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# Competition regime insights

**Gönenç Gürkaynak** and **Ayşe Güner** of **ELIG Attorneys-at-Law**, provide an in-depth update on competition law and a summary of recent major cases

The statutory basis for Turkey's competition law regime is Law number 4054 on the Protection of Competition of December 13 1994 (Law number 4054). Law number 4054 finds its underlying rationale in article 167 of the Turkish Constitution, which authorises the state to take appropriate measures to secure the functioning of the markets and to prevent the formation of monopolies or cartels. Law number 4054 applies to individuals and companies alike and even to public corporations if they act as an undertaking within the meaning of Law number 4054.

The national competition authority for enforcing the provisions of Law number 4054 in Turkey is the Turkish Competition Authority (Authority). The Authority has administrative and financial autonomy. It consists of the Competition Board (Board), Presidency and service departments. The Authority recently published its 17th Annual Activity Report on its activities for the year 2015 concerning cartels, dominance and merger control. In 2015, the Board resolved 89 cases in total concerning violations of article 4 (cartels) and article 6 (dominance); and assessed 158 transactions which included one merger, 124 acquisitions, 25 joint ventures and eight privatisations. The overall fines imposed by the Authority has so far amounted to more than TL 2.5 billion ($872 million) in total.

The Turkish competition law regime consists of three main branches, which are namely (i) cartels, (ii) dominance, and, (iii) merger control, as set out in Law number 4054.

## Cartels

### Legislation

Article 4 of Law number 4054 provides the basic principles of the cartel regulation. The provision is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the EU (TFEU).

Article 4 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have (or may have) as their object or effect the prevention, restriction or distortion of competition. Similar to article 101(1) of the TFEU, the provision does not define the term 'cartel' explicitly. However, article 4 prohibits all kinds of restrictive agreements, including any form of cartel agreement.

Unlike the TFEU, article 4 does not refer to additional requirements such as 'appreciable effect' or 'substantial part of a market' and consequently does not provide for any *de minimis* exception. Therefore, article 4 applies even to violations with minor effects on any market. The practice of the Board has not recognised any *de minimis* exceptions either. However, the enforcement trends and proposed changes to the legislation are increasingly focusing on *de minimis* defences and exceptions.

Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, granting a broad discretionary power to the Board. Additionally, article 4 brings a non-exhaustive list which provides examples of possible restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption issued by the Board. Vertical agreements are also caught by the prohibition laid down in article 4 to the extent they are not covered by block exemption rules or individual exemptions.

The Board's general practice shows that horizontal restrictive agreements, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be *per se* illegal.

The Turkish competition law regime also condemns concerted practices. A concerted practice is a form of coordination which indicates an understanding for the removal of competition between two or more companies without a formal 'agreement' or 'decision'. The Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. In practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice.

In addition, the Board has ruled that the exchanges of information, detailed surveys and statistical studies bear the potential to prevent competition by facilitating collusion among competitors. Obtaining this kind of information through direct communications with competitors would be problematic under Turkish competition law rules.

### Developments in enforcement

The Board has recently adopted its final decision regarding the investigation conducted in relation to the allegation that nine companies, including Schenker & Co, Schenker, Schenker Arkas Nakliyat ve Ticaret, Fertrans, Kühne+Nagel International, Kühne + Nagel, Rail Cargo Logistics – Austria, Express Interfracht Hellas and Raab-Oedenburg-Ebenfurter Eisenbahn, active in the railway freight forwarding services market have restricted competition by sharing customers (15-44/740-267, December 16 2015). The Board concluded that the customer protection agreements had not produced effects on the Turkish markets within the meaning of article 2 of Law number 4054. The allegations in question therefore did not fall within the scope of Law number 4054. This was a landmark decision as it showed the scope and limits of the Authority's territorial jurisdiction.

The Board reached its final decision (16-02/44-14, January 14 2016) concluding that six cement companies operating in the Aegean region of Turkey violated article 4 of Law number 4054 by allocating regions and increasing resale prices in collusion in the Aegean region. The Board fined the cement producers a total of approximately TL 71 million. The fines ranged between three percent and 4.5% of each company's 2014 annual income. It was inferred from the announcement of the final decision that the Board had determined the administrative monetary fine rate based on the two to four percent base fine range applicable to cartels under article 5(1)(a) of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (Regulation on Fines). The fines are considered to be relatively high in the Turkish jurisdiction in terms of turnover percentage. The case has been criticised in that no information or evidence was collected during the investigation in addition to the information and documents collected during the pre-investigation phase to link the defendants to the allegations. The decision serves as the new yardstick for the evidential thresholds in competition law proceedings before the Board.

