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GLOBAL COMPETITION REVIEW

Overview

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The Law on Protection of Competition No. 4054 (Competition Law), which entered into force on 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 2011, 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 increase the certainty and predictability of the application of Communiqué No. 2010/4 on Mergers and Acquisitions Calling for the Authorization 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 in order to eliminate competition law concerns surrounding a transaction in the event where such transaction may be prohibited under article 7 of the Competition Law.

The Competition Authority is also expected to draft a guideline for competitive effects analysis in order to assist public authorities in implementing public regulations. There is also a draft Competition Law, which is expected to bring about significant amendments to some of the fundamental competition rules.

In December 2012, the Competition Authority released for public opinion the draft Guideline on the Assessment of Horizontal Mergers and Acquisitions and the draft Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions. The Competition Authority has not yet announced the date on which these two guidelines will enter 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 340 people are employed in 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 120 case handlers. The annual budget of the authority for 2013 is set out to be 57.4 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).
- 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 189 investigations in the past 15 years.

Merger control

Threshold figures for merger filings were amended as of 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 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 14,651 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

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At ELIG, Attorneys-at-Law, we aim to provide our clients with high-quality legal services in an efficient and business-minded manner. We focus on the interests of our clients and strive to find flexible legal solutions that fit the ever-changing needs of our clients in their international and domestic operations.

We have a legal team of around 38 persons. While we take pride in being able to assist our clients in almost all fields of law, the main focus of our practice consists of competition law, corporate law, mergers and acquisitions, EU law, banking and finance, litigation, energy, oil and gas law, administrative law, real estate law and intellectual property law.

As an independent Turkish law firm, ELIG, Attorneys-at-Law collaborates with many international law firms on various projects.

Furthermore, Gönenç Gürkaynak is qualified to practise law in a number of jurisdictions. In addition to his membership of the İstanbul Bar, Mr Gürkaynak is a qualified attorney at the New York Bar, a member of the Law Society of England and Wales (currently non-practising) and a member of the Brussels Bar (B List).

by the Competition Board shall be deemed as 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 and 2008/3).

Appeal

Final decisions of the Competition Board, including its 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 LLM degree from Harvard Law School and is qualified in Istanbul, New York and England & 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 15 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Prior to joining ELIG as a partner more than eight years ago, he worked at the Istanbul, New York, Brussels and again in the Istanbul offices of White & Case LLP.



K Korhan Yıldırım

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K Korhan Yıldırım holds an LLB degree from Galatasaray University Law School and is qualified to practice in Istanbul. He is a senior associate at the competition law and regulatory department of ELIG. He has been assisting Mr Gönenç Gürkaynak with all matters of Turkish competition law counselling for more than eight years.