

EXPERTGUIDES

THE WORLD'S LEADING LAWYERS CHOSEN BY THEIR PEERS

Over 20 years' experience

COMPETITION AND ANTITRUST



WHAT'S INSIDE?

FEATURES BY:

LIM CHONG KIN
DREW & NAPIER

PAUL S RHEE AND SINSUNG (SEAN) YUN
YOON & YANG

CORMAC LITTLE
WILLIAM FRY

UROS POPOVIC
BOJOVIC & PARTNERS

ANDREW WARD AND LAURA PINILLA
CUATRECASAS

GÖNENÇ GÜRKAYNAK, ESQ AND ESRA UÇTU
ELIG, ATTORNEYS-AT-LAW

VALENTYNA HVOZD AND VLADIMIR SAYENKO
SAYENKO KHARENKO

TIM COWEN
PREISKEL & CO

RODRIGO M CARNEIRO DE OLIVEIRA AND LUÍS HENRIQUE
PERRONI FERNANDES
PINHEIRO NETO

PATRICIA AGRA ARAUJO
L.O. BAPTISTA ADVOGADOS

CARLOS MENA LABARTHE AND SEBASTIÁN MARTÍNEZ
PASTRANA
CREEL GARCÍA-CUÉLLAR AIZA Y ENRÍQUEZ

JOCELYN KATZ AND MARK GARDEN
ENSAFRICA

CHARLES H CRITCHLOW
BAKER & MCKENZIE

SERDAR DALKIR
CRETC

TURKEY

Recent Developments in Turkish Competition Law

Gönenç Gürkaynak, Esq and Esra Uçtu
ELIG, Attorneys-at-Law
Istanbul

“Monitoring legislations, practices, policies and measures of other countries concerning agreements and decisions limiting competition” ranks high among the duties assigned to the Turkish Competition Board (the “**Board**”) by Law No. 4054 on the Protection of Competition (“**Law No. 4054**”). The Board has been gearing up to harmonize the Turkish legislative framework in the field of competition law with European Union standards. In fact, this is a requisite of international agreements to which Turkey is party. To that end, the Turkish Competition Authority (the “**Authority**”) regularly examines the entire legislation applicable in the European Union and adopts, to the extent applicable, various secondary legislations. These secondary legislations concern, *inter alia*, mergers and acquisitions, agreements in motor vehicle and insurance sectors, vertical restraints, research and development agreements, technology transfer agreements, access to file, protection of trade secrets, hearings, leniency, and fines.

Few would disagree that 2017 has been one of the most prolific legislative periods for the Authority as it witnessed fundamental changes in important regulations and supporting guidelines. The (i) “Draft Guidelines on Vertical Agreements”, (ii) “Communiqué 2017/2 on the Amendment of Communiqué 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board” and (iii) “The New Block Exemption Communiqué No. 2017/3 for the Vertical Agreements in the Motor Vehicle Sector” have recently been a focus of the Board’s harmonization work.

I. Draft Guidelines on Vertical Agreements

The Authority announced on July 20, 2017 that its Draft Guidelines on Vertical Agreements (the “**Draft Guidelines**”) was available for public consultation. The Draft Guidelines include new regulations in respect of (i) evaluation of the non-compete obligations in the agency agreements, (ii) online sales and (iii) ‘most-favored-nation’ clauses aimed at eliminating inconsistencies between the current legislative framework of competition law in order to bring it more in line with EU legislation.

As for non-compete obligations in the agency agreements, the current Block Exemption Communiqué on Vertical Agreements No. 2002/2 (“**Communiqué No. 2002/2**”) and the Draft Guidelines provide that such clauses would only be considered under Article 4 of Law No. 4054 in case a market



foreclosure effect arises in the relevant market (thus promoting a “rule of reason” analysis). In this regard, the Authority’s informatory note states that such an approach would contradict the general framework of Law No. 4054. Accordingly, the Draft Guidelines suggest an amendment on this point to the effect that non-compete obligations would fall within the scope of Article 4 irrespective of whether they create a foreclosure effect in the relevant market.

The Draft Guidelines also introduce new provisions regarding online sales and point out the necessity of a specific regulatory framework for online sales. To that end, the new online sales provisions conform to the

equivalent provisions in the European Commission’s Guidelines on Vertical Restraints. The new provisions mainly relate to (i) hardcore restrictions for online sales, (ii) provisions concerning online sales in selective distribution systems and (iii) conditions for the use of online sales as sales channel.

Last but not least, the Draft Guidelines introduce new provisions with respect to most-favored-nation (“**MFN**”) clauses, which have recently been scrutinized by the Turkish Competition Board (e.g. *Yemek Sepeti*, 16-20/347-156; June 9, 2016), in a similar fashion as the European Commission. The new provisions provide for a *rule of reason* approach

TURKISH COMPETITION
AUTHORITY FOCUSES
ON HARMONIZING ITS
LEGISLATIVE
FRAMEWORK WITH
APPLICABLE
INTERNATIONAL BEST
PRACTICES

TURKEY

with regard to the analysis of MFN clauses under competition law. Their contribution is highly significant as they will provide vital guidance for the Board's future decisional practice on this matter.

II. Communiqué 2017/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board

The Authority published the Communiqué 2017/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board ("**Communiqué No. 2017/2**") on February, 24, 2017 on its official website. While there is no change regarding the current applicable turnover thresholds, the new regulation includes substantial amendments with respect to (i) notifiability assessment for successive transactions and (ii) the stand-still obligation applying to stock exchange operations (which take into consideration the current applicable EU law on this matter).

