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GLOBAL COMPETITION REVIEW

Overview

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The Law on Protection of Competition No. 4054 (the 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 competition in the whole territory of Turkey or a part thereof.

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

The Competition Authority just published the Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector Communiqué No. 2017/3 which brings the block exemption regime closer to that of the European Union. The Competition Authority recently released Communiqué No. 2017/1 on the Communiqué Concerning the Increase of the Minimum Administrative Fines Specified in Paragraph 1 of Article 16 of the Competition Law, to be valid until 31 December 2017 (Communiqué No. 2017/1). Communiqué No. 2017/1 enters an amendment to the minimum administrative fines to bring them in line with the current economic parameters. The Competition Authority also released the newest of the block exemptions. The Block Exemption Communiqué No. 2016/3 on R&D Agreements sets out revised rules for research and development agreements in Turkey, overhauling the Block Exemption Communiqué No. 2003/2 on Research and Development Agreements in order to retain the harmony between EU and Turkish competition law instruments.

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 was finally put on the parliament's agenda in late 2013 and it was officially submitted to the Presidency of the Turkish

Parliament on 23 January 2014. The draft law proposes several significant changes in merger control (eg, the introduction of a de minimis rule and the SIEC test) and investigation procedures (eg, 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 was submitted and discussed in the parliament's relevant Commissions in 2014. Legislative discussions and consultations on the draft law are still ongoing at the Commission level. However, it remains unknown whether the Turkish Parliament or the government will renew the draft law. It could be anticipated that the main topics to be held in the discussions on the potential new draft competition law will not significantly differ from the changes that were introduced by the previous draft.

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 that 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 349 people are employed at the authority, including competition experts, assistant experts, lawyers, board members, reporters and technical personnel. Several divisions with sector-specific work distribution handle competition law enforcement work through around 145 case handlers. The annual budget of the authority for 2017 was increased to 78 million lira.

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 250 investigations in the past 18 years. The sectors that are most investigated include: transportation; nutrition; agriculture; food and beverages; construction materials; and pharmaceuticals and healthcare services or products.

The overall fines imposed by the Turkish Competition Authority thus far total approximately 3 billion lira.

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, the pharmaceuticals sector and the natural gas 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. In 2015, the Competition Authority published a sector report concerning the wholesale and retail market for electricity. As expected, the Competition Authority published sector reports on media, motion pictures market and cement market in 2016.

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 lira and their Turkish turnovers exceed 30 million 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 lira and the worldwide turnover of the other party exceeds 500 million lira.

After the amendments, the 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 40 per cent for two years in a row, to 101 in 2015. 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 annual report for 2016 is expected to be published soon.

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 2017 is 18,377 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, 2017/3, 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 reasoned 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, Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition and regulatory department consists of four partners, one counsel and 32 associates. We represent corporations, business associations, investment banks, partnerships and individuals in a wide range of competition law matters. Our firm also collaborates with many international law firms on Turkish competition law matters.

In addition to unparalleled experience in merger control issues, ELIG has vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. ELIG has in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. Furthermore, 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 administrative courts and the High State Council, 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 often contain complex antitrust law issues, including distributorship, licensing, franchising and toll manufacturing.



Gönenç Gürkaynak
ELİG, Attorneys-at-Law

Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 70 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He received his LLM degree from Harvard Law School and is qualified to practice in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 19 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court, and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.



K Korhan Yıldırım
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K Korhan Yıldırım is a partner at ELIG, Attorneys-at-Law. He graduated from Galatasaray University Faculty of Law in 2005 and was admitted to the Istanbul Bar in 2006.

Mr Yıldırım has been working with ELIG for more than 10 years and has been a partner in the competition law and regulatory department since January 2014.

He has extensive experience in all areas of competition law including cartel agreements, abuse of dominance, concentrations and joint ventures. He has represented various multinational and national companies before the Turkish Competition Authority, administrative courts and the High State Court. Mr Yıldırım has given numerous legal opinions and trainings in relation to compliance to competition law rules. Mr Yıldırım has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conference and symposia. He is fluent in English and French.