniency programs with regard to the cartel activity is that, these programs give the competition authorities the opportunity to reach every kind of information whether it is an existing document[24] and whether the information and evidence is in the jurisdiction of the competition authority. While using direct force as a

[19] Wils 2007, p.40.

[20] 'Compared to the first and second method, direct force and compulsion, this third method has clear advantages. Indeed, contrary to the first method, it can be used to obtain all kinds of information, not just existing documents or other existing physical evidence. Like the second method, it saves on search costs in that the collecting of relevant information is done by the undertaking and its staff, who are most familiar with it. But contrary to the second method, it does not suffer from the same reliability problems, as there is no clear incentive for the cooperating undertakings or persons to provide unreliable information, given that they risk losing the benefit of immunity or reduced punishment if they provide misleading information and given that immunity from punishment is the highest benefit they can obtain.'(see WILS, W.P.J. (2005), 'Principles of European Antitrust Enforcement', Hart Publishing, Oxford and Portland, Oregon, p.148).

[21] LEVY, N., and R.O'Donoghue, (2004), "The EU Leniency Programme Comes of Age", *World Competition*, Vol. 27, issue 1, p.77.

[22] Wils 2007, p.41.

[23] AUBERT, C., REY, P. and W.E. KOVACIC (2006), "The Impact of Leniency and Whistle-blowing Programs on Cartels", *International Journal of Industrial Organization*, Vol. 24,p.1243

[24] Wils 2007, p.41.

way to obtain evidence, it is only possible to obtain evidence that is in existence during the inspection of the competition authority; however, leniency makes it possible to obtain all kinds of information and evidence. Because, within the leniency mechanism, even the information that is hardest to get can be presented to the competition authority voluntarily by the company or the individual. This information can even be provided from outside the jurisdiction of the competition authority in the event these information are kept in such places.

Furthermore, leniency programs can induce cartel members to keep hard evidences that they would not otherwise kept in the absence of leniency programs because of the possibility of it being found and used against themselves by the competition authorities in case of detection of the cartel. Under the program, firms become more inclined to keep evidences in order to benefit from leniency in the future. Therefore leniency programs also contribute to the amount of fines thanks to such hard evidences with regard to cartel activities being kept by cartel members in the context of the leniency program. The increased fines, in the end, creates more incentive to apply for the program[25].

As Brenner states, some information cannot be obtained by the competition authorities because it entails incurring high costs. In such cases, the costs of acquiring the information cannot be recovered due to the 'budget constraint of the competition authoritites' or 'because the costs exceed the social benefit of obtaining the information'[26]. However, it may be possible to obtain such information under the leniency program which results in more evidences for competition authorities in the enforcement process against cartels. This, in turn will decrease the prosecution costs of the competition authorities. Therefore, competition authorities, making savings on its limited budget through the leniency program, can lead the rest of its sources for the detection of undetected cartels.

3.1.2. Detection and Deterrence of Cartels

The formation and the maintenance of a cartel require effort to keep its members' internal behavior under control, as this cannot be realized through any legal system. The continuity of cartels can only be maintained with the implicit alignment of the members for the sake of increasing their gains through the cartel activity and with strategies to monitor and envisage punishments for cartel members to prevent them cheating.

[25] Wils 2007, p.41.

[26] BRENNER, S.(2009), "An Empirical Study of the European Corporate Leniency Program", *International Journal of Industrial Organization*, Vol. 27, p.640.

The idea behind the deterrence of cartels is to provide higher gains to a deviating cartel member than its potential gains from becoming or continuing to be a member of the cartel. At this point, it is possible to say that the aim of the leniency program is to increase the probability of cartel detection and thus make deviation and cooperation with the competition authorities more profitable for the cartel members. Together with the increased detections and convictions, leniency programs hence create a climate of deterrence for the cartel formation.

As stated by Fletcher, 'The probability of detection is a key factor in increasing deterrence'[27]. Therefore, leniency programs aim to create incentives for the cartel members to self-report, thus increase the probability of detection, which, in turn will provide deterrence[28].

Thus, the increased probability of detection through the leniency policy is one contribution of this program to cartel deterrence. The other one which is tied up to the first one, is the creation of distrust among cartel members through leniency. This effect will appear as a result of the fact that, each cartel member will be aware of the gains they can achieve if they apply for the leniency program and thus each one of them will have the incentive to cheat[29]. This incentive can either arise from the idea of avoiding sanctions or in Ellis and Wilson's view, of 'gaining a profitable strategic advantage' against their rivals[30].

The creation of distrust among the cartel members as an intrinsic value of the leniency program is a tool to construct the prisoner's dilemma model. This model can simply be illustrated as the following: 'two prisoners who have both committed a crime are interrogated in prison by the authorities. The authorities have enough evidence to convict both suspects for a minor crime, but would like to convict them for a major one for which they need further evidence. For this reason, they will try to obtain a confession from each single suspect by promising a lower sanction for whoever confesses first'[31].

Within the framework of this model's logic, the leniency program encourages the confession of a cartel member due to its fear that another

[27] FLETCHER, D. J. (2005), "The Lure of Leniency: Maximizing Cartel Deterrence in Light of La Roche v. Empagran and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004", *Transnational Law & Contemporary Problems,* Vol.15, p.347.
[28] Fletcher 2005, p.350.
[29] HARRINGTON, J. E. Jr. (2008), "Optimal Corporate Leniency Programs", *Journal of Industrial Economics*, Vol. 56, issue 2, p.222.
[30] ELLIS, C. and W.WILSON (2002), "Cartels, Price-Fixing, and Corporate Leniency Policy: What Doesn't Kill Us Makes Us Stronger," Manuscript, University of Oregon, cited in Spagnolo 2006, p.19.
[31] Zingales 2008, p.8.

member will confess first[32]. Such a fear places a premium on companies and their legal advisers to move faster than their competitors in the disclosure of the cartel "in order to avoid being 'beaten' in the race to confess"[33].

The deterrence effect of the leniency program through its effect on increased detection and probability of conviction and the creation of distrust among cartel members may prevent the new cartel formations; because the possible future cartel members have to consider the leniency program and its effect and therefore have to make additional expenses to prevent the possible negative consequences of cartel members applying for this program. This, in the end, will increase the formation costs and make the formation of a new cartel more difficult[34].

Therefore, leniency programs will disrupt the stability of cartels by causing cartels breaking down earlier, due to the increased costs of maintaining the cartel, which is the result of the increased probability of detection/conviction and distrust among cartel members, or by preventing a cartel formation in the first place[35].

Consequently, beside ex-officio efforts of competition authorities to detect and deter cartels, which are indispensable for a successful leniency program, leniency mechanism is itself a way for detection and deterrence of cartels as well.

3.2. Challenges

3.2.1. Penalty Reducing Effect

There are some concerns expressed in the literature with regard to the leniency programs on the ground that these programs rely on reducing or eliminating of fines in exchange for the revelation of information and that this may induce collusion as it reduces the expected cost of anti-competitive behavior[36].

As stated by Harrington, the more lenient the program, the more the penalties are reduced, the higher will be 'the expected payoff from continuing to collude' which is called the 'cartel amnesty effect'[37].

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[32] Fletcher 2005, p.350.
[33] Levy and O'Donoghue 2004, p.77.
[34]KEKEVI, G.H. (2008), 'Pismanlik Programlari: Muharebeyi Kaybetmek, Savasi Kazanmak', *Rekabet Dergisi, Sayi*.34, p.15.
[35] Wils 2007, p.42.
[36] MOTTA, M., and M. POLO (2003), "Leniency Programs and Cartel Prosecution", *International Journal of Industrial Organization*, Vol. 21, p.375.
[37] Harrington (2008), p.216-217.

Such lowering of the penalties has even been considered as an 'improper shirking of the duties by the enforcement agencies' as they do not take the necessary action against the antitrust violations. However the European Commission, as a reply to this objection, stated that 'the interests of consumers and citizens in ensuring that [cartel] practices are detected and prohibited outweigh the interest in fining those enterprises which co-operate with the Commission, thereby enabling or helping it to detect and prohibit a cartel'[38].

Therefore, it is possible to say that the reduction of penalties for the firms which were also the part of an antitrust misbehavior is justified by the fact that the detection and deterrence of cartels can be ensured through this means which is an offsetting effect for the punishment of some offenders with reduced penalties or them to go unpunished at all.

Moreover, as stated in the OECD Report, the decrease in the expected costs of the misbehavior may only be valid 'for the first firm in the door[39]'. As the likelihood of detection and conviction will be increased for other cartel members who are not the ones to apply for the program, the expected costs of misbehavior may be said to increase for them. In the end, this shows that reducing penalties does not necessarily mean higher inducement for collusion.

3.2.2. Use of Leniency Program as a ' Strategic Tool'

In his paper supported with statistical data, Stephan asserted that by April 2007 the Commission had decided on eleven cases with regard to horizontal cartels in the chemical industry that were revealed as a result of leniency applications. His argument relating to these cases was that, all these cartels revealed through leniency applications had already failed when these applications for leniency were made[40].

In the light of these findings, it is reasonable to assume that leniency programs are used by cartel members just to get a discount from the authorities after the break down of the cartel has become obvious. Also, by doing this first and benefiting from immunity, they can put their formal cartel partners, who will be faced with full sanctions, at a competitive disadvantage[41].

The suggestion offered by Stephan to prevent such perverse effect is not to give priority to investigating failing cartels the detection of which will not have a deterrent effect on the existing ones and to concentrate on the active cartels instead.

