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Competition law in Turkey

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Article 167 of the Turkish Constitution bestowed on the government the duty to take "for money, credit, capital, product and service markets, measures providing and improving healthy and regular procedures" to prevent "monopolisation and cauterisation created as result of activity or agreement in the markets".

As a requirement of this constitutional clause, in order to prevent agreements, decisions and practices which prevent, restrict or distort competition within the markets for goods and services in the territory of Republic of Turkey and the abuse of dominant position by those undertakings which are dominant in the market, the Law on the Protection of Competition No 4,054 was enacted in the Turkish Parliament on December 7 1994, published in the *Official Gazette* and became effective on December 13 1994. The Competition Board, which is the decision-making body of the Competition Authority, responsible for enforcing the Law, was established on February 27 1997. After establishing itself in a short period of time (eight months), the Authority officially announced its formation to the public with a decree published on November 5 1997. The Authority quickly began evaluating applications and so the process of realisation of Turkish Competition Law, which was initiated at the beginning of the 1970s was completed.

The Competition Authority is the body responsible for enforcing the Law on the Protection of Competition No 4,054. Article 20 includes a clause stating that while carrying out its duties, the Authority will be completely autonomous. The Competition Board established its own internal structure and organisation, while preparing decrees pursuant to the Law (called the second regulation).

The fundamental prohibitions and the exemption scheme

The Law No 4,054 is based on two fundamental prohibitions:

- Article 4, which aims to prevent the distortion of the competition by the associations between enterprises or agreements, or concerted practices between enterprises in a certain market for goods and services; and
- Article 6 which aims to prevent the abuse of dominant position by enterprises in such a position.

These two Articles equate to Articles 81(1) and 82 of the EC Treaty.

Article 5 of the Law (which contains the same provisions as Article 81(3) of the Treaty) is the main exemption clause. According to the provisions of Article 5, even in the presence of an agreement, concerted practices or decisions which restrict competition, in some cases, the Board may allow exemption from the provisions of Article 4. The exemption regulation in question includes agreements, concerted practices and decisions which allow consumers to:

- gain a share from the resulting benefit;
- contribute to new developments and progress or technical or economic improvement in production or distribution of goods and in providing services, which do not eliminate competition in a substantial part of the relevant market, and do not induce a restraint on competition that is more than essential.

In any case, a decision for exemption is issued for a specified period of not more than five years.

Article 5 also bestows on the Board the power to issue communiqués by which certain categories of agreements are exempted as a group. Within this framework, the Board issued the following Communiqués under the foregoing principles of an exemption regime:

- the Block Exemption Communiqué on the Exclusive Distribution Agreements no 1997/3;
- the Block Exemption Communiqué on the Exclusive Purchasing Agreements no 1997/4;
- the Block Exemption Communiqué Concerning the Distribution and Servicing Agreements In Relation to Motor Vehicles no 1998/3; and
- the Block Exemption Communiqué Concerning the Franchising Agreements no1998/7.

Mergers and acquisitions

As mentioned in the Law, the merger of two or more enterprises and acquisition (except by way of inheritance) by an enterprise or by a person of another enterprise, either by acquisition of all or part of its assets or securities or other means by which that person or enterprise concerned, which creates or strengthens the dominant position of one or more enterprises as a result of which competition is significantly impeded in the market for goods and services in the whole or part of the state, is unlawful and prohibited.

There are strict thresholds for mergers and acquisitions in Turkey. Where total market shares of the undertakings that are parties to the merger or acquisition exceed 25 per cent of the market in the relevant product market within the whole territory of the country or a part of it, or even though they do not exceed this rate, and their total turnovers exceed 25 trillion Turkish lira (approximately US$40 million), it is compulsory for them to file for authorisation from the Competition Board. Market share or turnover is calculated by the sum of market shares or sum of turnovers of the undertakings (and connected undertakings) within the relevant product market.

The filing is mandatory where the thresholds are exceeded. In cases where a merger or an acquisition has not been notified, the Board, when it is informed about the transaction concerned, by any means, will investigate the merger or acquisition. Upon conclusion of the investigation:

- If the Board finds that the merger or acquisition concerned does not create any problems with regard to competition issues, it will consent to the transaction. However, the Board can impose fines against the parties concerned for their failure to notify.
- If the Board finds that the merger or acquisition concerned "creates or strengthens the dominant position of one or more undertakings as a result of which, competition would be significantly impeded in a market for goods and services in the whole territory of state or in a substantial part of it", the Board, as well as imposing fines, may terminateof the transaction.