In *Hyundai Dealers* (December 16 2013, 13-70/952-403), the Board had fined 14 Hyundai dealers for violation of article 4 of Law number 4054 for agreeing on car and accessory prices and sales conditions. One of the dealers (Tuna) had applied for leniency. As the Board decided that the infringement did not constitute a cartel, Tuna was granted fine-reduction on the basis of active cooperation rather than on the basis of its leniency application. Tuna subsequently appealed the Board's decision to the Administrative Court, which upheld the decision in 2016. The decisions may be interpreted as efforts to curtail leniency applications.

## Dominance

### Legislation

The main legislation applying specifically to the behaviour of dominant firms is article 6 of Law number 4054. It provides that '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 within the whole or part of the country is unlawful and prohibited'.

Article 6 provides a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to article 102 of the TFEU. Accordingly, such abuse may, in particular, consist of: (a) directly or indirectly preventing entries into the market or hindering competitor activity in the market; (b) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties; (c) making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services or; acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price; (d) distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; or, (e) limiting production, markets or technical development to the prejudice of consumers.

Article 3 of Law number 4054 defines dominance as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers'. The Board considers a high market share as the most indicative factor of dominance. Nevertheless, the Board also takes account of other factors (such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm) in assessing and inferring dominance.

### Developments in enforcement

The Board decided on February 18 2016 that Solgar Vitamin (Solgar) ve Sağlık Ürünleri San ve Tic, the Turkish subsidiary of Solgar, did not violate Law number 4054 by means of refusing to supply Anadolumed Ecza Deposu Tic (Anadolumed), a pharmaceutical warehouse established in Turkey. This investigation was re-launched following the 13th Chamber of the Council of State's annulment of the Board's initial decision not to launch an investigation on the basis of the complaint that Solgar's Turkish subsidiary refused to supply goods to Anadolumed and abused its dominant position by discrimination and thus violated articles 4 and 6 of Law number 4054 (September 16 2010, 10-59/1204-454).

Moreover, in a recent decision, the Board held that Mey İçki held a dominant position in the rakı market and imposed an administrative monetary fine on it of over TL 41.5 million, amounting to 1.5% of its annual turnover (June 12 2014, 14-21/410-178). The Board held that the undertaking prevented sales points from selling competitors' products, imposed exclusivity on sales points and obstructed competitors' activities on the market. After this decision, another investigation was launched recently against Mey İçki upon a complaint claiming that Mey İçki abused its dominant position by engaging in practices aimed at preventing the operations of its competitors (July 28 2015, 15-32/459-M).

Tüpraş is also a high-profile dominance case (January 17 2014, 14-03/60-244), in which Turkey's incumbent energy company was fined over TL 412 million, the equivalent of one percent of Tüpraş's annual turnover in 2013, for abusing its dominant position through excessive pricing practices. This is the highest fine levied on a single undertaking in the Authority's enforcement history with an amount almost double the previous highest fine on a single undertaking.

Continuing investigations involving abuse of dominance allegations include the high-profile investigations against Yemek Sepeti, a Turkish online meal order platform, and Booking.com. Upon the preliminary inquiry conducted about the claims that Yemek Sepeti prevented its customers from working with its competitors and thus excluded its competitors, the Board decided to initiate an investigation against Yemek Sepeti (March 18 2015, 15-12/161-M). Similarly, the Board also initiated an investigation following the preliminary inquiry which was launched further to a complaint claiming that the 'best price guarantee' promised by Booking.com and its Turkish office to their customers within the framework of the booking services they provided constituted a violation under articles 4 and 6 of Law number 4054 (July 9 2015, 15-29/432-M).

## Merger control

### Legislation

The relevant legislation on merger control is article 7 of Law number 4054 and Communiqué number 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué number 2010/4). Additionally, there are various guidelines published by the Authority including: (i) the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control; (ii) the Guideline on the Assessment of Horizontal Mergers and Acquisitions; (iii) the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions; (iv) Guidelines on Market Definition; (v) the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions; and, (vi) the Guideline on Remedies Acceptable in Mergers and Acquisitions.

There is no other relevant legislation applicable to foreign transactions or investment in Turkey, as far as the merger control rules are concerned. However, there are specific merger control rules for mergers that concern banks, privatisation tenders and certain other sectors.

The notification is compulsory, provided that the applicable turnover thresholds are exceeded. The thresholds are as follows: (a) the aggregate Turkish turnover of the transaction parties exceeding TL 100 million and the Turkish turnover of at least two of the transaction parties, each exceeding TL 30 million; or, (b) (i) the Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million; or, (ii) the Turkish turnover of any of the parties in mergers exceeding TL 30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500 million.

The Board reviews the aforementioned thresholds every two years. The next deadline for the Board to confirm or revise the thresholds is the beginning of 2017. As a side note, there is no *de minimis* exception or other exceptions under the Turkish merger control regime, except for certain mergers in the banking sector.

