

The Turkish Competition Authority submits to public consultation the Regulation Project on Fines to apply in cases of violations of the Act on the Protection of Competition

Turkey, Procedures, Sanctions / Fines / Penalties, Association of undertakings, Liability (group), Reform, Liability (personal), All business sectors

Ercüment Erdem, e-Competitions | N° 66392, www.concurrences.com

Article 16 entitled “Administrative Fine” of the Act on the Protection of Competition No. 4054 (“Competition Act”) regulates fines for undertakings, associations of undertakings and employees and/or administrators of such undertakings or associations of undertakings, who engage in anti-competitive activities banned under Articles 4, 6 and 7 of the Competition Act.

The same article also states that the criteria to be taken into account when determining fines will be determined in communiqués to be issued by the Competition Board (“Board”).

Within this scope, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position (“Regulation” or “Regulation on Fines”) entered into force by being published in the Official Gazette dated 15.02.2009 and dated 27142 [1].

The Regulation on Fines has been in effect for more than five years. During this period, some deficiencies in the Regulation on Fines were identified [2]. In order to remedy these deficiencies, the Regulation Project on Fines to Apply in Cases of Violations of the Act on the Protection of Competition (“Regulation Project” or “Regulation Project on Fines”) was prepared and submitted to public opinion on January 17, 2014 by being published on the official website of the Competition Authority [3].

Why a New Regulation?

The grounds for the Regulation are set forth under the General Preamble in the Regulation on Fines. Contrary to the Regulation on Fines, the Regulation Project on Fines includes neither a general preamble, nor justifications for articles. However, it may be stated that the Regulation Project on

Fines was prepared in order to (1) remedy deficiencies met in practice and (2) keep up with European Union competition legislation.

In light of the foregoing, it would be appropriate to include a general preamble and justifications for articles in the Regulation Project on Fines.

What are the Novelties in the Regulation Project on Fines?

Novelties Related to Base Fine

- The Competition Act does not explain whether the total turnover of the undertaking or the turnover of the undertaking in the relevant product and geographic market shall be taken as a basis for the calculation of the fine. Nevertheless, the Regulation Project on Fines clearly states that the turnover of the undertaking in the relevant product and geographic market shall be taken as a basis for the calculation of the fine.

Even though this amendment is appropriate, it is not in conformity with the Competition Act; and regulations should be in line with laws. The Draft Act on the Protection of Competition (“Draft Act”) to amend the Competition Act, submitted to the Presidency of the Grand Assembly of Turkey on 23.01.2014, also does not amend Article 16, entitled “Administrative Fine”, of the Competition Act referenced above. Therefore, it would be appropriate to urgently amend the Competition Act and to adopt the system brought by the Regulation Project on Fines.

- The turnover to be taken into consideration in calculating the total fine is specified as the revenue “... generated at the end of the fiscal year preceding the final decision, or if that cannot be calculated, by the end of the fiscal year closest to the date of the final decision ...” under the Competition Act, the Regulation on Fines and the Regulation Project on Fines. Nevertheless, European Union competition law expressly states that the turnover to be taken into consideration is the turnover of the undertaking’s last business year during which the infringement took place. Thus, similar to the Regulation on Fines, the Regulation Project on Fines also contrasts with European Union competition law in this respect.

The consequence of the above-stated provision in the Regulation of Fines, maintained in the Regulation Project on Fines is unfair. The turnover of undertakings after they have committed a competition violation may increase without any relation to such violation. This situation may result in heavy fines imposed on undertakings. In light of the foregoing, it would be appropriate to amend such provision such that the turnover of an undertaking’s last business year during which the infringement took place will be taken into account.

- The Regulation on Fines foresees the increased amount of fines by half in the event the violation of competition continues for a period of one to five years, and the doubling of the amount of the fine if the violation of competition exceeds five years. Contrarily, European Union competition law foresees a fine imposed based on the number of years the violation of competition continues and therefore relates the duration of the violation with the amount of the fine by multiplying the fine by the number of infringing years. The system foreseen by the Regulation on Fines is clearly not in compliance with European Union competition law. Moreover, this system does not comply with the relative equality principle either, since the time periods set forth for the increase of fines are too broad. In other words, an undertaking having violated competition for a much longer time and an

undertaking that violated the competition for a much shorter time will be faced with fines increased to the same extent.

