

THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES

2015

A Global Competition Review special report
published in association with:

ELIG, Attorneys-at-Law

GCR |
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

Overview

Gönenç Gürkaynak and K Korhan Yıldırım

ELIG, Attorneys-at-Law

The Law on Protection of Competition No. 4054 (Competition Law) of 13 December 1994 is designed to prevent agreements, decisions and practices that have, as their purpose or effect:

- the prevention, restriction or distortion of competition in the markets for goods or services within Turkey;
- the abuse of dominance by undertakings dominant in a relevant market; and
- concentrations creating or strengthening a dominant position and significantly lessening the competition in the whole territory of Turkey or a part thereof.

The Competition Board is the decision-making body of the Competition Authority.

In 2014, the Competition Authority introduced a new Guideline on Abuses of Dominance through Exclusionary Practices (Guideline on Dominance). The Guideline on Dominance was published to avoid uncertainties concerning the application of article 6 of the Competition Law, which prohibits abusive behaviour by dominant firms. Similar to the EU Commission's Guidance No. 2009/C 45/02, the Guideline is limited to exclusionary abuses and does not include information on exploitative or discriminatory abuses. It provides an overview of exclusionary practices by explaining the most common practices such as:

- refusal to supply;
- predatory pricing;
- price or margin squeeze;
- exclusivity or single-branding agreements;
- rebate systems; and
- tying agreements.

The Competition Authority recently released Communiqué No. 2013/2 on Procedures And Principles to Be Pursued In Pre-Notifications And Authorisation Applications to Be Filed With The Competition Authority in order for Acquisitions Via Privatisation To Become Legally Valid and Block Exemption Communiqué No. 2013/3 on Specialisation Agreements. The Competition Authority has also released the Guideline on Explanation of the Regulation

on Active Cooperation for Discovery of Cartels, Guideline on Horizontal Cooperation Agreements and Guideline on Mergers and Acquisitions Transactions and The Concept of Control. Furthermore, the draft guidelines on the basic principles of exemption, on the assessment of horizontal mergers and acquisitions and on the assessment of non-horizontal mergers and acquisitions, have entered into force recently.

There is also a draft Competition Law that is expected to bring about significant amendments to some of the fundamental competition rules. After a long wait on the sidelines, the draft law has finally been put on the Parliament's agenda in late 2013. The draft law proposes several significant changes in merger control (ie, the introduction of a *de minimis* rule and the SIEC test) and investigation procedures (ie, the introduction of the settlement procedure). The draft law is designed to be more compatible with the way the law is being enforced. It also aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes that promise a more efficient procedure in terms of time and resource allocation. The draft law has been submitted and discussed in the Parliament's relevant Commissions in the first quarter of 2014.

Additionally, the Competition Authority has released the draft Regulation on Administrative Monetary Fines for public consultation. The draft regulation is akin to and closely modelled after the European Commission's Guidelines on the method of setting fines imposed under article 23(2)(a) of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in articles 101 and 102 of the TFEU. It provides a new calculation method for administrative monetary fines, which would result in the explicit recognition of the parental liability principle. The regulation also introduces new aggravating and mitigating factors. Additionally, the regulation obliges the Board to reduce the monetary fine in case of existing mitigating factors. The Competition Authority has not yet announced the date on which this regulation will enter into force. However, an implementation is not expected before the draft law on the renewal of the Turkish Competition Law enters into force.

The Competition Authority

The Competition Authority has public legal personality, as well as administrative and financial autonomy. The authority consists of the board, presidency and service units. A total of approximately 355 people are employed at the authority, including competition experts, assistant experts, lawyers, board members, reporters and technical personnel. Five divisions with sector-specific work distribution handle competition law enforcement work through around 130 case handlers. The annual budget of the authority for 2015 has been increased by 11.4 per cent to 65.5 million Turkish liras.

The Competition Board

The Competition Board comprises seven members, including a chairman and two deputy chairmen. The term of office of the chairman, deputy chairmen and members of the board is six years. A member whose term has expired is eligible for re-election.

The duties and the powers of the Competition Board can be categorised into three main areas:

- preventing the violation of competition;
- agreements, decisions and concerted practices that have as their purpose or effect the prevention, restriction or distortion of competition, which are, in principle, deemed illegal (Competition Law, article 4); and
- any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services, which is also unlawful and prohibited (Competition Law, article 6).

Undertakings and associations of undertakings condemned by the board for violating articles 4 and 6 of the Competition Law may be given administrative fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (or, if this is not calculable, in the financial year nearest the date of the fining decision). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. The Competition Board may also order structural or behavioural remedies, or both, to protect competition and restore it to its state before the violation. The Competition Authority launched a total of 230 investigations in the past 17 years. Sectors that are most investigated are as follows:

- transportation;
- nutrition;

- agriculture;
- food and beverages;
- construction materials; and
- pharmaceuticals and health-care services or products.

The overall fines imposed by the Turkish Competition Authority so far amount to approximately 2 billion Turkish lira in total.