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[38] OECD 2002, p.60.
[39] OECD 2002, p.27.
[40] Stephan 2008, p.539.
[41] Stephan 2008, p.539.

Beside the perception of leniency program as the best thing to apply when it is obvious that the cartel will not work anymore, leniency programs can also be considered by the cartel members as a way to create new cartels or maintain the existing ones. One possible means of using the leniency program in this way is to benefit from it as a tool to punish any deviations from the cartel agreement[42].

However, by making the immunity benefit of leniency applicable to the first applicant alone, it is possible to prevent such negative consequence, as this solution will hinder cartel members from applying collectively in order to punish one member who deviates from the cartel agreement[43]. All leniency programs applied worldwide currently, envisage independent application for having the benefit of leniency programs; therefore this risk can only be asserted on the theoritical basis[44].

3.2.3. Political Drawbacks of Leniency Programs

There can be political drawbacks with leniency programs on the ground that it is not fair to permit a violator to avoid the consequences of its misbehavior by giving it the right to confess.

However as explained in the OECD Report, the effects of leniency programs that result in detection and conviction of cartels can be much more welfare enhancing than the punishment of an individual violator. Although the antitrust agencies will give up the opportunity to prosecute the party who confesses its violation and fulfils the conditions for benefiting from the program, there will be other members, who will be prosecuted and perhaps could not have been in the absence of the leniency program[45].

Although this justification could be seen as sufficient against the political objections towards leniency programs, it is still important to prevent the first leniency applicant gaining more benefits from the leniency program than is 'strictly necessary to obtain the positive enforcement effects'[46]. Besides, expecting the fulfillment of some conditions such as 'genuine and full cooperation to the enforcement authorities'[47] to make the applicant eligible for benefiting from the program can also contribute to preventing concerns about the possible unfair consequences of leniency programs.

[42] Wils 2007, p.49.
[43] Wils 2007, p.48.
[44] Kekevi 2008, p.18.
[45] OECD 2002, p.26.
[46] Wils 2007, p.50.
[47] Wils 2007, p.50.

Finally, it is also possible to object to leniency program on the ground that it puts the cartel members committing the same infringement into different situations by providing the leniency applicant protection from sanctions on the one hand, while punishing other cartel members on the other. As stated by Wils, it is important to design and apply leniency program in a 'transparent and consistent way' so that it is possible for all cartel members to have the sufficient information about this program and to apply it for its benefits[48].

All in all, at the end of the day 'the point of leniency programs is not to maintain a morally defensible justice system but to provide a means of deterring, destabilizing and uncovering cartels, so that in the end they may cease a phenomenon'[49].

4. LENIENCY AS A COMPLEMENTARY TOOL IN FIGHTING AGAINST CARTELS

An ideal cartel policy is the one that can incentivize cartel members in such a way that collusion is not sustainable for them anymore[50]. Despite all the benefits that the leniency programs provide in detection and deterrence of the cartels through increasing the incentives of the members to self-report and be exempted from fines, there are other enforcement tools that the competition authorities must use in fighting against cartels.

The first reason for this is that, as explained above, the introduction of leniency programs may facilitate collusion by reducing the expected cost of the misbehavior of the cartels unless they know that they can be caught at anytime by the competition authority and will be subject to high fines[51].

Secondly, again as explained above, according to some statistical data, in most of the cartel cases based on evidence from leniency programs, the break down of the cartels was imminent. Then, under such circumstances it is possible to say that cartels, which are aware of the fact that they will break down in the near future, may want to use the leniency program in order to reduce their penalty levels. Therefore leniency, which can be seen as a 'terminal care' for the cartels in such situations, cannot be the only tool to deter cartels. As stated by

[48] Wils 2007,p .54.

[49] JONES A., and B. SUFRIN (2008), "EC Competition Law", 3rd edition, Oxford University Press, New York, p.1249.

[50] FRIEDERISZICK, H. W. and F.P. MAIER RIGAUD (2007), "The Role of Economics in Cartel Detection in Europe", http://www.esmt.org/fm/312/Role_of_Economics_in_Cartel_Detection_in_Europe.pdf, Date Accessed: 03.07.2010, p.9.

[51] MOTCHENKOVA, E. (2004), "Effects of Leniency Programs on Cartel Stability", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617224, Date Accessed: 15.07.2010, p.26.

Bloom, "If sanctions are weak and there is a very low probability of being uncovered, even a very well designed program is unlikely to be effective"[52].

Leniency programs, hence, are indeed complementary to the threat of high sanctions and the perception that detection is likely (without the leniency program)[53]. Furthermore, transparency and certainty within the system as a whole are indispensable for a successful leniency program.

4.1. Threat of High Sanctions

It is important for the deterrence of cartels that high sanctions will be waiting for the cartel members who do not choose to apply for the leniency program. The logic behind such sanctions in cartel deterrence should be to 'decrease the expected benefits of belonging to the cartel, by credibly increasing the expected value of fines to be paid'[54].

Considering the fact that, firms join cartels with the expectation of high profits, small fines will not be enough to deter cartel creation. Unless the fines are large enough to discourage firms from creating cartels, they may see these fines simply as 'tax or a cost of doing business'[55].

These types of sanctions can differ according to different jurisdictions and it is obvious that where it is possible for individuals to be subjected to criminal liability, the incentive to apply for the leniency program would be significantly higher. As Hammond states: 'the threat of criminal sanctions and individual jail sentences provides the foundation for an effective leniency program'[56].

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[52] BLOOM, M.(2006), "Despite Its Great Success, the EC Leniency Program Faces Great Challenges", EUI-RSCAS/EU Competition 2006 – Proceedings, European University Institute Robert Schuman Centre for Advanced Studies 2006, *EU Competition Law and Policy Workshop Proceedings*, http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Bloom.pdf, Date Accessed: 15.07.2010, p.22.

[53] Stephan 2008, p.560.

[54] AZEVEDO, J. P.(2003), "Crime and Punishment in the Fight Against Cartels: The Gathering Storm", *European Competition Law Review*, 24(8), p.404.

[55] Hammond 2009, p.7.

[56] Hammond 2009, p.6; However, there are arguments in the literature that are against criminal sanctions for individual executives. For instance, Levenstein and Suslow, within an economical and legal framework, asserted that criminal punishments involves 'costly losses' because 'managers' productivity is less during their period of incarceration, and resources must be devoted to the construction and operation of prisons.' However, they raised the idea that, the fines imposed on the cartel may result in the bankruptcy of a firm which causes the reduction of suppliers number in a market and lessens competition and yet it may not be deterrent for the executives. In such cases criminal sanctions may be the only means 'to alter the incentives of corporate executives.' (see Levenstein and Suslow 2001); O'Donoughe also raises an argument against

However it is still possible to provide the deterrence effect via high financial sanctions. What matters is 'not (to) stop at halfway measures'[57]. As stated by Azevedo, 'Tools like sanctions and leniency should be utilized to their full potential. In that sense, sanctions should be as high and serious as possible in order to deter the creation of cartels while leniency schemes should be as certain and complete as possible to destabilize cartels'[58].

4.2. Fear of Detection

High sanctions are not enough for cartel deterrence if firms do not perceive the risk of getting caught by the competition authorities. Cartel members must be aware of the fact that, even if they do not apply for the leniency program and confess their misbehavior voluntarily, there will be an antitrust authority that will detect them. Such a risk of detection will give them the necessary incentive and encouragement to come forward[59].

As stated by Wils, this risk may arise from two different sources. It could be a specific risk for the cartel members concerning their own cartel formation as the antitrust authority had already started to collect or received information about the violation or at least the firms believe this to be the case. It can also be a general risk arising from the fact that the antitrust authority has a reputation for successfully detecting and prosecuting cartels[60].

In order for the competition authorities to deter and prosecute cartels successfully, they must have access to every enforcement power[61]. An antitrust authority having the necessary powers of detection and prosecution and the reputation for using them successfully, will inevitably make cartel members more anxious with the fear of being detected. This position can create distrust between cartel members and thus start a race to be the first to apply for the leniency program[62].

Such fear of detection not only creates a competition between the cartel members with regard to applying for the leniency program, but can also create the same race between the individual executives and the companies if the leniency policy in the related jurisdiction does have such an individual leniency

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criminal sanction for cartels on the grounds that imprisonment of business people may affect their 'preparedness to assist leniency applications' which may create unintended implications for the EU leniency program.(see Levy and O'Donoughe, p.96).

[57] Azevedo 2003, p.406.

[58] Azevedo 2003, p.406.

[59] ICN 2009, p.3.

[60] Wils 2007, p.41.

[61] Hammond 2009, p.8.

[62] Hammond 2009, p.8.

program as in the US example. As stated by Hammond: 'The real value and measure of the Individual Leniency Program is not in the number of individual applications received, but in the number of corporate applications it generates'[63]. This is because companies, under the pressure and fear of the possibility that their executives can exploit the leniency mechanism, will want to act first as the individual leniency policy does not allow companies to benefit from the leniency applications made by the individuals.

Therefore, such political choices can have a positive effect on the increase in leniency applications through benefiting from the fear of detection created on the cartel member firms.