In cases where a merger or acquisition has been closed before clearance, the Board imposes fines against the parties concerned, regardless of the final decision concerning the merger or acquisition.

In making its appraisal in a merger transaction, the Board takes into account *inter alia*:

- the market position of the undertakings concerned;
- their economic and financial powers;
- the alternatives available to suppliers and users;
- their opportunities for access to sources of supply or entry into markets;
- any legal or other barriers to entry into the market;
- supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers;
- developments in the technical and economic progress provided that they are to the advantage of consumers and do not form an obstacle to competition.

When making its decision, the Board also considers the criteria which are directly related with competition issues. Although they play a limited role, the Board may also take into account economic and social factors.

According to the provisions of Law No 4,054 and the related communiqué on mergers, the parties to a merger cannot give divestment undertakings. However, the Board may permit a merger or an acquisition notified on condition that remedial measures deemed appropriate by the Board are taken, and certain other obligations, determined by the Board, are complied with; thus, parties cannot negotiate undertakings with the Board. There is no specific pre-merger negotiation procedure or any other mechanism such as the Merger Task Force in the EU.

In assessing a merger or an acquisition, the Board may, where necessary, request information from the parties to the merger as well as third parties such as the customers, competitors and suppliers of the parties, and other parties concerned with the merger; it may also invite such persons to the hearing. Third parties may also make a request to the Board to be heard, provided that they can prove their legitimate interest.

Application for a review of any of the Board's decisions and the decisions regarding the interim measures, fines and periodic penalty payments can be made to the Council of State within the specified time. The decision of the Board becomes final if no action is taken within this specified time limitation.

Turkish merger legislation does not contain special provisions for foreign investments or special sectors. Foreign investors, regardless of whether the investment is direct or with a Turkish partner, are subject to same rules and are under the same obligations as a Turkish firm.

Typical steps during the investigation

The Competition Board may, upon application or its own initiative, decide on a direct or a preliminary investigation determining whether there appears an initial proceeding is needed for any application. In cases where a preliminary investigation is carried out, the Director of the Board appoints one or more experts among the staff as a reporter. The reporter who is appointed to carry out the preliminary investigation notifies the Board in writing of all the information and evidence together with his view on the matter concerned, within 30 days. Within 10 days of the submission of the report on the preliminary investigation, the Board must meet to conclude its decision on whether it is necessary to initiate a preliminary investigation.

Where the Board, having received an application or a notification, considers that there are serious and sufficient grounds on the basis of the information in its possession, it informs the applicants of its decision in writing and of the commencement of the proceedings.

The Board, upon the decision to initiate the investigation procedure, appoints the Board members together with a reporter or reporters authorised to carry out the investigation. The investigation must be completed within six months at most. The Board may extend this period for only once – for a further six months – where it is deemed necessary.

The Board, informs the parties concerned of the investigations initiated within 15 days of the date of the decision and requests the parties to submit their first arguments relevant to their defence in writing within 30 days of this. For this submission period to begin to run, the Board, together with its request for the arguments of the parties, informs them of the legal grounds and the nature of the alleged infringement. The decision of the Board on the initiation of investigation is final.

During the course of investigation, the Investigation Committee may requesting information and exercise the powers of on-the-spot investigation. Within this period, the Committee may also request the parties and other related authorities to submit all necessary documents and information. During the investigation stage, any parties that are alleged to have infringed the Law may submit at any time to the Board information and evidence that may affect the decision.

The parties, being investigated may, from the date of initiation of the investigation up to the date of request for a hearing, request copies of all documents issued relating to the investigation, and if possible, all types of evidence obtained. It is important to note that the Board cannot base its decision on any criteria about which the parties are not informed or not given the right to defend themselves. The report prepared at the end of the investigation stage is notified to all the Board members and to the parties concerned.

Those who are deemed to have infringed the Law are asked to submit their second defence in writing to the Board within 30 days. Upon the defence arguments, the experts authorised to carry out the investigation submit their additional views in writing within 15 days; these should also be notified to all the Board members and to the parties concerned who then have 30 days to reply. This period may be extended for only once for another 30 days, and only in cases where the parties can show justified reasons why its should be; otherwise, replies of the parties not made within the specified time period is not taken into consideration.

