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1. What is the name of the main regulator/ regulators governing the competition law in this jurisdiction?

The Turkish Competition Authority (TCA) is entitled to apply the Code on the Protection of Competition (Competition Code) in Turkey. The TCA is a legal entity with administrative and financial autonomy. It consists of the Presidency, the Turkish Competition Board and the service departments.

The TCB is the TCA body which is entitled to decide on competition law matters which are investigated, reviewed, documented and submitted by the service departments. The TCB consists of seven members who are appointed for a term of four years.

The service departments of the TCA include five enforcement and supervision departments who are referred to as the technical assessment units and eight supportive service departments, including a department responsible for economic and statistical analysis to support the competition law cases.

2. In the context of a merger acquisition in what circumstances, are the seller and/or the purchaser required to notify the competition regulator?

Transactions which cause a permanent change in the control of an entity, which has been independent from the purchaser until the transaction, are subject to merger control in Turkey. Accordingly, intragroup transactions and minority share purchases do not qualify. On the other hand, minority share purchases which are attached to the transfer of rights which give the power to the minority shareholder to exert decisive influence over the strategic decisions of the target entity may cause a lasting change in control. These powers may generate, inter alia, from veto rights of the minority shareholder over the business plan, annual budget and strategic investments of the corresponding entity.

In addition, the establishment of a joint venture which will have all resources and operational abilities of an independent entity (fully functional joint ventures) are subject to the merger control as well.

In a merger or acquisition transaction, authorisation from the TCB is required provided the following turnover thresholds are met:

- (a) The total turnover of the transaction parties in Turkey exceeds 100 million Turkish Lira (approximately $18 million) and the turnover of at least two of the transaction parties in Turkey exceeds 30 million Turkish Lira (approximately $5 million) each, or

- (b) The asset or operation subject to acquisition in the acquisition transaction and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding 30 million Turkish Lira (approximately $5 million) and the other party to the transaction has a global turnover exceeding 500 million Turkish Lira (approximately $85 million).

3. What steps will a competition regulator take if there are potential concerns around a company obtaining a dominant market position following a merger/purchase of a competitor?

The Competition Code prohibits merger and acquisition transactions which lead to the creation of a dominant position or strengthening of an already existing dominant position in the Turkish markets. If there are potential concerns around a company obtaining a dominant position following a merger/purchase of a competitor, the TCB has to prohibit the consummation of the transaction unless the parties offer remedies to abolish the competitive concerns around the transaction. The remedies may involve structural or behavioural commitments. The TCB announced in its guidelines the structural remedies (mostly divestment of a business line) would be the preferred way of sanitising a merger or acquisition transaction which involves competitive concerns. Even though the TCB is not allowed to issue a conditional approval on its own discretion it can accept suggested remedies and condition its approval on the fulfilment of the remedies.

The remedies can be offered and accepted at each stage of the review. However if the TCB is not satisfied with the remedies in the Phase I review or no remedies are offered, the TCB may decide to take the transaction under a 'final' or 'phase II' examination, which could take up to eighteen months. Concurrent with its preliminary objection, the TCB will duly notify the relevant parties, together with any other measures it considers necessary, that the merger or acquisition transaction has been suspended until a final decision has been rendered and the proposed transaction may not be implemented during this period. The TCB has the power to withhold clearance for these transactions. However, this is rare in practice.

4. How would a dominant market position be derived?

The concept of a dominant position in the market has been defined as 'the power of one or more undertakings in a particular market to determine the economic parameters of the market such as price, supply, and the amount of production and distribution by acting independently of their competitors and customers'. Under this definition, an undertaking with the power to act independently from competitive pressure to an appreciable extent is considered to hold a dominant position. An undertaking therefore which behaves independent of competitive pressure is capable of profitably increasing its prices above the competitive level and maintaining that price at that level for a certain period of time. In addition, the undertaking will also be able to maintain other factors including the level of production and distribution, the variety and/or quality of goods and services and the level of innovation below the competitive level to its own advantage and to the detriment of consumers.

