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Overview

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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.

Recently, the Competition Board introduced two new guidelines:

- Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions; and
- Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions.

The former was introduced with a view to increasing the certainty and predictability of the application of Communiqué No. 2010/4 on Mergers and Acquisitions Calling for the Authorisation of the Competition Board. It sets out explanations for understanding concepts such as “undertakings concerned” and “ancillary restraints,” as well as the method of calculating turnover thresholds. The latter guidelines on remedies acceptable by the Turkish Competition Authority were introduced with a view to providing guidance on remedies that could be proposed by the parties to the Turkish Competition Authority to eliminate competition law concerns surrounding a transaction in the event such transaction may be prohibited under article 7 of the Competition Law.

In December 2012, the Competition Authority released Communiqué No. 2012/2 on the Application Procedure for Competition Law Infringements and introduced the draft Guideline on the Assessment of

Horizontal Mergers and Acquisitions and the draft Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions for public consultation.

The year in review witnessed many noteworthy changes with respect to secondary legislation. The Competition Authority has released Communiqué No. 2013/2 on the 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 drafts guidelines on the assessment of horizontal mergers and acquisitions and on the assessment of non-horizontal mergers and acquisitions, which were released in 2012, have entered into force. Additionally, the Competition Authority has released drafts for Regulation on Administrative Monetary Fines and Guideline on Basic Principles of Exemption for public consultation. The Competition Authority has not yet announced the date on which these regulations and guidelines will enter into force.

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. 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.

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 340 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 2014 is 58.8 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 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, 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 (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 210 investigations in the past 15 years.

Merger control

Threshold figures 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 liras and their Turkish turnovers exceed 30 million Turkish liras, 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 liras and the worldwide turnover of the other party exceeds 500 million Turkish liras.

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 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 is 15.226 Turkish liras.

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 No. 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.

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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.



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Mr Gönenç Gürkaynak holds an LLM 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 15 associates. He has unparalleled experience in all matters of Turkish competition law counselling with over 17 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Prior to joining ELIG as a partner more than nine years ago, he worked at the Istanbul, New York, Brussels and again in the Istanbul offices of White & Case LLP.



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