A hearing is held if the parties concerned have requested so in their defence or reply petitions. On the other hand, the Board may also decide on a hearing on its own initiative. The hearing is held between 30 days and 60 days of the end of the investigation stage. The invitations for the hearing are sent to the related parties within at least 30 days prior to the date of the hearing.

Hearings are held in public. However, the Board may, on the grounds of protection of public morality or trade secrets, decide for closed sessions. Despite the possibility of closed sessions, the experiences showed that for the Board to decide for a closed session, the parties have to submit strong arguments.

Hearings are presided by the chairman and in his absence by the deputy chairman. A hearing can only be held in the presence of the chairman or the deputy chairman and at least seven members of the Board. Hearings should to be concluded in no more than five consequent sessions (several meetings held on the same day shall be considered as one session). The final decision of the Competition Board should be made on the same day, and if this is not possible, together with its reasoning, within 15 days following the hearing.

In cases where a hearing is neither requested by the parties nor decided by the Board on its own initiative, the final decision is given within 30 days of the end of the investigation stage.

Fines

The Board may impose fines on natural persons or legal entities which have the status of an enterprise, and associations of enterprises and/or on the members of these associations in cases where incorrect or misleading information is provided in an application for clearance of a merger, in a request for information or in an on-the-spot investigation. Fines also apply in cases of failure to notify a merger or acquisition or an agreement within the specified time period, and for the infringement of any obligations or conditions attached to an exemption decision of the Board.

The enterprises and associations of enterprises against which a Board decision is given on the infringement of the fundamental prohibitions cited in Articles 4 and 6 of the Law are fined up to 10 per cent of their gross income for the previous financial year. In cases where such a fine is imposed, an additional fine of up to 10 per cent of the corporate fine may also be imposed on the individuals managing of these entities. The Board may also impose periodic penalty payments per day.

Up until now, the largest fine that the Board has imposed is approximately US$1.7 million in the *Aegean Cement Case* concerning parallel conduct, US$1.6 million in *Istanbul Wholesale Case* concerning refusal to supply and US$500,000 in *TV Advertisement Marketing Case*.

The actions of the Competition Board

A total of 896 applications have been submitted to the Competition Board between November 5 1997, which was the date when the completion of the Board's organisation was announced to the public, and December 31 1999. While 444 of these applications involved violation of competition, 294 of them involved applications related to negative clearance/exemption and 143 of them involved merger transactions.

With regard to the applications submitted to the Board in connection with violation of competition, preliminary investigations were conducted in 50 of those applications which were found to fall within the scope of Competition Law and were subsequently processed. A decision of inquiry was taken on 20 of the 50 investigations started, with two additional decisions of inquiry taken *ex officio*. Thus in the period concerned, a total of 22 investigations were started, and the Board had announced its final decision regarding 7 of them as of December 31 1999.

The high number of applications received by the Board clearly indicates the extent of delay experienced by Turkey in preparing the necessary legislation to regulate the competition regarding the markets handling goods and services; it also points to the fact that the Board is anticipating the same heavy workload in the near future. On the other hand, the fact that about half the total number of applications concerning violation of competition was found to be outside the scope of the Competition Law demonstrates that the relevant circles including the lawyers and public were considerably unaware of the concept of "competition" defined in and governed by said law.

Considering the fact that the Competition Law is a relatively new branch of law, and that the rights and obligations brought by the Law are not yet sufficiently known by the public, the Board allowed, in its Communiqué No 1997/2, undertakings and associations of undertakings with agreements existing prior to November 5 1997 (the date of the Board's initial public decree), a considerably longer notification period of six months. Within this period and afterwards, a total of 294 applications concerning negative clearance/exemption were entered in the files of the Board and were subsequently examined. 78 of these applications have been so for finalised.

In accordance with Article 7 of Law No 4,054, as well as with the Communiqués issued pursuant to this Article, a total of 143 applications concerning mergers and takeovers have been submitted to the Board. It has finalised 132 of these applications and 11 applications are still being examined.

Despite the fact that applications relevant to matters concerning competition legislation are rather new, the high number of applications involving mergers is noteworthy. The main reason for this is the frequent cases of company 'marriages' experienced in the last two years. Another factor involved here is the significant number of applications received by the Board which are outside the scope of Article 7 and relevant Communiqués, due to the fact that the public has not yet been adequately informed about the competition legislation.