The fear of detection entails that an antitrust authority has a good reputation and high levels of cartel detection[64]. In order to achieve this aim, in some jurisdictions leniency programs can also include mechanisms such as 'amnesty plus'[65] and 'penalty plus'[66] which give strong incentives for the companies already within in an ongoing investigation or involved in a prior offense to self-report potential antitrust violations in other markets[67] or 'cartel profiling'[68] that may expand investigations to include additional markets, in particular other markets in which some of the same cartel participants operate[69].

4.3. Transparency and Predictability

One of the conditions of having a successful leniency program that can induce cartel members to come forward is the existence of transparent and certain rules on how the program works, how they will be treated if they report the violation

[63] Hammond 2009, p.9.
[64] Hammond 2009, p.10.
[65] Amnesty plus: "Pursuant to the amnesty plus policy, an applicant that does not qualify for leniency for the initial matter under investigation, but discloses a second cartel, and meets the leniency program requirements for the second matter, will receive leniency for the second offence and lenient treatment for its participation in the first offence." (ICN 2009, p.5).
[66] Penalty plus: This provides that if an applicant participated in a second cartel and does not report it under the amnesty plus policy, enforcers will urge the sentencing authority to consider the company's, and any of its culpable executives', failure to report the conduct voluntarily as an aggravating sentencing factor."(ICN 2009, p.5).
[67] "Tailoring Compliance Programs to Address the Antitrust Division's Tools for Expanding Cartel Investigations', (2009), by WilmerHale, http://www.wilmerhale.com/publications/whpubs-detail.aspx?publication=9161, DateAccessed: 10.08.2010.
[68] Cartel profiling: In US, using cartel profiling techniques, "The Division will target its proactive efforts in industries where it suspects cartel activity in adjacent markets or which involve one or more common players from other cartels. When the Division can identify culpable executives, it begins digging deeper to determine whether they had pricing authority on other products over time and then for indicia of collusion in those products as well." (Hammond 2009, p.11).
[69] 'Tailoring compliance programs to address the Antitrust Division's tools for expanding cartel investigations' 2009.

and what the consequences of the revelation will be.

Therefore, a successful leniency program should clearly determine the conditions of being exempted from the penalties or having fine reductions. Moreover, the success of the program also depends on its publicization. Thus it is important for the competition authorities to make the program well advertised with all its features. For this purpose, the US Antitrust Division has published numbers of papers to make the Leniency Program more clear and even created a model conditional amnesty letter to make it ready for any possible applicants to review[70]. Conferences regarding leniency program are also the part of the efforts to provide the awareness of public. Moreover, brochures like the one prepared for the presentation of the Brazil's Leniency Program[71] is also another way to make the leniency program more transparent, more predictable and reliable.

It is also important to determine that the leniency program will be equally applicable to information disclosed before and after an investigation has started.

However, in the literature based on an economic perspective, there have been different views about the timing of the application to gain immunity or reductions in fine. Although there are some views as to giving the same amount of reduction for the wrongdoers not detected and the ones who are under investigation[72], some scholars have defended giving less discount for the latter type of wrongdoers on the grounds that fine reduction means net awards for such firms for which there is more probability of being found guilty compared with undetected wrongdoers[73]. Yet, it can still be argued that, although the fine reduction for the firms who are already under investigation and who apply for the leniency program may decrease the deterrence effect of these programs, they should still be given these reductions as their cooperation even at that stage will at least decrease the investigation costs[74].

EU leniency program, which is mostly based on the US experience and ECN Model Leniency program, is highly instructive as to the above-mentioned elements of a successful leniency program. Therefore, we will analyze the 2006 Leniency Notice of the EU in light of the abovementioned explanations and then

[70] Hammond 2009, p.9.
[71] Fighting Cartels: Brazil's Leniency Program (2009), 3rd. ed.
Secretariat of Economic Law, Antitrust Division Council for Economic Defense Ministry of Justice, Brazil , http://www.oecd.org/dataoecd/52/22/43619651.pdf, Date Accessed: 05.02.2011.
[72] Motta and Polo 2003, p.375.
[73] Spagnolo 2006, p.26.
[74] Brenner 2009, p.640.

move on to the new Turkish Leniency Regulation, which will give us the chance to draw comparisons with that of the EU.

5. OVERVIEW OF THE 2006 EUROPEAN LENIENCY NOTICE

The first leniency program at EU level was introduced in 1996 in light of the success of the 1993 reforms to the Amnesty Program in the USA and it was revised in 2002. On December 8, 2006 the Commission adopted a new Leniency Notice benefiting from the experience it gained in applying the 2002 Notice and introducing some amendments. These changes were adopted in line with the ECN Model Program, which 'sets out the essential procedural and substantive requirements that the ECN members believe every leniency program should contain'[75].

Despite the effectiveness of the 2002 Leniency Notice in convincing cartel members to reveal their violations and cooperate with the Commission[76], there was still need to make the program more transparent and effective. As stated by the Commission, the proposed changes to the Leniency Notice were aimed at 'providing more guidance and clarity for companies applying for immunity'[77]. The Commission also stated that this clarification would provide better guidance for companies as to what their applications for the leniency program should contain.

In its entirety, the 2006 Leniency Notice explains the conditions, requirements and procedures for immunity and reduction of fines, introduces a marker system for immunity applicants, allows oral corporate statements and guarantees greater protection for confidential corporate submissions[78].

[75] EUROPEAN COMMISSION PRESS RELEASE (2006b), "Revised Leniency Notice - Frequently Asked Questions*",* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/469&format=HTML&aged=0&language=EN&guiLanguage=en, Date Accessed: 17.07.2010.

[76] As stated by the previous Competition Commissioner Kroes, 'By the end of 2005, twice as many applications had been submitted under the new Notice as compared with its predecessor.' '…total of one hundred and sixty-seven applications up to end of 2005 under the 2002 Notice was made by companies…'.
KROES N. (2006), "Enforcement of Prohibition of Cartels in Europe", *European Competition Law Annual,* http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Kroes.pdf, Date Accessed: 15.07.2010, p.3.

[77] European Commission Press Release (2006b).

[78] GRASSO, R. (2008), "The EU Leniency Program and US Civil Discovery Rules: A Fraternal Fight?", *Michigan Journal of international law,* Vol.29: 565, p.576.

The 2006 Leniency Notice envisages cumulative conditions for granting immunity[79]. In order for a firm to qualify for immunity from any fine, it must be the first to submit information and evidence the quality of which must enable the Commission either to 'carry out a targeted inspection'[80] or 'to find an infringement of article 81 EC in connection with the alleged cartel'[81] together with the condition that 'the Commission has no sufficient evidence to carry out an inspection in relation to the cartel at the moment it receives the application'[82]. A party providing one of these types of information and evidence must also 1-'cooperate genuinely, fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure'[83], 2-'end its involvement in the alleged cartel" unless otherwise allowed by the Commission'[84] and 3- 'it must not have destroyed, falsified or concealed evidence of the alleged cartel'[85] when it had formed the intention to make application to the Commission. The Notice also clarifies that if the applicant firm coerced other undertakings to join the cartel or to remain in it, it would not be possible for it to receive immunity[86].

The information that should be provided by the applicant and that should allow a 'targeted inspection' includes the necessity of providing more detailed evidence than was required by previous Notices[87]. Moreover, in case the Commission has already carried out an inspection concerning an alleged cartel or has sufficient evidence to carry out an inspection, the applicant shall also provide 'contemporaneous, incriminating evidence of the alleged cartel'[88] apart from the corporate statement.

This increase in the standard of evidence required to make a successful immunity application may be compensated, to some extent, by the adaption of the discretionary 'marker system'[89] which has been available in US for a long

[79] INCARDONA, R. (2007), "International and European Business and Competition Law, the Fight Against Hard-core Cartels and the New EU Leniency Notice", *The European Legal Forum*, Issue 1/2, p.39.
[80] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (Text with EEA relevance) (2006/C 298/11), http://eur-lex.europa.eu/lexuriserv/lexuriserv.do?uri=celex:52006xc1208(04):en:not, Date Accessed: 20.06.2010, Art. 8(a).
[81] Commission's Leniency Notice, article 8(b).
[82] Commission's Leniency Notice, article 11.
[83] Commission's Leniency Notice, article 12(a).
[84] Commission's Leniency Notice, article 12(b).
[85] Commission's Leniency Notice, article 12(c).
[86] Commission's Leniency Notice, article 13.
[87] Commission's Leniency Notice, article 9(a).
[88] Commission's Leniency Notice, article 11.
[89] MORGAN, E. J. (2009), "Controlling Cartels - Implications of the EU Policy Reforms", *European Management Journal*, Volume 27, Issue, p.4.

time and was introduced in the EU Leniency policy under the 2006 Leniency Notice. This system allows an immunity applicant to reserve its first place in the queue for immunity by only providing limited information related to the alleged cartel and without presenting all the evidence. The Commission may grant a marker and give a certain time for the applicant to perfect its application and following the receipt of the required information and evidence provided by the applicant, it then grants the conditional immunity from fines 'as if the application was submitted on the date the marker was granted'[90]. It is also important to note that, under the 2006 Leniency Notice, the marker system only applies to immunity applicants and not to applicants applying for a reduction in their fines.

The Notice retains the possibility of immunity applications in 'hypothetical terms'[91] meaning that it is possible for a firm to present a detailed descriptive list of evidence that it intends to disclose at a later date in an anonymous form and requires an assessment from the Commission to see if the evidence satisfies the conditions for immunity.

In the event that a firm's immunity application has been rejected by the Commission, because either it was not the first to apply or it failed to meet the evidentiary threshold for immunity, it may still be eligible for a reduction in fines.