### Developments in enforcement

The Board recently rendered a refusal decision in the transaction concerning the acquisition of sole control over Beta Marina Liman ve Çekek İşletmesi and Pendik Turizm Marina Yat ve Çekek İşletmesi by Setur Servis Turistik, a wholly-owned subsidiary of the Koç Group (July 9 2015, 15-29/421-118). The Board held that the transaction would lead to the creation of a dominant position and thereby restrict competition in the relevant markets. Even though Setur offered to exclude the acquisition of the operating rights of Kalamış Marina, the Board decided that such a commitment was not

sufficient to remove the competition law concerns. The decision stood out among the Board's former decisional practice in terms of its distinctive market definition and analysis, along with involving a directly-rejected acquisition transaction.

Moreover, the Board issued one of its notable decisions after a Phase II review regarding the acquisition of sole control over Migros Ticaret by Anadolu Endüstri Holding (AEH), which controls the major food and beverages companies including Coca-Cola Turkey and Anadolu Efes Biracılık ve Malt Sanayii (July 9 2015, 15-29/420-117). After defining several relevant product markets, the Board concluded that the transaction would not impede competition in the relevant product markets, except the market for beer, in which AEH's beer brand Anadolu Efes was in a dominant position. AEH submitted a number of behavioural commitments for a period of three years. Consequently, the Board granted conditional approval to the transaction. This decision is particularly important for containing detailed analyses on the competitive concerns that could occur in non-horizontal concentrations.

The Board also cleared NV Bekaert's acquisition of Pirelli Tyre's steel tyre cord business in Turkey (January 22 2015, 15-04/52-25). The initial agreement concerned Bekaert's acquisition of Pirelli's global steel tyre cord business, which consisted of five plants located in five different countries by the end of 2014. In October 2014, Turkey was the sole pending jurisdiction for clearance. The parties agreed to split the transaction into the non-problematic global section of the transaction, and the problematic Turkish section of the transaction. Considering the Board's precedents that do not allow for methods such as carve-out and hold separate, the parties took every possible measure – such as preparing two separate sale and purchase agreements – to prevent the Board from considering the division of the transaction as carve-out. The Board set a precedent and approved Bekaert's acquisition of Pirelli's assets in Brazil, Italy, Romania and China, considering it to be a separate transaction from the acquisition in Turkey. During the Phase II review, Bekaert proposed to conclude long-term supply agreements with its local customers for a period of at least three years. The fact that Bekaert's proposed remedies were purely behavioural is noteworthy, as behavioural remedies are considered secondary to structural remedies.

### Sanctions

The sanctions that could be imposed under Turkish competition law are administrative in nature. Law number 4054 leads to administrative fines (and civil liability) but does not lead to criminal sanctions.

In the case of a proven cartel or an abuse of dominance, the companies concerned may be subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision. Additionally, such restrictive agreements will be deemed as legally invalid and unenforceable with all its legal consequences.

In terms of merger control, where the parties to a merger or an acquisition that requires the Board's approval to close the transaction without or before obtaining the Board's approval, the Board imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision on the relevant undertaking(s). In acquisitions, the fine is levied on the acquirer, whereas in mergers it is levied on all merging parties. This monetary fine does not depend on whether the Authority will ultimately clear the transaction. The minimum amount of this fine is set at TL 17,700 for 2016 and is revised each year. In cases where the parties close a transaction that violates article 7 (that is, a transaction that creates or strengthens a dominant position, thereby drastically reducing competition in a relevant market), the Board can impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Additionally, a notifiable concentration is also invalid with all its legal consequences, unless and until it is approved by the Board.

Furthermore, employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of these violations are also fined up to five percent of the fine imposed on the undertaking or association of the undertaking.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the violation, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as existed before the infringement.

In determining the magnitude of the monetary fine, Law number 4054 makes reference to article 17 of the Law on Minor Offences for the Board to take into consideration factors such as the level of fault and the amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration of the infringement, recidivism, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, and compliance with the commitments. In line with this, the Authority enacted the Regulation on Fines which sets out detailed guidelines as to the calculation of monetary fines applicable in the case of a competition law violation. The Regulation on Fines applies both to cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines.

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Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which consists of 36 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 18 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

He frequently speaks at conferences and symposia on competition law matters. He has published more than 100 articles in English and Turkish by various international and local publishers. Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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Ayşe Güner joined ELIG, Attorneys-at-Law in 2012 following her practice at a reputable law firm in Istanbul. After graduating from the University of Arizona in 2003, Güner obtained her Juris Doctorate from the Southern Methodist University Dedman School of Law in Dallas, Texas in 2008, and her LLM degree from Maastricht University, Netherlands in 2010. She has been a member of the California Bar since 2009. Güner was promoted to counsel in 2016 and has extensive experience in competition law matters. She has represented various multinational and national companies before the Turkish Competition Authority. In addition, she speaks at various university lectures and conferences and co-authors many articles published internationally and locally in English and Turkish on contemporary competition law issues.