The main indicator of a dominant position is high to very high market shares in the relevant product or service market. Even though there is no accepted threshold for a market share level being high enough to indicate a dominant position a widely used limit is 40%. There are also several decisions of the TCB where the corresponding market share was higher than 40% but

the TCB did not find any dominant position. Further parameters of the market taken into account by the TCB are the stability of the market shares over the time, the market share distribution of the competitors, barriers to entry, existing production capacity and idle capacity which could be employed easily if the market conditions are favourable, determinants of customer behaviour in terms of brand loyalty, bargaining behaviour, switching costs and similar. The expectation of a dominant position after a merger or acquisition transaction will depend on the interplay of all the above market parameters.

5. Is it possible to appeal a decision by the competition regulator- how does this work?

TCB decisions are considered 'administrative acts' which are subject to judicial review before administrative courts. In general, reasoned final decisions rendered by the TCB or their decisions on interim measures can be challenged before administrative courts by initiating a lawsuit within 60 days of the TCB notifying the relevant parties of the decision. Although the administrative action does not automatically stay the execution of a decision, if execution is likely to cause serious and irreparable damages, the court may decide to stay the execution at the request of the claimant. Decisions issued by administrative courts may be appealed before the Regional Administrative Court of Appeals and their decisions may be appealed to the Court of Appeals.

6. How quickly is any decision on a competition risk as a result of a merger/company purchase normally taken?

Clearance decisions for merger or acquisition transactions are generally rendered within four to six weeks after the relevant notification forms have been submitted if there is no significant overlap between the activities of the parties and if there is no substantial competition restriction identified within the scope of the transaction. This period may be extended for a few weeks if the case handlers assigned to the case send information requests to the parties of the transaction. A short decision is then issued, and on receiving the decision, the parties may close their transaction. Following this short decision, a reasoned decision is issued within two months.

The approval process of merger and acquisition transactions which involve a considerable increase in the market concentration may take up to 18 months.

The length of the procedures regarding decisions concerning competition law violations which require an investigation by the TCA typically take one to two years depending on the complexity and the number of undertakings involved of each case.

7. What remedies are generally taken when a dominant market position is established which would a merger or acquisition?

The parties to a transaction may propose remedies to cure a transaction if a merger/acquisition transaction is likely to cause substantive competition law concerns such as causing an undertaking to acquire a dominant position in a market. The TCB issued guidelines involving the form, contents and corresponding procedure of proposed remedies. Proposal of remedies is at the sole discretion of the parties. In other words, the TCB is not entitled to require remedies on its own. The TCB cannot also alter the remedies but can either accept the proposed remedies eliminate the competitive concerns or to assess they are insufficient to cure the transaction. Nevertheless, the TCB can put forward certain conditions and obligations to be fulfilled by the proposing parties so the performance of the remedy is guaranteed.

The remedies accepted by the TCB so far greatly vary in form and content based on the specifics of the case. Examples of remedies are divestiture of a business line or some parts of the assets in a predetermined time span; unbundling of ownership rights if there are cross shareholdings, legal separation of entities, licensing commitments and commitments to deal with purchasers and competitors on FRAND terms.

8. What penalties apply for failure to follow competition law in a merger or acquisition?

If an undertaking does not notify the TCA of a transaction it will be considered void.

In this case once the TCB becomes aware of the existence of the transaction it will initiate evaluation procedure ex officio and require parties to submit a notification form in a time span to be determined by the TCB (usually within 30 days of notification regarding the initiation of the review). Regardless of the outcome (eventual clearance decision or prohibition of the transaction), the TCB will issue an administrative fine equal to 0.1% of the annual turnover of the relevant undertaking generated in Turkey in the year preceding to the fining decision for failure to notify the TCB of the transaction.

If the transaction involves considerable competition law concerns and the TCB decides not to issue a clearance, then the TCB may issue a further pecuniary fine up to 10% of the annual turnover of the relevant undertaking generated in Turkey in the year preceding to the fining decision. The exact percentage of the fine will depend on the term the transaction existed and generated effects on the market.

In addition, the TCB has the right to wind-up the transaction, take measures to eliminate all illegal de facto consequences of the transaction, take measures to return shares and assets to previous owners and to transfer them to other suitable third party holders if returning to previous owners is not feasible.

9. Are there any rules governing the way a company seen as having a dominant market position must sell or market their products - which are the most important ones?

Some common commercial practices may cause a violation of the competition law when applied by a dominant company. A company which is dominant in some product or service markets carries a special burden to refrain from the commercial practices which restricts competition.