The first condition for a firm to receive a reduction in fines is the presentation of evidence representing 'significant added value'[92]. The conditions necessary to obtain immunity (genuine, full cooperation and termination of the infringement) are also required for getting reduction in fines[93].

The scale of reductions in the 2002 Notice remained the same in the 2006 Notice and envisaged, for applicants providing significant added value, reductions in fines are between 30% and 50% for the first firm, between 20% and 30% for the next firm and up to 20% for subsequent firms[94].

The presentation of the evidence which may, for instance, alert the Commission about the seriousness of the alleged cartel behavior or the length of time it has been in operation, and which may strengthen the Commission's ability to prove infringement accordingly, will be the basis for the evaluation of

[90] Incardona 2007, p.40.
[91] Commission's Leniency Notice, article 15.
[92] Commission's Leniency Notice, article 24.
[93] Wils 2007, p.31.
[94] Commission's Leniency Notice, article 26.

the 'added value' concept[95]. The 2006 Notice also states that the evidence provided should be of such a kind that it does not require corroboration ('compelling evidence'[96]) to have greater value.

The 2006 Notice also includes the possibility of applying for partial immunity[97]. As stated in the Notice: 'If an applicant for a fine reduction is the first to submit compelling evidence which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement the Commission will not take such additional facts into account when setting any fines to be imposed on the undertaking which provided this evidence'[98].

Finally it is important to mention two further procedural contributions of 2006 Notice into the overall EU Leniency program, which are the possibility of making 'oral corporate statements' and 'the specific procedure to protect corporate statements'.

The important new concept of oral corporate statements was introduced to prevent the possibility of corporate statements made by the leniency applicants from being subject to disclosure orders in private litigation[99]. Such a concept was introduced in the Notice in line with the aim of the Commission to prevent potential leniency applicants from being dissuaded by the fear of impairing their position in civil proceedings[100].

Moreover, the protection of corporate statements is seen as the duty of the Commission 'to pursue a general policy' beside its other duties to investigate and punish infringements[101]. In line with this duty, access to

[95] Morgan 2009, p.4.
[96] Commission's Leniency Notice, article 25.
[97] Wils 2007, 32.
[98] Commission's Leniency Notice, article 26.
[99] Incardona 2007, p.41- It should be noted that, as stated by Riley, 'in order to protect the leniency process and the flow of leniency applications, the Commission should give serious consideration as to how leniency applications can be protected from civil damages.'. In line with this purpose, another point discussed by the scholars is the immunity or reduction of liability with regard to follow on private damages actions. Because unlike the US leniency program that envisages recuced liability for the companies being granted immunity under the leniency program, EU does not have such an arrangment. However some scholars assume leniency applications in EU follow the approach in the US of non-disclosure because it is consistent with the position set out by the European Commission in the White Paper that says: "adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers".(Green J., McCall I.(2009) Leniency and civil claims: Should leniency programmes extend to private actions?', *Competition Law Insight,* http://www.europe-economics.com/publications/2009cli_1.pdf , Date Accessed:05.02.2011).
[100] Commission's Leniency Notice, article 6.
[101] Commission's Leniency Notice, article 7.

corporate statements will only be granted to the addressees of a statement of objections provided that they undertake not to make any copy of any information contained in the corporate statement and to keep its contents confidential[102]. As with the other steps to protect corporate statements, the Notice also contains provisions stating that the use of such information for a purpose other than the administrative proceedings for the application of EC competition rules can cause the refusal of the leniency at the end of the procedure[103] and that third parties will not be entitled to have access to the corporate statements[104].

After this brief explanation with regard to the 2006 Leniency Notice, we will now try to determine whether the overall EU Leniency policy, together with the abovementioned Notice, includes all three prerequisites[105] of a successful leniency program.

5.1. Concerning Transparency and Predictability

Although the 2006 Leniency Notice can be regarded as the 'coming of age of the European Leniency program'[106], considering the guidance it introduced about the conditions of receiving immunity and reduction in fines and the introduction of the marker system, the clarity and consistency of the Notice can be criticized in several ways.

First, despite the evidential threshold stated in a detailed way in the Notice, what matters is its clear, consistent and certain application.

As stated by Freshfields Bruckhouse Deringer's Response to the consultation of the 2006 Notice [107], correctly in my opinion, one of the uncertainties created with the new Notice is a seemingly small vocabulary change in paragraph 8 of the Notice which states the requirements to qualify for immunity from fines. According to this paragraph, 'the Commission will grant immunity to an applicant if it is the first to submit information and in the Commission's view *will* enable it to carry out a targeted inspection or find an infringement' (my italic). However, in the previous notice the word 'may' was

[102] Incardona 2007, p.41.
[103] Commission's Leniency Notice, article 34.
[104] Commission's Leniency Notice, article 34.
[105] see p.18 above.
[106] Stephan 2008, p.559.
[107] FRESHFIELDS BRUCKHAUS DERINGER, "Response dated 27 October 2006 to Commission of the European Communities DG Competition, Consultation on the Draft Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases Published on 29 September 2006", http://ec.europa.eu/competition/cartels/legislation/files_leniency_consultation/fbd.pdf, Date Accessed: 01.08.2010.

used instead of 'will'. Therefore, it is clear that, the evidentiary threshold has been raised with the new Notice bringing an uncertainty along with itself as it can be harder to meet this higher condition[108].

During the public consultations on the amendment of the Leniency Notice, Linklaters[109] raised its concerns with regard to the term 'targeted inspection'. Linklaters presents the idea that such a wording gives the Commission 'excessively wide discretion' in the evaluation of an application and the decision on whether it is eligible to receive conditional immunity, which is a factor that can prevent firms from coming forward[110].

Another criticism with regard to the evidential threshold of the new Notice was made by Griffin and Sullivan. According to these authors, the condition of providing 'significant added value' in order to be eligible to receive fine reduction can be defended on the ground that the Commission would not like to grant reduction for little or no evidence; however it can be criticized at the same time, as it creates a higher threshold for the applicants intending to come forward but cannot do due to this condition[111]. Moreover, as stated by Grasso, just like the gap in the 2002 Notice, the new Notice also has a gap in determining what makes an 'added value' 'significant'[112]. It can also create a barrier for the possible applicants to come forward as they will not be able to know if they can satisfy the significant added value condition. What is meant by the 'compelling evidence' is also of a concern in terms of clarity and certainty as it is not possible to understand the purpose of this statement.

There are further criticisms in the literature with regard to the discretionary 'marker system'. As Incardona asserts, such a discretion on giving marker creates uncertainties which may 'reduce the attractiveness, which the marker system is supposed to bring to firms' intending to apply for the leniency program[113]. It is possible to operate a marker system that does not include the discretion of the Commission as seen in the systems of some Member States

[108] Freshfields Bruckhaus Deringer 2006, p.4.
[109] LINKLATERS (2006), "Response to the European Commission's Draft Leniency Notice", http://ec.europa.eu/competition/cartels/legislation/files_leniency_consultation/linklaters.pdf, Date Accessed: 01.08.2010.
[110] Linklaters 2006, p.3.
[111] GRIFFIN, J.M. and K.R. SULLIVAN (2008), "Recent Developments in Leniency Policy and Practices in Canada, the European Union and the US", *Paper presented at the ABA "Advanced International Cartel Workshop in San Francisco* cited in RILEY, A.(2010), "The modernisation of EU Anti-cartel Enforcement: Will the Commission Grasp the Opportunity?", *European Competition Law Review*, Vol.31(5), p.195.
[112] Grasso 2008, p.578.
[113] Incardona 2007, p.40.

such as Austria, Denmark, Greece and Sweden[114]. However it should be noted that in most of the leniency texts inluding ECN and EU texts, the common application with regard to the marker system is the use of discretionary power by the competition authorities; but as suggested by Kekevi, other than extraordinary situations, it is expected that dicretionary power will be used in the affirmative way for the applicants applied for a marker[115].

Moreover, the information requested from an applicant to reserve a place in the queue through the marker system is excessive in the Notice which is not something included in the US system on which the EU program mostly based.

5.2. Concerning Threat of High Sanctions and Fear of Detection

As explained above, in order to have a successful leniency policy as a whole, it is important to emphasize once again that 'leniency and punishment should go hand in hand and be integrated as one policy'[116]. This is the only way to provide deterrence in fight against cartels.

Therefore, we will try to analyze the 'punishment leg' of EU leniency policy in order to see if it creates the necessary deterrence. First of all it should be noted that, in the aspect of the leniency policy, the deterrence can be provided by the introduction of fines large enough to discourage prospective cartels and by the establishment of an effectively operating antitrust authority[117].

The Commission's fine setting method depends on the new 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003'[118] ('2006 Fining Guidelines') This Guideline introduces higher fines compared with the 1998 Guidelines[119] and changes adopted to increase the transparency and predictability of policy to add to its deterrent

[114] ECN Model Leniency Programme*, Report on Assessment of the State of Convergence,* http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf., Date Accessed: 17.07.2010, p.15.
[115] Kekevi 2009, p.104.
[116] BILLIET, P.(2009), "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *European Competition Law Review*, 30(1), p.18.
[117] MOTTA, M. (2008), "On Cartel Deterrence and Fines in the European Union", *European Competition Law Review*, 29(4), p.212.
[118] Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:2:0005:EN:PDF, Date Accessed: 20.06.2010.
[119] 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] OJ C9/3, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y0114(01):EN: NOT, Date Accessed: 20.06.2010.

effect[120]. The 2006 Fining Guidelines introducing an application of the fines in two steps, firstly determine the basic amount of the fine and secondly adjust this value according to the existence of any aggravating or mitigating circumstances[121]. The basic amount of the fine depends on a proportion of the value of the undertaking's sales of goods or services which can be up to 30 % of the firm's annual sales of the affected goods or services in the relevant geographic market within the European Economic Area (EEA). For secret cartels the basic amount will generally be set at the higher end of the scale and regardless of the length of the infringement, a sum of between 15 % and 25 % of the value of sales will also be included in the basic amount[122].