Article 2 of Communiqué No. 2017/2 abolished Article 8/5 of Communiqué No. 2010/4, which previously propounded that "*two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué.*". The Communiqué No. 2017/2 extended the scope of successive transactions. In the new regime, "*two or more transactions carried out between the same persons or parties or within the same relevant product market by the same undertaking concerned within a period of three years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué.*". With this amendment, the Board now considers transactions carried out by the same undertaking in the same relevant product market within three years as a single transaction.

Another amendment is the exception to the stand-still obligation for series of transactions in securities (where control is acquired from various sellers in a stock exchange). Accordingly, such transactions could be notified to the Authority after their implementation/closing, provided that (a) the notification is submitted to the Board without delay, and (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation which would be granted by the Board.

III. The New Block Exemption Communiqué No. 2017/3 for the Vertical Agreements in the Motor Vehicle Sector

The New Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector in Turkey (the "**New Communiqué**") was published in the Official Gazette dated 24 February 2017. It revoked the Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector (the "**Former Communiqué**"). The Authority published on its

official website on March 7, 2017 a new set of guidelines which provide further details regarding implementation of the New Communiqué (the "**New Guidelines**").

The New Communiqué brought fundamental changes, in particular with regard to (i) conditions for block exemption, (ii) non-compete obligations and multi-branding and (iii) withdrawal of exemption and calculation of market shares.

The New Communiqué abandons separate threshold system adopted in the Former Communiqué. It provides a unilateral market share threshold of 30% for both quantitative distribution agreements and exclusive distribution agreements in order to benefit from the block exemption regime on the grounds that "different thresholds system" did not introduce efficiencies in the formation of distribution systems. Within the scope of the Former Communiqué, the market share threshold for quantitative selective distribution system was 40%.

The New Communiqué excluded certain requirements that were necessary to benefit from the protective cloak of block exemption under the Former Communiqué. For instance, granting parties (suppliers and distributors) the right to bring conflicts arising from the relevant agreement to an independent expert or arbitrator is no longer a condition of block exemption. On the other hand, certain provisions regarding termination notice have been preserved in the New Communiqué.

The New Communiqué defines non-compete obligation as "*any direct or indirect obligation imposed on the buyer, aimed at purchasing, from the supplier or another undertaking to be designated by the supplier, more than 80% of the goods or services, or substitutes of such goods or services subject to the agreement, based on the purchaser's purchases within the previous calendar year, in the market for sales of motor vehicle.*". Therefore, it introduced a major change regarding non-compete obligation as the Former Communiqué set the relevant threshold at 30%.

The New Communiqué also introduced several new provisions with regard to (i) equivalent and original spare parts, (ii) restrictions hindering benefits of group exemption and (iii) changes in the supplier's market share which exceeds the thresholds determined in order to benefit from the block exemption regime over time.

Conclusion

Considering recent legislative studies undertaken by the Authority, the Turkish Competition Authority focuses on harmonizing the Turkish legislative framework regarding competition law with applicable international best practices and in an effort to consider the most recent international competition law practices in its assessment of the undertakings' conducts and M&A transactions.

TURKEY

**Gönenç Gürkaynak****ELIG, Attorneys-at-Law**

Citlenbik Sokak, No:12

Yildiz Mahallesi

Besiktas

34349 Istanbul

Turkey

Tel: (90) 212 327 17 24

Email: gonenc.gurkaynak@elig.com

Website: www.elig.com

Mr Gönenç Gürkaynak is the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 87 lawyers in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He holds an LLM degree from Harvard Law School, and he is qualified to practice in Istanbul, New York and 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 45 lawyers. He has unparalleled experience in Turkish competition law counseling issues with more than 20 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, around 15 antitrust appeal cases in the high administrative court, and over 60 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 international and local articles in English and in Turkish, and two books, one published on "A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective" by the Turkish Competition Authority, and the other on "Fundamental Concepts of Anglo-American Law" by Legal Publishing. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities and gives lectures at other universities in Turkey.

ELIG*Attorneys at Law*

ELİG

Attorneys at Law

INTEGRITY EFFICIENCY COMMITMENT

ELİG, Attorneys-at-Law is an eminent, independent Turkish law firm founded in 2005. The firm is based in Istanbul.

Widely recognized as having the leading competition law practice in Turkey, our team consists of 45 dedicated competition law specialists led by Gönenç Gürkaynak, the firm's managing partner with more than 20 years of competition law experience, along with three partners and one counsel.

Our competition law team at ELİG has a unique understanding and significant experience in a range of industries including pharmaceuticals, transportation & airlines, food & agricultural products, manufacturing, telecommunications, media & technology, healthcare & medical devices, energy, tobacco, construction and defense.

In addition to our unparalleled experience in merger control issues, our team has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before the courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

“

ELİG is your best bet for competition expertise in Turkey. Praised by colleagues across the country and internationally... ELİG's peers all agree: there is ELİG, and then there is everybody else.

”

Global Competition Review, Turkey Survey, Elite

“

Stellar practice representing clients in antitrust investigations and proceedings before the Turkish Competition Authority. Highly esteemed for assisting multinational corporations with Turkish merger control law and non-compete agreements. Clients describe the firm as “the best in the class in competition law.”

”

Chambers Europe 2017, Competition / Antitrust Band 1

We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include: competition law • corporate law

- M&A • contracts law • white collar irregularities and compliance
- data protection and cybersecurity law • litigation and dispute resolution
- Internet law, technology, media and telecommunications law
- intellectual property law • administrative law • real estate law • anti-dumping law
- pharma and healthcare regulatory • employment law • banking and finance law

For further information, please contact:

Gönenç Gürkaynak, Managing Partner
gonenc.gurkaynak@elig.com

Çitlenbik Sokak, No. 12, Yıldız Mahallesi
Beşiktaş, 34349, İstanbul, Turkey
Tel: + 90 212 327 17 24

www.elig.com