The TCB provides guidance with respect to possible ways of abusive conduct of a dominant position in its Guidelines on the Assessment of Abusive Conduct by Undertakings with a Dominant Position (Guidelines on Abusive Conduct). In its Guidelines on Abusive Conduct the TCB provides explanations regarding refusal to supply, predatory pricing, margin squeeze, exclusive branding, rebate systems and tying. A dominant undertaking is supposed to refrain from commercial practices which fall under any of these categories.

The following examples are not prohibited per se, however they need delicate and in depth analysis with respect to their actual and potential effects on the market, competitors and purchasers.

Refusal to Supply:

The TCB acknowledges, in principle, that any undertaking, whether dominant or not, has the right to freely choose the undertakings they will do business with and dispose of the assets they own. However under certain exceptional circumstances, a refusal to supply by a dominant undertaking may be considered behaviour with restrictive effects on competition by the TCB and the dominant undertaking may be placed under an obligation to supply.

Refusal to supply can be in the form of direct refusal through the dominant undertaking refusing the request for supply without citing a reason, or in the form of 'constructive refusal' through behaviour including undue delays, restriction of product supply and imposition of unreasonable conditions.

When assessing refusals to supply, the TCB looks for all three of these conditions to be met to find a violation.

- i. the refusal should relate to a product or service which is indispensable for the prospected purchaser to be able to compete in a downstream market,

  ii. the refusal should be likely to lead to the elimination of effective competition in the downstream market; and

  iii. the refusal should be likely to lead to consumer harm.

If all the three conditions listed above exist with respect to a product and undertaking, then the dominant undertaking may not refuse to supply a purchaser.

Predatory Pricing

Predatory pricing is an anti-competitive pricing strategy where a dominant undertaking, with a view to maintain or strengthen its market power, accepts incurring losses (sacrifices profits) by setting a below-cost sales price in the short-term, in order to foreclose or discipline one or more of its actual or potential competitors, or otherwise prevent their competitive behaviour.

In predatory pricing analysis, which compares the price implemented by the dominant undertaking with the costs incurred with respect to the conduct under examination, the Board evaluates whether the conduct in question is likely to lead to market foreclosure for an equally efficient competitor.

Margin/Price Squeeze

Price squeeze is when an undertaking active in vertically related markets which is dominant in the upstream market sets the margin between the prices of the upstream and downstream products at a level which does not allow even an equally efficient competitor in the downstream market to trade profitably on a lasting basis. The undertaking dominant in the upstream may cause margin squeeze by increasing the price for the upstream product, by decreasing the price for the downstream product, or by doing both simultaneously. The dominant undertaking is therefore able to transfer its market power over the upstream product to the downstream market and lead to the restriction of competition.

Exclusivity/Single Branding Agreements

Exclusivity provisions put the obligation on the purchaser to conduct all of its purchases or a significant portion of them from a single supplier. A formal agreement is not necessary. Any kind of mutual consent including oral agreements even practices of dominant undertaking which incentivise and lead to a de facto exclusivity could cause an abusive exclusivity which violates the law.

Exclusivity provisions may violate competition law by market foreclosure and restricting the likelihood other firms might emerge as efficient competitors to the dominant undertaking.

Rebate Systems

The rebate systems are well established and a legitimate part of commercial life. However strategic use of rebate systems may substitute de facto exclusivity or predatory pricing. Accordingly, rebate systems may violate competition law by market foreclosure and restricting the likelihood other firms might emerge as an efficient competitor for the dominant undertaking the Board assesses rebate systems based on their actual market effects.

Tying

Tying usually refers to situations where customers who purchase one product (the tying product) from the dominant undertaking are also required to purchase another product (the tied product) from the same undertaking. A dominant undertaking can cause market foreclosure in the tied market. This is because through tying, the dominant undertaking can drive existing competitors from the market by reducing the number of potential customers and create new barriers to entry for its competitors in the tied market.

10. What are the penalties for failure to apply competition rules when selling or marketing products?

Under Article 5 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), undertakings violating competition rules may be subject to fines ranging from 0.5% to 3% of the undertaking's previous year gross income. However, according to Article 6 of the Regulation on Fines, the TCA may impose higher or lower fines depending on whether there is any mitigating or aggravating factors as provided in Law No. 4054. Repetition of a violation, failing act in line with the made commitment, refusing to help within the course of an investigation and forcing other companies to violate competition rules are examples of aggravating factors.