Changes that may increase the deterrent effect of the fines can be seen, for example, in provisions envisaging tougher fines for the repeat infringements[123], the fact that long running cartels will be punished with higher penalties[124] and the newly introduced 'entry fee'[125]. All of these changes have the intention of discouraging cartel formations.

Despite such positive aspects, the 2006 Fining Guidelines can still be criticized on different grounds. For example, as stated by Riley, referring to Lever, that the calculation of the damages depending on the turnover criterion may cause the punishment of a very incompetently run cartel that is having a small effect on the market with very high fines[126]. According to Riley, 'the focus on heavy penal sanctions should be on those antitrust violators who have had a significant market effect and have made substantial profits'[127].

Another point to consider is how to determine the level of fines sufficient to induce leniency applications. Currently the only available sanction for cartels at the EU level is fines of up to 10 % of undertaking's worldwide turnover. Although there are views in the literature considering the fine levels being imposed in EU as a 'good model'[128] in determining the right level of penalization for cartels, some criticizes the EU fining policy due to its lack of criminal sanctions, which is a greater deterrent factor for cartel formation.

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[120] Morgan 2009, p.7.
[121] Morgan 2009, p.7.
[122] Wils 2007, p.31.
[123] 2006 Fining Guidelines, article 28.
[124] 2006 Fining Guidelines, article 24.
[125] 2006 Fining Guidelines, article 25.
[126] LEVER Q.C (2009), "Whether and if so How, the EC Commission's 2006 Guidelines on Setting Fines for Infringements of Articles 81 and 82 of the EC are Fairly Subject to Serious Criticism', *BDI Law and Public Procurement* cited in Riley 2010, p.201.
[127] Riley 2010, p. 201.
[128] Hammond 2009, p.7.

The EU does not have criminal powers and cannot put cartel offenders in prison and 'no individual in his or her capacity as an employee, director or officer can be fined or otherwise'[129]. The only deterrent factor on which the EU leniency policy depends is the high level of fines against undertakings.

However, there is an increasing tendency in the literature suggesting criminal sanctions for the EU leniency policy by taking into account the successful US example. Some grounds for introducing criminal sanctions for cartel offenders that is defended in the literature can be summarized as follows: Criminal sanctions for cartels, which cause greatest harm to the competitive structure in the EU, presents a better deterrence than financial penalties and 'a jurisdiction without individual liability and criminal sanctions will never be as effective at inducing amnesty applications as a program that does'[130]. This is because, individuals who have most to lose and who wish to avoid jail sentences will be more inclined to report violations. Moreover, as stated by Riley, fines against undertakings cannot deter the 'rogue director' as individual executives can be more inclined to engage in price fixing for their own sake[131] and this is another ground to introduce criminal sanctions for individual executives.

This suggestion brings with the idea of introducing an 'individual leniency program[132] at the EU level on the grounds that such a policy giving individual executives the opportunity to apply for leniency programs would also strengthen the possibility of applications made by the undertakings. As Riley claims, 'undertakings understand that if they don't make a leniency application, then for fear of personal fines and a jail sentence one or more of their executives will make an individual leniency application.'

This acts as a significant additional pressure on undertakings to file for leniency[133]. It should be noted that, if criminal penalties for individuals are introduced in the EU leniency program without making leniency available for individuals, criminal penalties will decrease the effectiveness of the leniency policy and thus not create the expected deterrent effect. This is because, for firms that care about their staff, the application for leniency means exposing

[129] Riley 2010, p.203.
[130] Hammond 2009, p.7.
[131] Riley 2010, p.204.
[132] This means that "when a company is the first to apply for immunity, it can also obtain immunity for its cooperating staff, but that immunity is normally no longer available for a company if an individual has applied for it earlier." (Wils 2007, p.55)
[133] Riley 2010, p. 204.

their staff to punishment and that may discourage them from doing so accordingly[134].

Moving on to the efficiency of the European Commission in the detection and prosecution of cartels, it can be said that, despite the possible statistical data that can be collected, this would not present the whole picture with regard to the effectiveness of the Commission in the fight against cartels. This is because it is not possible to have full information on the number of cartels existing in a market[135]. However, as claimed by Motta, 'overall the European Commission is an efficient competition authority which devotes many resources to cartel investigations, defends quite successfully cases in the Community courts, and has set up a leniency procedure which increases the probability that, if formed, a cartel is uncovered'[136].

The introduction of higher fines in the 2006 Fining Guidelines was also an attempt by the Commission to increase cartel deterrence. As stated by Wils, 'effective deterrence does not require that each and every violation is detected and punished but rather that the expected penalty, which is a function of both of the probability of detection and punishment and of the size of the penalties imposed, exceeds the expected gains of antitrust infringements'[137].

Furthermore, the settlement procedure introduced for the first time in Europe with the Commission Regulation (EC) No.622/2008 is another attempt to minimize the costs and resources used in investigating potential violations; thus to reach greater efficiency in terms of timely management and deterrence[138].

6. OVERVIEW AND EVALUATION OF THE TURKISH LENIENCY POLICY

6.1. Overview

'Leniency' concept was first introduced in Turkish competition law with the law numbered 5728 and dated January 23, 2008 enacted to Article 16 of Turkish Competition Act ('the Act') numbered 4054. Until this amendment there was not any provision in Turkish competition legislation that envisages a leniency program, although there was the possibility of mitigating fines in the old version of the Act. However, according to a scholar view, even this possibility did not

[134] Wils 2007, p.56.
[135] Motta 2008, p.213.
[136] Motta 2008, p.213.
[137] WILS, W. P.J.(2009), 'The Relationship Between Public Antitrust Enforcement and Private Actions for Damages", *World Competition*, Vol. 32, Issue 1, p.10.
[138] Grasso 2008, p.584.

give way to a total immunity, as there had to be a minimum set of fines for substantive infringements[139] despite the fact that the Turkish Competition Authority ('the TCA') had some contrary decisions to this argument even before the abovementioned amendment[140].

The amendment introduced with the law no. 5728 conferred the TCA the competence to introduce a regulation on the application of a leniency program and the TCA issued the 'Regulation on Active Cooperation for Detecting Cartels'[141] ('the Leniency Regulation') on February 15, 2009 depending on this authority. The TCA did also refine its policy on fines with the 'Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition'[142] ('the Fines Regulation') that was issued on the same date. Through these regulations, the TCA aimed at providing a new regulatory framework for its enforcement policy in line with the ongoing process to align Turkish Competition Law more closely to EU Law[143].

The aim of the Leniency Regulation was defined as 'to regulate the principles and procedures in terms of non-imposition and reduction of fines mentioned in paragraphs three and four of Article 16 of the Act with regard to those making an active cooperation with the Authority for detecting and investigating cartels'[144].

Despite the fact that, there had been applications in the past decisions of the Turkish Competition Board ('the TCB') resembling leniency applications[145], there was not a legal basis determining the substantive and procedural rules of

[139] GURKAYNAK, G.(2009), Turkey: A New Era In Turkish Antitrust Enforcement: Leniency Program And Regulation On Fine Calculation, http://www.mondaq.com/article.asp?articleid=74588, Date Accessed: 05.07.2010.

[140] Konya Surucu Kurslari II (dated 26.07.2007 and no.07-62/761-263) and Konya Surucu Kurslari (dated 23.08.2007 and no 07-68/838-309) Decisions where the TCA did not apply any fine at all despite the presence of 'minimum set of fines for substantive infringements' rule of the Act.

[141] Regulation on Active Cooperation for Detecting Cartels, dated 15.02.2009, published on the Official Gazette of Republic of Turkey dated 27142, <http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik10.pdf>, Date Accesssed: 25.06.2010.

[142] Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, dated 15.02.2009, published on the Official Gazette of Republic of Turkey dated 27142, http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik11.pdf, Date Accesssed: 25.06.2010.

[143] SOMAY, M.(2010), "Recent Developments in Turkish Competition Law: Bridging the Gap to Europe?", *The European Antitrust Review,* http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/779/turkey/, Date Accessed: 17.07.2010.

[144] Fines Regulation, General Preamble Article 5.

[145] For eg. Competition Board Decision No.08-26/283-91, dated 27.03.2008 ("Trafik Sinyalizasyon" decision where the TCB applied leniency program on its on initiative for the first time before the publication of the Leniency Regulation)

such applications in a clear and consistent manner in the way the Leniency Regulation provides.

In its entirety, the Leniency Regulation provides the possibility of receiving immunity or reduction of fines both for undertakings and directors or employees of the undertakings, meaning that the regulation contains provisions for both corporate and individual leniency applicants and sets the conditions, requirements and procedural rules for these processes. Such an approach makes the Turkish Leniency Regulation different both compared with EU Leniency Notice, as this Notice does not include individual leniency and with US leniency program as in US there are two separate programs for corporate and individual leniency policy while Turkish Leniency Regulation includes two separate parts for these programs in the same Regulation.