Eight applications were finalised by the Competition Board during this period which involved takeover transactions realised through the process of privatisation. These applications were particularly noteworthy not only from the standpoint of being finalised, but also because they showed the need for laying down the legislation required to ensure taking into consideration the rules of competition in carrying out the privatisation transactions.

In view of inadequacy of Communiqué No 1997/1 in this respect, a new set of rules has been required and 'Communiqué No 1998/4 Concerning the Principles and Procedures to the Followed in Submission of Preliminary Declarations and Authorisation Applications to the Competition Board in order to Ensure the Legal Validity of Taking Over Transactions Realized through Privatization' has been issued for exclusive application to privatisation transactions. The Competition Law will now play a major role in privatisation transactions, as the parties concerned are required to obtain, prior to commencement of tender procedures, the opinion of the Competition Board regarding the outcome of the dominance or privileges exercised by public enterprises in their respective markets following privatisation, and then to obtain the Competition Board's authorisation concerning the takeover transactions to be realised through privatisation after realisation of tender.

Another noteworthy point regarding merger applications is that 51 per cent of the total number of transactions involves enterprises who have at least one party or partner with foreign capital. These transactions, which occur by the enterprises with foreign capital taking over (partly or wholly) the partnership shares of enterprises domiciled in Turkey, or by establishing joint ventures with them, indicate that there has been a significant entry of foreign capital into Turkey in this way during this same two-year period.

The Competition Board has assumed a determinative function in the process of Turkey's membership in EU. The joint competition policy has unquestionably played an important role in the implementation of a 'customs union' by the EU in late 1960s, of the 'single market', and in the process of realising "monetary union" in the present period.

From this perspective, the Turkish Competition Board and the Authority have had to develop a cooperative relationship with other antitrust authorities both on case-by-case basis (when necessary for large-scale mergers and violations of competitions involving foreign firms) and on instructive basis (for eg educational issues). Moreover, it is to be noted that the cooperation system between the Turkish authorities and the Commission of the European Union's Directorate General of Competition is based on bilateral agreements between Turkey and the EU.

In addition, the application of competition law in Turkey is also the result of obligations regarding the 'Decision of the Association Council No 1/95 Establishing Customs Union between the European Union and Turkey'. Correspondingly, Turkey has enacted Law No 4,054 on the Protection of Competition and accepted the applicability of the case law of the Institutions of the EU pursuant to Article 39(2)(a) of the Decision of the Association Council No 1/95.

Thus, the case law of EU Court of Justice has also become the case law of Turkish national legislation. For competition matters that involve Turkish and EU-based undertakings, both the EU Commission and the Turkish Competition Authority are considered to be the 'competent authority'. The principles of this cooperative system are laid down in Article 43 of the Decision of the Association Council No 1/95.

As a final point, the adoption of the same rules of competition by Turkey as adopted by EU should, in a sense, be recognised as 'running along the same track' as the EU in the field of economics. In other words, the establishment of a joint competition policy between Turkey and EU will create the legal foundation for economic integration. It also means that full membership of Turkey in EU will occur within this framework.

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ESC Consulting is the first and only Turkish European law and consultancy firm in Turkey specialising mainly in competition law, anti-dumping proceedings, intellectual property law, telecoms and privatisation issues. Founded in Istanbul in 1986, this office has built a reputation in the competition law field with its ability and willingness in defending corporations and trade associations in all types of antitrust matters. Today the firm consists of three partners. The partners are known in both Turkey and Europe for their grasp of business and familiarity with the technical and regulatory issues that confront their clients, as well as their imaginative response to clients' needs.

ESC Consulting is widely recognised as Turkey's leading competition law firm with an enviable corporate client base. The firm comprises of lawyers and economists, all specialising in competition and regulatory matters. ESC Consulting has built up an acknowledged high reputation for its services concerning Turkish and EC antitrust and merger control law.

The Competition Group provides legal services in antitrust and merger control law which entail the filing of notifications to the Turkish Competition Authority and the European Commission, defending undertakings subject to antitrust proceedings before the Turkish Authority and the Commission as well as advice on competition law aspects with regard to commercial agreements, in particular agency, distribution, franchising and licensing agreements.

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