11. Are there any rules which prevent companies from colluding with competitors in the market when setting prices?

Article 4 of the Competition Code prohibits any kind of agreements, concerted practices, or decisions of associations of undertakings which have an objective, effect or likely effect of the prevention, distortion, or restriction of competition. In particular, the Competition Code prohibits directly or indirectly fixing the purchase or sale prices of goods and services or its market conditions. In line with Law No. 4054, undertakings have to act independent from another while setting the prices of goods or services and should take into account they may be exposed to potential accusations of violating the competition rules by the TCA on any kind of interaction they have with their competitors.

12. What are the penalties for colluding with competitors?

The Competition Code defines colluding with competitors as an agreement which has the object, effect or likely effect of the prevention, distortion, or restriction of competition (i.e., a cartel), and these agreements are illegal and strictly prohibited. According to Article 5 of the Regulation on Fines, such agreements will be subject to a monetary fine from 2% to 4% of the undertakings' gross income for the previous year depending on various factors, such as the duration of the violation, the market power of undertakings and the severity of the damage. If a company repeats an offence, failing to act in line with the commitment, refusing to help within the course of investigation and forcing other companies to violate competition rules they may increase the fines in line with Article 6 of the Regulation on Fines.

13. Are there any rules governing the way a company seen as having a dominant market position as related to one product is able to sell or market other products?

There is no rule in Turkish law preventing an undertaking with a dominant market position as related to one product from selling or marketing another product.

However, an undertaking which is dominant in the market of a product may be prohibited from tying the product with another good .

14. Are there any specific industries, which have particular competition rules? Give examples of some of the main ones- and the legislation governing this regime.

There are various industries which are subject to sector specific competition legislation under Turkish laws. The banking industry is one example of this. According to Article 19 of the Banking Law No. 5411, in the event two banks are contemplating a merger, they should obtain clearance from the Banking Regulation and Supervision Agency rather than the TCA. The TCA also issues communiques concerning various industries in order to enable undertakings to understand the TCA's approach to specific markets. The Communique on Group Exemptions in the Insurance Industry and the Communique on Group Exemptions for Vertical Agreements in the Motor Vehicles Industry are a few examples of this.

15. Do the free zones have a different competition regime from mainland?

Companies operating in free zones are exempt from certain taxes such as corporate income tax, VAT, tariffs etc. They can also transfer their profits domestically or internationally without any limitations. However, the competition legislation does not provide any exceptions for conduct in free zones.

16. Are there any industries in which only state or public owned enterprises are allowed to operate? Give the main examples.

Until the late 2000s, there were several industries where publicly owned enterprises acted as legal monopolies, such as Türk Telekom in the telecommunication industry and Boru Hatları İle Petrol Taşıma Anonim Şirketi in the natural gas distribution and sale industry. However, these undertakings have since been privatized.

17. Are there any industries where fixed/state regulated pricing must apply? Give the main examples.

The Energy Market Regulatory Authority determines the sale price of electricity, natural gas, LPG, and oil, while the Agriculture and Forestry Ministry regulates the sale prices of cigarettes and the municipalities determine the sale prices of utility water.

18. What restrictions govern the inclusion of non-compete clauses in employee's contracts?

Under Turkish law, if employers wish to include a non-compete clause in an employee's employment contract, under Articles 444 and 445 of the Turkish Code of Obligations No. 6098, the clause will have to satisfy the following conditions to be valid and enforceable:

- -It should be in writing.

  -The employee should be in a position where they have access to information regarding

  - (1) the customer portfolio,

    (2) the production secrets, or

    (3) business transactions of their employer.

  -The employee should be able to cause significant harm to the employer's business by using this information.

  -The non-compete clause should not stipulate unjust limitations which endanger the financial future of the employee and the term of the non-compete clause will not exceed two years without prejudice to exceptional conditions and circumstances.

Firm

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Description

Since 1989, we have strived to reshape the Turkish law firm model in harmony with modern standards of professional practice while still preserving the personal attention that our clients have come to expect. Our pioneering efforts have allowed our firm to be rightfully recognized as the first "Full Service Law Firm" in Turkey.

Full service independent law firm

Throughout our history, we have chosen to remain independent of global coalitions. This has given us the flexibility to adopt the best global practices and apply them to the necessities arising in local practice. We independently built the foundation for the modern Turkish legal practice models and are proud of where our determination has taken us. Nonetheless, we recognize that client's needs evolve and our innovation continues to improve the services that can be offered. We have never rested on our laurels, and we will continue to work just as hard to remain ahead of the curve.

Our size and expertise make us one of the few truly full-service independent Turkish law firms with a global reach, either at home in the role of primary counsel or as local counsel for our foreign and domestic clients. Our firm's expertise and institutional knowledge enables us to go beyond simple lawyering and develop creative business-oriented solutions according to client needs. We accomplish this by putting clients first and becoming intimately acquainted with all aspects of their business and legal needs.

A large team with unprecedented experience

We take full advantage of our size: every project is handled by a unique project team composed of attorneys with the precise area of expertise and level of experience that the task requires. Our project teams are led by an exceptional corps of partners, each with decades of experience managing landmark projects in every practice area. Each new project calls for a different team composition which allows our attorneys to absorb more institutional knowledge and create ever-increasing synergies throughout project lifecycles and across practice areas. Our experience in international transactions allows us to assist clients expanding into other markets by collaborating closely with local counsel in developing economies throughout the MENA region.

Known for innovation

The firm's reputation for innovation goes back almost three decades, having drafted many first-of-its-kind agreements in cross-border transactions that continue to be used as model agreements in the market today. Our output continues to set industry standards, as our attorneys combine their experience in global transactions and international education with their strong base in Turkish law to generate unique client solutions.

Understanding your business

In today's rapidly changing business environment, decision makers need two things to be successful: trust in relationships and insightful advice at work. Understanding and meeting the expectations of business leaders requires rethinking how legal advice should be provided. We believe our expertise is meaningful to the extent that it helps you achieve your business objectives. This is why our ambition is to go beyond delivering technical answers to legal inquiries. We strive to understand your business in its entirety and provide solutions for your success.

Authors

Suleyman Cengiz
Inhouse Competition Expert, Herguner Bilgen Ozeke

Education

Suleyman received his Bachelor's Degree in International relations from Gazi University in 1996, an MA in International Economic Relations from the University of Konstanz in 2000, and a PhD in Finance from Hacettepe University in 2010. He also attended Penn State University Smeal College of Business as a visiting student on a Fulbright Scholarship granted by the US Department of State.

Biography

He is the firm's in-house competition expert where he oversees every competition/antitrust related matter in the firm on every transaction or court case with competition/antitrust elements. He is responsible for providing competition related guidance to every relevant transaction and agreement, as well as interacting with the Turkish Competition Authority (TCA) on behalf of all clients, providing all competition training, and 'dawn raid' responses. He was a TCA agent for over 14 years and has worked on some of the largest antitrust cases in Turkey's history, both as a TCA agent and as an adviser to the firm. Recent examples include the TCA's substantial cases where Süleyman has represented a major world-renowned logistics company, a local company which is part of one the largest industrial conglomerates in Turkey and a market leader in the food industry in Japan. Suleyman also represents many clients worldwide who engage in the steel industry in their M&A transactions which are subject to TCA's approval in Turkey.

Mey Akkayan
Associate, Herguner Bilgen Ozeke

Education

Mey received her LLB from Istanbul University in 2015 and became a member of the Istanbul Bar Association in 2016. She is currently attending an LLM lesson in Bilgi University organized by the Competition Law and Policy Research Centre.

Biography

Mey Akkayan is an Associate in the firm's competition law department where she plays a lead role in nearly every complex competition case which comes to the firm. She represents high profile international and domestic clients with competition needs and has significant experience in all areas of competition law including M&A clearances, individual exemptions, or investigations conducted by the TCA. Mey has recently been assisting Suleyman Cengiz with the investigations conducted by the TCA in the logistics, poultry meat and transportation sectors.

She recently co-authored the article Restrictions on the Use of Search Engine Keywords from a Competition Law Perspective: History, Recent Developments, and Further Analysis published in the Herguner Bilgen Ozeke Summer 2019 Newsletter alongside Suleyman Cengiz.