After defining its purpose, scope and basis in the first part, the Regulation states the conditions, requirements and procedures for corporate applications in the second, for individual applications in the third part.

In line with the EU Notice, the Leniency Regulation also determines two different possibilities for corporate immunity. In the event that the TCB has not decided to carry out a preliminary inquiry yet, the first undertaking, which submits the information and evidence, independently from its competitors, will be granted immunity from fines[146]. It should be noted that, this is an automatic immunity possibility for which the TCB does not have any discretionary power. On the other hand, if the TCB has already started a preliminary inquiry or an investigation, the first undertaking which submits the information and evidence, independently from its competitors, as of the decision by the Competition Board to carry out preliminary inquiry until the notification of the investigation report, shall be granted immunity from fines on condition that the TCA does not have, at the time of the submission, sufficient evidence to find the violation of Article 4 of the Competition Act[147]. In the event that the undertaking is eligible for receiving immunity, the directors and employees of will be as well[148]. The applicant meeting one of these conditions must also 1- submit (i) information on the products affected by the cartel, (ii) information on the duration of the cartel, (iii) names of the cartelists, (iv) dates, locations, and participants of the cartel meetings, and (v) other information/documents about the cartel activity. 2- avoid concealing/destroying the information/documents on the cartel activity. 3- cease to be a party to the cartel (unless otherwise requested by the TCA); 4- keep the submission of evidence confidential until the submission of the investigation

[146] Leniency Regulation, article 4.
[147] Leniency Regulation, article 4(2).
[148] Leniency Regulation, article 4(3).

report (unless otherwise requested by the TCA); and 5- continue to actively cooperate with the TCA until the final decision on the case has been rendered[149]. Just as in the EU Notice, not being the coercer of the violation is another requirement for the applicant to be eligible for receiving immunity.

With regard to individual leniency applications by the directors or employees of it, similar principles will be valid as well[150].

An undertaking, which is not eligible to receive immunity either because it was not the first one to apply before the preliminary inquiry decision or because the TCA has sufficient evidence to find the violation despite the undertaking was the first to apply after the preliminary inquiry decision, may still apply for reduction of fines when it applies independently from the other members to the cartel within the time frame between a decision by the TCA to conduct a preliminary inquiry and the notification of the investigation report[151]. The type of evidence and information that is required to be submitted and other requirements aforementioned are also valid for this applicant to receive fine reduction. The reduction amounts for such applicants will be determined according to their timing to apply for the program, just as in the EU Notice. The Regulation envisages reduction in fines of are 1/3 to 1/2 for the first applicant; 1/4 to 1/3 for the second applicant and 1/6 to 1/4 for the subsequent applicants on the condition that they provide the necessary information[152].

The Leniency Regulation also determines a fine scale for the directors and employees of the undertakings who confess the violation and cooperate with the TCA. In such cases, these directors and/or employees, subjected to the same conditions[153] mentioned above, will also benefit from relevant reductions or they will not be fined at all[154]. Kekevi claims that, these provisions giving the directors and/or employees the opportunity to avoid from fines partially or totally, aims at providing high standard evidence from such internal sources in the process of disclosing cartels[155].

In Wil's words, the possibility of 'partial immunity'[156] is recognized in the Turkish Leniency Regulation as well, meaning that 'If the applicant for a reduction of a fine is the first to submit evidence as a result of which the amount

[149] Leniency Regulation, article 6.
[150] Leniency Regulation, article 9.
[151] Leniency Regulation, article 5(1).
[152] Leniency Regulation, article 5(1).
[153] Leniency Regulation, article 8(1).
[154] Leniency Regulation, article 5(1).
[155] Kekevi 2009, p.91.
[156] Wils 2007, p.32.

of the fine should increase due to increase of gravity or duration of the infringement or similar reasons, the TCA will not take such additional facts into account when setting any fine to be imposed on the undertaking which provides this evidence'[157].

Finally, it is necessary to mention about some procedural issues brought with the Leniency Regulation. Pursuant to Articles 6 and 9 of the Regulation, corporate or individual applicants for the leniency program can be given time to submit the information and evidence mentioned above and complete their applications. This 'marker system' brought with the Regulation, is not restricted with the immunity applications unlike the EU Notice, and is also valid for reduction of fines applications. Furthermore, the applicants are only required to submit information concerning affected products, the duration of the cartel and the names of the parties to the cartel whereas in the EU Notice, additional information such as the geographical market affected by the cartel and possible competition authorities applied or are planned to apply are also required.

Another difference between the EU Notice and the Turkish Leniency Regulation in terms of procedural issues is that the 'hypothetical application' possibility has not been clearly stated in the Turkish system on the contrary to the EU Notice[158].

The 'oral statements' procedure which is a new concept in the EU leniency system brought with the 2006 Notice is also recognized in the Turkish Leniency Regulation with the statement that 'The application and request for time to prepare information and evidence, if any, shall be made by the representative of the undertaking in writing. However, the information mentioned in subparagraph (a) of paragraph one may be submitted orally'[159].

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[157] ÖNDER N.T. (2009), "Turkey: Turkish Competition Authority Published Regulation On Immunity From Fines And Reduction Of Fines In Cartel Cases On 15 February 2009", http://www.mondaq.com/article.asp?articleid=74918, Date Accessed: 05.07.2010.

[158] However, it should be noted that, there is also not any provision in the Turkish Leniency Regulation that hinders the hypothetical application possibility. As stated by Kekevi, the difference between Turkish and EU system on hypothetical application possibility can be arisen from the fact that, in the Turkish system, 'information and evidence the quality of which must enable the Commission either to carry out a targeted inspection or to find an infringement of article 81 EC in connection with the alleged cartel' are not envisaged as a condition for leniency application on the contrary to the EU system and therefore, there is no need for the possible leniency applicants to present their documents to the Authority just to make them be evaluated within the framework of these conditions. (Kekevi 2009, p.103).

[159] Leniency Regulation, articles 6(3) and 9(3).

The EU and Turkish systems also seem similar with regard to the 'amnesty plus'[160] system. However, unlike the EU Notice, Turkish system does have in fact area of application for amnesty plus. Despite the fact that the Turkish Leniency Regulation does not include this term, it can be seen that Fines Regulation envisages amnesty plus[161] by stating that 'In an ongoing investigation, the fine to be given to an undertaking which cannot benefit from the arrangement for non-imposition of fines under the Active Cooperation Regulation, shall be reduced by one fourth if it presents the information and documents specified under Article 6 of the Active Cooperation Regulation before the Board decides to conduct a preliminary inquiry into another cartel. The provisions of the Active Cooperation Regulation for non-imposition of fines, or reduction in fines to be given, are reserved.[162]' Thus it is possible to state the presence of amnesty plus system in the Turkish system as a difference than that of the EU.

After explaining the general content of the Turkish Leniency Regulation, whether it provides the 'transparency and predictability' condition and whether other two prerequisites of a successful leniency program exist in the Turkish competition legislation overall will be analyzed below. By doing this, further differences and/or similarities between the Leniency Regulation and EU 2006 Notice will be presented together with an evaluation with regard to Turkish leniency policy and if it has enough positive ingredients for the Turkish antitrust enforcement policy that can compensate any possible negative outcomes.

6.1.1. Concerning Transparency and Predictability

As stated by the experts of the TCA who served in the preparation process, Turkish Leniency Regulation is mostly based on the EU Leniency Notice and Model Leniency Program accordingly. However the effort to make the Turkish Leniency Regulation more transparent and predictable compared to EU Notice is noticeable. There are some significant differences in the Regulation so as to make the conditions of receiving immunity and reduction in fines more clear and consistent.

According to the provisions of the Regulation setting the conditions for corporate and individual immunity, the fulfillment of the requirements stated in Article 6 and 9[163], before the Board decides to carry out a preliminary inquiry, is

[160] 'This is a system by which an applicant for leniency in respect of one cartel is further rewarded if it reveals another cartel in the course of the proceedings.'- Jones and Sufrin, p.1249.
[161] Kekevi 2009, p.110.
[162] Fines Regulation, article 7(2).
[163] See p.40 above.

sufficient for the TCB to grant immunity which means an automatic immunity for the applicants meeting these requirements. In the EU Leniency Notice, however, it is stated that 'Immunity… will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection'[164]. Moreover, the EU Leniency Notice requires information and evidences to enable the Commission to 'carry out a targeted inspection'[165], while the Turkish Leniency Regulation only requires the information/ evidences stated in Article 6 and 9. Therefore, it is possible to say that the Turkish regulation tries to make the conditions for getting immunity much more transparent and predictable for the applicants and thus attract more applications.

Despite the fact that for the immunity applications submitted after the preliminary inquiry decisions, the Board will grant immunity if it does not have sufficient evidence at the time of the submission[166] and thus it has some sort of discretionary power for these cases, it is not as wide as the discretionary power of the Commission given by the EU Leniency Notice[167]. Because the condition of providing 'contemporaneous, incriminating evidence of the alleged cartel which would enable the Commission to find an infringement'[168] does not exist in the Turkish Leniency Regulation which is expected to make the Turkish regulation more predictable for the applicants.