The Competition Authority launched several sector inquiries as part of its duty to protect competition on Turkish markets. As a result, the Competition Authority published sector reports concerning sectors such as the retail sector for fast-moving consumer goods, the motor vehicles sector and the pharmaceuticals sector. The Competition Authority's primary goal in conducting these inquiries is to detect impediments that negatively affect competition on the reviewed markets and to prepare suggestions against detected sector specific problems. Recently, the Competition Authority published the sector report concerning the wholesale and retail market for electricity. Sector reports on media, motion pictures market and cement market are expected to be published soon.

Merger control

The thresholds for merger filings were amended on 29 December 2012. Under the new merger control regime, a merger filing is required before the Competition Board where either the entire Turkish turnover of the parties to the transaction exceeds 100 million Turkish lira and their Turkish turnovers exceed 30 million Turkish lira, separately; or the entire Turkish turnover of the transferred assets or businesses in acquisitions, and at least one of the parties to the transaction in mergers, exceeds 30 million Turkish lira and the worldwide turnover of the other party exceeds 500 million Turkish lira.

After the amendments, the new regulation no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement. The parties no longer need to check to see whether the transaction results in an affected market. This amendment is designed to have an impact on notifiability analyses only. The concept of affected market still carries weight in terms of the substantive competitive assessment and the notification form. The amendment has resulted in a noteworthy drop in the number of merger filings. While the Competition Board analysed 303 filings in 2012, the filings realised a downturn of approximately 30 per cent for two years in a row, to 215 in 2014. Although the drop in the filings might also be caused by other events with direct or indirect effects

on economic activities in Turkey, it is fair to say that the amendment of the filing requirements had an effect on the number of merger notifications.

The Competition Law provides for a suspension requirement. If the parties to a transaction that requires the approval of the Competition Board close the transaction without the approval of the board, a fixed monetary fine of 0.1 per cent of the acquirer's Turkish turnover generated in the financial year preceding the date of the fining decision applies (if this is not calculable, in the financial year nearest the date of the fining decision). In the event of a merger, the fine applies to both merging parties. The minimum fine for 2015 is 16,765 Turkish lira.

If the Competition Board reaches the conclusion that the transaction closed before clearance creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned may also receive administrative monetary fines of up to 10 per cent of their Turkish turnover generated in the financial year specified above. In such a situation, employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. In any case, a notifiable merger or acquisition not notified to and approved by the Competition Board shall be deemed legally invalid with all its legal consequences.

Exemptions and negative clearances

The Competition Board may decide to exempt agreements, decisions of associations of undertakings and concerted practices from the application of the provisions of the Competition Law, article 4.

Exemption decisions may be granted for a certain period of time or for an indefinite period. They may also be conditional upon the satisfaction of particular conditions or obligations (or both), such as structural or behavioural remedies.

Certain categories of agreements and decisions are subject to a block exemption regime under block exemption communiqués (Communiqués Nos. 2002/2, 2003/2, 2005/4, 2008/2, 2008/3 and 2013/3).

Appeal

Final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to judicial review before the competent administrative court in Ankara by filing an appeal case within 60 days upon receipt by the parties of the justified decision of the Board. Filing an administrative action does not automatically stay the execution of the Board's decision. However, upon request of the plaintiff, the court, on providing its justifications, may decide to stay the execution if the implementation of the decision is likely to cause irreparable damage, and if the decision is highly likely to be against the law.



Gönenç Gürkaynak
ELIG, Attorneys-at-Law

Mr Gönenç Gürkaynak holds an LL.M degree from Harvard Law School and is qualified in Istanbul, New York, and England and Wales (currently a non-practising solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently comprises 26 associates. He has unparalleled experience in all matters of Turkish competition law counselling, with over 18 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Prior to joining ELIG as a partner more than 10 years ago, he worked at the Istanbul, New York, Brussels and again in the Istanbul offices of White & Case LLP.



K Korhan Yıldırım
ELIG, Attorneys-at-Law

Mr K Korhan Yıldırım holds an LL.B degree from Galatasaray University Law School and is qualified to practise in Istanbul. He is a partner at the competition law and regulatory department of ELIG. He has been working extensively on all matters of Turkish competition law counselling for more than 10 years.

ELIG

Attorneys at Law

Çitlenbik Sokak No:12
Yıldız Mahallesi
Beşiktaş, 34349 Istanbul
Turkey
Tel: +90 212 327 17 24
Fax: +90 212 327 17 25

Gönenç Gürkaynak
gonen.gurkaynak@elig.com

K Korhan Yıldırım
korhan.yildirim@elig.com

www.elig.com

ELIG aims to provide its clients with high-quality legal service in an efficient and business-minded manner. All members of the ELIG team are fluent in English. ELIG represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. The firm also collaborates with many international law firms on Turkish competition law matters.

In addition to an unparalleled experience in merger control issues, ELIG has a vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. We have in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to a significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well equipped to represent clients before the High State Court, both on the merits of a case, and for injunctive relief. ELIG also advises clients on a day-to-day basis concerning business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing.