**e-Competitions**
National Competition Laws Bulletin

January 2014

# The Grand National Assembly of Turkey amends the Act on the Protection of Competition

**Turkey, Anticompetitive practices, De minimis, Sanctions / Fines / Penalties, Criminal sanctions, Reform, Exemption (individual), Negative clearance, All business sectors**

**Ercüment Erdem, e-Competitions | N° 66391, www.concurrences.com**

A Draft Act ("Draft Act") to amend the Act on the Protection of Competition No. 4054 ("Competition Act"), which entered into force by being published in the Official Gazette dated 13.12.1994 and numbered 22140, was submitted to the Presidency of the Grand National Assembly of Turkey on 23.01.2014 [1].

The first Draft Act ("First Draft") foreseeing some amendments to the Competition Act was submitted to the Presidency of the Grand National Assembly of Turkey on 31.07.2008 [2]. The Draft Act includes developments since 2008, and thus extends the content of the First Draft.

Violations of competition and fines to be applied to such violations are examined in this article.

**Grounds for the Preparation of the Draft Act**

The Draft Act was prepared on the basis of two main grounds:

***Harmonization with European Union Acquis.*** Turkey is a candidate state to the European Union ("EU"). In order for Turkey to obtain EU membership status in the future, it must adapt its legislation to the EU *acquis*. Within this scope, amendments made in EU competition law should be transposed into Turkish legislation, and thus the Competition Act should be amended accordingly.

***Harmonization with Secondary Legislation***. The Competition Act has been in effect since 05.11.1997. Meanwhile, new communiqués were issued as secondary legislation and various amendments were made in important communiqués, such as the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board No. 2010/4 [3] ("Communiqué No. 2010/4"). Thus, the Competition Act should be reviewed in light of current needs.

**Important Novelties provided by the Draft Act**

The Draft provides important amendments and novelties:

***"De Minimis" Rule***. A parallel regulation to the *"de minimis"* practice of EU legislation is adopted under Art. 4 of the Competition Act. In cases where thresholds like market shares and turnover determined in advance by the Competition Board ("Board") are exceeded, agreements, concerted practices and decisions of associations of undertakings cannot be the subject of investigation. The Board can enact communiqués in this regard.

The Board will then be able to concentrate on competition violations, which may have more negative effects on competition through such an amendment. Thus, said amendment is deemed to be appropriate.

***Extension of the Exemption***. Art.5 of the Competition Act, which regulates individual exemption, is extended and the exemption provisions in various articles of the Competition Act are brought together. Exemptions may be made conditionally or related to some engagements. Moreover, the Board may exclude agreements, concerted practices and/or decisions of undertakings from block exemption if it determines that they have *"incoherent"* effects on individual exemption conditions.

There is no doubt that the amendments are related to the protection of the competitive market. However, the definition of *"incoherent effects"* should be stated in the secondary legislation and thus the secondary legislation should be reviewed accordingly. For instance, the Guidelines on the General Principles of Exemption [4], which was published in the official website of the Competition Authority ("Authority") on 29.01.2014 does not include the notion of "*incoherent effect*".

***Concentrations, Notification and Inspection.*** Mergers and acquisitions as regulated under Art. 7 of the Competition Act are defined as concentration operations, and thus said article is regulated accordingly. The establishment of joint ventures performing on a lasting basis all the functions of an autonomous economic entity are also defined as a concentration. The test of "substantial lessening of effective competition" is adopted instead of the "dominant position" test in accordance with EU legislation in order to determine the distortive effects of concentrations.

The Board may give conditional authorization to undertakings in order to eliminate competition concerns.

The amendments are deemed appropriate and permit full compliance between the Competition Act and the secondary legislation, such as the Communiqué No. 2010/4. However, relevant article of the Draft Act amending Article 7 of the Competition Act is very detailed. For instance, the said article stipulates the cases where the control will be deemed permanently changed although such details may be stated in the secondary legislation, such as the Communiqué No. 2010/4. Thus, the relevant article of the Draft Act amending Article 7 of Competition Act shall be simplified and include only the essential points.

***Negative Clearance***. Negative clearance is removed from the Draft Act, but the grounds for this removal are not stated in the legal justification. This might have been done in order to reduce the work-load of the Board since undertakings can evaluate whether they distort the competition in light of secondary legislations relating to group exemption and personal exemption, or they can consult the Board. However, it would be more appropriate to explain the grounds for this removal.

Negative clearance was also removed from the EU competition legislation through Regulation No. 1/2003. Therefore, full compliance is established with EU law through this amendment.

***Competition Advocacy.*** The Board is entitled to give opinions to institutions, organizations or professional associations with the status of public entity regarding administrative acts, which may have similar consequences to competition violations, or seek the nullity of such acts before tribunals in order to establish and foster a competitive environment.

The Board is used to providing such opinions to public organizations. Thus, such amendment creates a legal ground for the Board's behavior.

***Re-establishment of Competition after Violation***. In case there is a violation of competition, the Board may decide on *"behaviors to be adopted or not by undertakings or associations of undertakings or to structural remedies such as the transfer of shares or some lines of business in order to re-establish competition"*.

The Competition Act does not foresee "structural remedies" for the re-establishment of competition. Thus, the biggest difference provided within the Draft Act is that the Board can take "*structural remedies"* as well. Such regulation is appropriate since it clarifies the nature of commitments and clarifies the Board's powers.

Furthermore, all transactions contrary to the Competition Act are invalid. The same provision is also stated in the Draft Act (Art. 30 of the Draft Act). "Invalidity" should be understood as "absolute nullity" in competition law. Therefore, the transaction will be considered as never having happened, and thus the competition environment before the transaction took place should be re-established. Powers granted to the Board show how competition may be re-established.

***Conciliation***. The Draft Act gives the possibility to undertakings, which violated competition rules, to collaborate with the Board. In fact, this possibility was already granted by secondary legislation. The Active Cooperation/Leniency Regulation ("Leniency Regulation") was published in the Official Gazette dated 15.02.2009 and numbered 27142 [5]. Therefore, the integration of such provision in the Draft Act constitutes the legal grounds for the Leniency Regulation.

However, the Leniency Regulation includes the terms "active collaboration" and "leniency" and not the term "conciliation". Thus, in order to create uniformity within the competition legislation, it would be more appropriate to use the term "active collaboration" or "leniency" in lieu of "conciliation".

***Sanctions***. In parallel with the Competition Act, the Draft Act foresees both penal and legal sanctions. In this section, sanctions applied by the Board to undertakings and/or associations of undertakings are examined.

• ***Penal Sanction.*** No essential amendment is made in the Draft Act concerning penal sanctions. In other words, a fine may be imposed by the Board *"up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it"*. Nevertheless, this provision is neither in compliance with EU competition rules, nor with general rules of law since it is

not clear whether *"the annual gross revenue"* means the total annual gross revenue or the annual gross revenue generated in the line of business, where the violation has occurred. This provision is not in compliance with EU competition rules since it is clearly stated under EU competition legislation that total annual gross revenue or the annual gross revenue generated in the line of business, where the violation has occurred, should be taken into account. Such provision is neither in compliance with the "Draft Regulation on Fines to be imposed in cases of Violation of the Act on the Protection of Competition" [6], which was submitted to public opinion by being published in the official website of the Authority on 20.01.2014. In light of the above-stated, the article of the Draft Act amending Article of the Competition Act on penal sanctions (Art. 16 of the Competition Act) should be amended and should foresee that the annual gross revenue generated in the line of business, where the violation has occurred, should be taken into consideration in the determination of the fine.

Additionally, both the Competition Act and the Draft Act state that the annual gross revenue *"which was generated by the end of the financial year preceding the decision, or which was generated by the end of the financial year closest to the date of the decision"* should be taken into account. However, EU legislation states that the annual gross revenue, which was generated during the last full business year of its participation in the infringement, should be taken into consideration. There is no doubt that EU legislation is more equitable since the fine may be proportional to the competition violation.

• ***Legal Sanction.*** As per the Draft Act, all kinds of violations of competition (agreements, concerted practices and decisions and practices of associations of undertakings in contradiction with competition law, abuse of dominant position and distortion of competition through mergers and acquisitions) are invalid. The Competition Act, contrary to the Draft Act, states that only agreements, concerted practices and decisions and practices of associations of undertakings are invalid. The amendment made with the Draft Act is appropriate since it includes all kinds of violation of competition. As also stated above, "invalidity" should be understood as "absolute nullity" in competition law. In other words, the agreement, concerted practice or merger and acquisition should be considered as never having occurred and thus, the competitive environment in place before the violation should be re-established.

The legal justification of the Draft Act states that general provisions of the Code of Obligations shall apply in order to re-establish competition.

**Conclusion**

Draft Act includes not only regulations of EU competition law, but also novelties brought by secondary legislation. Nevertheless, attention shall be drawn to the below stated points:

• Although the legal justification of the articles is extremely important since it permits a just interpretation of the articles, deficiencies in the legal justification exist for articles such as the removal of the negative clearance.

• There are still differences between the EU and Turkish competition laws. For instance, the annual gross revenue to be taken into account for the determination of the fine is different in both systems. These differences should be eliminated.

• Board is granted the power to take “structural remedies” and thus the Draft Act determines how competition will be re-established in case of violation of competition.

• Board powers should not be expanded unlimitedly. Thus, the Board should not be entitled to decide on “structural remedies”, or such power should be limited.

• Coherence should be ensured between the terms of both the Competition Act and secondary legislation.

[1] To access the Draft Act, please see http://web.tbmm.gov.tr/gelenkagitla... (accessed on: 05.02.2014).

[2] To access the First Draft, please see http://www2.tbmm.gov.tr/d23/1/1-0636.pdf (accessed on: 06.02.2014). In addtition, on the First Draft, please see ERDEM, Ercüment: *“Rekabetin Korunması Hakkında Kanun Tasarısı ile Rekabet Hukukunda Yeni Bir Dönem Hedefi”*, May 2009, http://www.erdem-erdem.av.tr/articl... (accessed on: 06.02.2014).

[3] To access to the Communiqué No. 2010/4, please see http://www.rekabet.gov.tr/File/?pat... (accessed on: 05.02.2014).

[4] To access to the Guidelines on the General Principles of Exemption, please see http://www.rekabet.gov.tr/File/?pat... (accessed on: 05.02.1014).

[5] To access to the Leniency Regulation, please see http://www.rekabet.gov.tr/File/?pat... (accessed on: 06.02.2014).

[6] To access to the Draft Regulation on Fines to be imposed in cases of Violation of the Act on the Protection of Competition, please see http://www.rekabet.gov.tr/default.a... (accessed on: 06.02.2014).

**Ercüment Erdem | Erdem & Erdem (Istanbul) | ercument@erdem-erdem.com**