Another difference of the Turkish Leniency Regulation that aims at bringing much more transparency is seen in the conditions with regard to the requirements for receiving reduction in fines. The requirement of bringing 'significant added value' with the evidences presented to the Commission to get reduction in fines[169] is not required in the relevant articles of the Turkish Leniency Regulation[170]. Therefore, on the condition that the applicant submits the evidence and information envisaged in Article 6 and 9, the reduction of fines will be automatically granted as per to the Turkish Regulation, which is again an enhancing factor to increase transparency with the aim of inducing more applicants.

Despite these differences that can be supported on the ground that more transparency is being aimed with the Turkish Regulation compared to EU

[164] Commission's Leniency Notice, article 10.
[165] Commission's Leniency Notice, article 8(a).
[166] Leniency Regulation, articles 4(2) and 7(2).
[167] Kekevi 2009, p. 86.
[168] Commission's Leniency Notice, article 11.
[169] Commission's Leniency Notice, article 24.
[170] Leniency Regulation, articles 5 and 8.

Notice, the same criticisms brought to the EU Notice with regard to the 'discretionary marker system'[171] may be reiterated for the Turkish Regulation as well; because, just as the EU Notice, Turkish Regulation also brings a discretionary system for the marker applications[172] and this can create a legal ambiguity for the possible leniency applicants[173].

Another criticism can be asserted on the ground that there is no clear arrangement in the Regulation so as to protect corporate statements from discovery in civil litigation, unlike the EU Leniency Notice and that this can decrease the attractiveness of the program as the applicants will not be able to be sure on whether their statements will be kept confidential or not.[174] However, there is an article in the Regulation stating that 'information that can be used as evident may be analyzed by the ones who are under investigation within the premises of the Authority after the notification of the investigation report[175]' which means that if the sufferer of the cartel activity opens a file for compensation and requires from the defendants the documents presented within the leniency program, there will not be any documents (unless the Court demands it from the Authority) since all the documents related to the leniency applications shall be kept in the structure of the Authority[176]. Thus, despite the fact that there is not a clear statement about the protection of statements just like in the EU Notice, there is still a layout in the Regulation providing the same consequence.

Beside the abovementioned article, the provision in the Regulation envisaging an interpretation 'in favor of whistle blowers in case of ambiguities or gaps' is an important setting in terms of providing confidence for the possible applicants by guaranteeing that, the provisions of the Regulation will not impair the conditions of the applicants compared to undertakings that did not apply for the program[177]. Together with this significant provision, it can be expected that the issues such as hypothetical application or confidentiality of corporate statements that do not exist in the Regulation will be dealt with by the Board on a case-by-case basis.

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[171] See p.32 above.
[172] Leniency Regulation, article 9(2)- "The assigned unit may give time to managers and employees for submitting information and evidence mentioned in subparagraph (a) of paragraph one and completing their application."
[173] See p.32 above.
[174] Somay 2010.
[175] Leniency Regulation article 6(3) and 9(3).
[176] Kekevi 2009, p.105.
[177] Leniency Regulation, general preamble 4.

6.1.2. Concerning Threat of High Sanctions and Fear of Detection

The threat of high sanction is an indispensable component of a successful leniency policy as already mentioned above. Before all else, the existence of a clear and detailed fining regime envisaging high levels for the antitrust violations makes the cartel members to be aware of the cost they will meet in case of detection. Therefore, cartels formed on the basis of a cost- benefit analyses can be deterred from cartel formation when they know that the fines they will face will be higher than the benefit they can get from the cartel, thus applying for leniency program can be a better choice[178].

On this basis, depending on the authority given to the TCA by article 27 of the Competition Act, the TCA introduced the 'Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition' ('Fines Regulation') on February 15, 2009 together with the Leniency Regulation, thus presented a policy choice in the fighting against cartels.

The Fines Regulation can be seen as an important step in the ongoing process of integrating Turkish Competition Law with that of EU as well as it is a refining amendment in the previous fining applications, which failed to meet the applications of high sanctions in a clear and consistent way. Because, TCB had previously given decisions criticized on the ground that the fines imposed for different violations were inappropriate and far away from being transparent and objective[179].

The introducing of the Fine Regulation aims at providing specific and general deterrence against cartels in the meaning that administrative fines envisaged for the cartel members have a sufficiently deterrent effect in terms of fining them with high sanctions and that other undertakings will be deterred from engaging in or continuing cartel membership[180]. In order to realize this purpose, Fines Regulation tried to envisage stricter fines 'in a transparent,

[178] ARI H.M. and E. AYGÜN (2009), "Regulation on Fines Adopted by Turkish Competition Authority: Footsteps of the New Era", *Competition Journal,* Vol.10, No. 4, p.14.

[179] For example the TCB had generally issued fines of 1-3% of turnover to undertakings violating competition legislation (despite the 10% threshold) in the past and imposed relatively low fines on long-term cartel cases just as in the Decision dated 14.10.2005 and No 05-68/958-259. In this decision, the maximum amount of fine imposed on the undertakings party to the cartel in iron-steel sector was only 1,5 per thousand of their turnover, despite the fact that this cartel existed for a long time (10 years) and caused serious damages.

[180] Fines Regulation, general preamble 4.

objective, consistent and impartial way'[181] compared to past applications of the TCA.

In order to realize this purpose, the Fines Regulation adopted a two-step fine application procedure in line with the EU Fining Guidelines. Pursuant to this approach the fines will be set through the determination of the basic fine in the first step and then adjustment of it for aggravating and mitigating factors[182]. In any way, there is a cap for the fines determined as the 10% of the last fiscal year's turnover of the relevant undertaking[183].

The percentage of the base fine for cartels will be between 2 and 4% of the annual gross revenues of the undertakings or associations of undertakings generated at the end of the fiscal year, or if it is not possible to calculate, at the end of the fiscal year closest to the date of the final decision[184].

This base fine can be increased depending on the duration of the violation[185] and the existence of aggravating circumstances such as the repetition of the same or similar infringement after the Board's decision; continuation of the cartel upon the notification of the investigation decision; failure to assist during the investigations; taking the coercer position; and non-compliance with commitments made to eliminate the infringement[186]. The fine can also be decreased if there are mitigating factors such as cooperation, voluntary compensation to aggrieved parties, incentive by public authorities or coercion by other companies concerning the violation, ceasing other violations and the amount of the turnover obtained from activities which are the subject to the violation[187].

Despite the fact that bid-rigging in public tenders, which is also a cartel type, is a criminal offence as per to the Turkish Penal Code and is subject to criminal sanctions accordingly, in Turkish competition law system there are not any other individual criminal sanctions for cartels just like in the EU system which can be criticized on the abovementioned grounds[188]. However, there are administrative fines envisaged for individuals in the Fines Regulation, which creates a positive difference compared with EU system. According to Article 8 of the Regulation, when an undertaking is imposed fine for a violation, the

[181] Fines Regulation, general preamble 4.
[182] Fines Regulation, article 4(1).
[183] Fines Regulation, article 4(2).
[184] Fines Regulation, article 5.
[185] Fines Regulation, article 5(3).
[186] Fines Regulation, article 6.
[187] Fines Regulation, article 7.
[188] See p.35 above.

directors/employees that had a decisive effect on the violation will be subjected to fines the minimum amount of which is 3% of the fine imposed on the undertaking. The Regulation also provides certain reductions for these persons and also, the fine which is determined depending on the fine of undertaking shall not exceed 5%.

Moving on to the efficiency of TCB in the detection and prosecution of cartels, it can be said that, the TCB is conferred very wide examination and investigation powers. The power to conduct dawn raids, to examine books and other records in that context, take copies, ask for written and oral explanations and carry out on the spot investigations are some of these powers of the Board. Moreover, the Board can request any information from public institutions, private companies and undertakings. The refusal to cooperate with the Board experts or objection of investigation on the premises can be fined[189].

However, as explained in the following part, there are some considerations with regard to both the effective applicability of new Leniency Regulation and the activities of the TCB in general.

Therefore, a general evaluation considering possible positive and negative sides and effects of the new leniency policy in its entirety will be presented below together with the considerations asserted by the enforcers of the Regulation.

6.2. Evaluation

The leniency policy adopted with the Leniency and Fines Regulations is a relatively new concept for the Turkish competition law. Therefore, whether this policy will be successful in the fighting against cartels in Turkey can be evaluated only after a certain period of application and according to the judicial review of these applications in the courts.

However, some prior evaluations can still be made with regard to the possibility of the successful application of the leniency program in Turkey. While doing such an evaluation, the existence of the prerequisites of a successful program will be analyzed more critically in the light of the abovementioned theoretical basis of the Regulations and by taking into account the benefits and challenges of the leniency programs in general.

[189] ÖZ, G. and Z. ÇAKMAK, "Turkey *Pakistan to Venezuela Anti-Cartel Enforcement Worldwide,* <http://www.cakmak.gen.tr/pdf/antitrust.pdf, Date Accessed: 01.08.2010, p.1194.

As stated above, the Turkish Leniency Regulation aims at a more clear and transparent leniency program and thus includes a lower evidentiary threshold compared to EU Leniency program. The fulfillment of the requirements envisaged in the Articles 6 and 9 is seen sufficient for being eligible to get immunity or fine reductions. Most of the additional requirements envisaged in the EU Leniency program with regard to granting immunity or fine reduction do not exist in the Turkish leniency program[190].

It would not be wrong to say that, according to the logic behind the Turkish Leniency Regulation, what matters is to receive as much leniency applications as possible and the presentation of the information stated in Articles 6 and 9 of the Regulation are enough in terms of getting the confessions of the violators and thus disclosing the unknown cartels. Moreover as stated by Kekevi[191], a TCA expert, during the application of the Regulation it is crucial to always take into account the principle of 'interpretation in favor of the applicants'[192]. This principle may also mean that, even if the Board has enough information and evidences to disclose a cartel, an applicant can still be granted immunity unless it is a very late phase of the investigation.

In my opinion, however, such a lower evidentiary threshold can have perverse effects in the success of the leniency program. As stated above[193], leniency programs intrinsically have 'penalty reducing effect' which means that, the expected cost of the misbehavior gets lower when there is a leniency program in a system and this can induce collusion. Moreover, the fact that the applicant will not be punished severely or not be punished at all although it did take place in the same violation with the other cartel members can be criticized on justice considerations. However, as mentioned above, the benefits that the consumers get by the detection and conviction of an undetected cartel outweighs the benefit of this consumer from the conviction of the undertaking applying for the leniency program. The Turkish Leniency Program, however, may damage this balance, which should be in favor of the consumers, if 'the principle of interpretation in favor of applicants' is applied in a strict way. It should be borne in mind that, the purpose of the leniency program is to detect and deter cartels.

[190] For example in contrast to the EU program, there is no need for the applicant to present evidence to enable the Board to carry out targeted inspection for receiving immunity before the preliminary inquiry, or no need for 'contemporaneous, incriminating evidence' regarding the alleged cartel to get immunity depending on an application submitted after the preliminary inquiry; there is also no need for the applicants to present evidence having 'significant added value' in order to get fine reduction.

[191] Kekevi 2009, p.95.

[192] Leniency Regulation, general preamble 4.

[193] See p.14 above.

In the event that every kind of application is seen valuable and given immunity even if the Board has enough awareness about the related cartel, the deterrent effect of the leniency program may diminish and also it may lead to the riskiness of the using of leniency programs as a 'strategic tool' by the cartel members. Besides, this may hinder one of the expected benefits from the leniency program, which is the providing of 'higher level of information'[194]. This is because cartel members, who feel comfortable knowing that their leniency applications will be awarded somehow even if they do not present qualified evidence, will not be pushed to keep such evidences.

Moreover, considering the social and cultural background in Turkey, it is possible to say that undertakings and especially directors/employees can be reluctant to make a leniency application. Under such a circumstance, if the principle of interpretation in favor of the applicants is widely used and therefore provides high amount of reductions for the second or subsequent applicants, then the possible applicants may choose not to be the 'informant' with the confidence that they will be granted high amount of fine reduction anyway.

Therefore, although it is acceptable to apply a more generous program for the first years of the Regulation in order to increase the awareness in the public, the risks that such an application can bring should not be ignored. A limited period for a more lenient program may be declared by the Board in order to attract much more applicants in the short term; but then a more stricter application should be envisaged both to prevent penalty reducing effect and thus the perception of the leniency program as an award by the applicants and to push the cartel members to keep more qualified evidences thus increase the distrust between them. Anyway, as stated above[195], the success of the Turkish Leniency Program will also depend on its publicization; therefore it is important to have an actively working 'frequently asked questions' part within the structure of Competition Board web site, conferences should be arranged by the TCA experts, brochures, presentation movies and such kinds of advertising activities should be held by the TCA in order to provide the awareness of the related bodies.

With regard to Fines Regulation on the other hand, it can be said that 'threat of high sanctions' has mostly been realized with the new settings. Especially considering the past applications of the Board, the new Regulation is a very significant step for the deterring effect of fines against cartel formations.

[194] See p.9 above.
[195] See p.23 above.

As explained by Ari, another TCA expert, in the past, cartels were subjected to very low fines compared to other antitrust violations. For example, in the Karbogaz file[196], which was about an abuse of the dominant position, the undertaking was fined with 3% whereas in Demir-celik file[197] which was about a cartel lasted for a very long time, the undertakings were subjected to fines between the minimum amount and 0.5%

Considering such past examples, which were against the general application in the world that imposes higher fines for cartels, the new Regulation envisaging fine at minimum 2% of the annual gross revenues of the undertaking[198], is an important development both in the fighting against cartels and in the ongoing process of integration with the EU.

Beside such higher fines envisaged for the undertakings, the new Regulation also includes fines for directors and employees who have a decisive effect in the violation which is a positive step in terms of increasing the deterrent effect for the individuals who took part in a cartel formation and creating a race between the individuals and the undertaking for being the first in applying for leniency.

The fine scale, which is between 3% and 5% of the fine given to the undertaking, is also at satisfactory levels. In the Beyaz Et file[199], which is the first sample of individual fining in Turkish competition law[200], the director of the undertaking, who was identified as having decisive effect in the violation, was fined with 3% of the fine given to the undertaking. Thus, the first signals regarding strict application of the new regulation for the executives have been given with this decision.

Moving on to the 'fear of detection', that is a further precondition for a successful leniency program, given the facts that the Board has extensive investigation powers stated above and it realizes cartel investigations in nearly all kind of sectors and examinations in lots of fields, it can be possible to say that there is an efficient competition authority in Turkey. In the 2009 Progress Report[201], the European Commission used positive statements about the

[196] Competition Board Decision, No. 02-49/634-257, dated 23.08.2002 (Karbogaz File).
[197] Competition Board Decision, No. 05-68/958-259, dated 14.10.2005 (Demir-celik File).
[198] Fines Regulation, article 5.
[199] Competition Board Decision, No. 09-57/1393-362, dated 25.11.2009 (Beyaz Et File)
[200] TURKISH COMPETITION AUTHORITY (2009), "11th Annual Report", http://www.rekabet.gov.tr/dosyalar/faaliyetraporu/falrap23.pdf, Date Accessed: 01.08.2010.
[201] COMMISSION STAFF WORKING DOCUMENT (2009), *"Turkey 2009 Progress Report"*, COM (2009) 533, http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf, Date Accessed: 02.08.2010.

operations of TCA and found the administrative and operational independency of the authority satisfactory.

Moreover, as stated above, the fear of detection that can be created through an effective competition authority also necessitates a good reputation and high level of cartel detection records[202]. Amnesty plus mechanism is a way to achieve such efficiency and this mechanism also takes part in the Fines Regulation although it is not included directly in the Leniency Regulation. According to Article 7 of the Fines Regulation: 'In an ongoing investigation, the fine to be given to an undertaking which cannot benefit from the arrangement for non-imposition of fines under the Active Cooperation Regulation, shall be reduced by one fourth if it presents the information and documents specified under Article 6 of the Active Cooperation Regulation before the Board decides to conduct a preliminary inquiry into another cartel.' Therefore, it is possible to say that, together with the introduction of the amnesty program, the TCA will be able to detect potential antitrust violations in other markets by the self-report of the undertakings, which are already under an ongoing investigation.

Finally, it should be noted that, the decisions of the Board are subject to judicial review of the Turkish Council of State and in the past, a big amount of final decisions of the Board was cancelled by the Council of State on the ground of procedural matters[203]. Therefore, the procedural rules must be paid attention by the Board in the future practices for the prevention of such cancellations and an increased efficiency of the Board.

7. CONCLUSION

Leniency programs are one of the greatest investigative tools in fighting against cartels, which are hard to detect due to their secret characteristics and limited resources that the competition authorities have.

Leniency programs designed to detect and deter cartels by providing the cooperation of the cartel members and/or their executives in exchange of information about the cartel formation, have both benefits and some challengeable intrinsic features. These programs may cause the authorities to provide higher and more qualified evidence about the secret cartels directly by the insider informants and thus reduce the prosecution costs of the competition authorities and provide the detection and deterrence of the cartels. However, the

[202] See p.21 above.

[203] 'From 1999 to 2004, about 45% of all 744 final decisions have been challenged before the council of state. Almost all of these decisions were cancelled by the council of State on procedural grounds.'- Oz and Cakmak.

penalty reducing effect, the possibility of the use of these programs as a strategic tool by the cartel members and some political considerations can be presented against the leniency programs. Yet, such challenges can be offset by a well designed program.

The success of the leniency programs in its entirety does not only depend on the leniency regulations but also greatly depend on the fining policy, efficiency of the competition authority as a deterrent factor and a clear and predictable set of rules with regard to leniency and fining applications.

EU leniency program, that can be given as a successful example of leniency application has achieved heavier sanction and efficient competition authority conditions; however there are serious criticisms in the literature and enforcers side with regard to the transparency of the rules enabling leniency applicants to receive immunity or fine reduction.

Turkish leniency program, recently adopted mostly depending on its EU counterpart, includes differences compared to EU Leniency Notice as the Turkish Regulation envisages provisions aiming at much more predictability and application that the applicants can benefit most. Fining Regulation adopted simultaneously with the Leniency Regulation brings high amount of sanctions both for cartel member firms and their executives having decisive effect on the cartel and thus takes a step towards an efficient Turkish leniency policy. Moreover, the effective Turkish Competition Authority, despite its deficiencies in applying procedural rules properly, is another important leg of this aim.

However, I believe that, there are some provisions in the Leniency Regulation which may cause it to be assumed as too flexible by the cartel members; thus may affect the leniency program in a negative way. If such provisions are applied in such a way that they are always interpreted in favor of the applicants and if this application lasts for a long time, the risks of using the leniency program as a strategic tool by the cartel members through benefiting from its penalty reducing effect can arise and in the end, this may affect the success of the Turkish leniency program in a negative way.

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