Contrary to the Regulation on Fines, the Regulation Project on Fines foresees a fine imposed based on the number of years the violation of competition continues. I think that the system brought by the Regulation Project on Fines is appropriate.

- The Regulation Project on Fines refers to provisions of the Communiqué Concerning Mergers and Acquisitions Calling for the Authorization of the Competition Board No. 2010/4 (“Communiqué No. 2010/4”) on the calculation of turnover. However, the Regulation Project on Fines uses several terms such as “annual gross revenue” and “net sale” for turnover.

Contrary to Communiqué No. 2010/4, the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions only uses the term “turnover”. Within this scope, it would be appropriate to use the unique term “turnover” in the Regulation Project on Fines in order to create term uniformity between legislation.

On the basis of the above-stated, Article 16 of the Competition Act (and the Draft Act) should also be amended accordingly and the unique term “turnover” should be used.

Novelties Related to Aggravating Circumstances

In General The Regulation on Fines does not limit the number of aggravating circumstances. However, this system was amended in the Regulation Project on Fines and a limiting system was adopted. Within this scope, three aggravating circumstances are enumerated: (1) to have the role of leader in, or instigator of, the infringement, (2) to refuse to comply with the Board’s commitments and (3) to repeat the infringement.

I think that the new system brought by the Regulation Project on Fines is appropriate since mitigating and aggravating circumstances are clearly enumerated in Turkish penal law. In other words, penalties may not be decreased or increased if not clearly permitted by law (Art. 61/10 of the Turkish Penal Code). Otherwise, the principle of “certainty in crimes and punishments” will not be respected, which may cause arbitrariness in punishments.

Provision Related to “Repetition”

The Regulation Project on Fines states that the fine will be increased by up to 100% for each infringement in case a new competition infringement is realized by the same undertaking within eight years as of the notification of the justified decision. In other words, the Regulation Project on Fines sets forth a general repetition provision. Such provision does not take into consideration the nature of the repeated infringement. However, it would be more appropriate that the Regulation Project on Fines foresees a special repetition provision such that the concept of aggravating circumstances is applied to undertakings repeating the same infringement. Otherwise, an undertaking, which has infringed a competition rule may be confronted with a fine based on aggravated circumstances for a very different type of infringement.

Novelties Related to Mitigating Circumstances

Contrary to aggravating circumstances, the Regulation Project on Fines does not provide a limiting enumeration of mitigating circumstances. The provision related to mitigating circumstances is in compliance with both Turkish penal law and European Union legislation.

Novelties Related to Minimum and Maximum Limits to Fines

The Regulation on Fines states, contrary to the Competition Act, that fines to be imposed on undertakings or associations of undertakings should be between 2% and 4%, and those to be imposed on managers and employers should be between 3% and 5%.

This contradiction was completely eliminated from the Regulation Project on Fines, which foresees, in compliance with the Competition Act, (1) that undertakings, which violate competition may be subject to fines of up to 10% of their revenues within the scope of the investigation and that (2) managers and employees may be subject to fines of up to 5% of the fine imposed on the undertaking or association of undertakings.

Deterrence in Competition Infringements

The Regulation Project on Fines sets forth that the Board may increase the fine to be imposed on undertakings that have a particularly large turnover beyond the sale of goods or services to which the infringement relates. However, this provision is not in compliance with the new system brought by the Regulation Project on Fines which holds that the turnover of the undertaking in the relevant product and geographic market shall be taken as a basis for the calculation of the fine. Moreover, neither does the provision state the increase amount to be applied by the Board, which may cause arbitrariness.

To Whom does the Regulation Project on Fines Apply?

Parties to a Concentration

The Regulation Project of Fines clearly states that mergers and acquisitions are within the scope of the Regulation Project. This is in complete compliance with Communiqué No. 2010/4, as Article 10 of said Communiqué states that fines will be imposed as per Article 16 of the Competition Act in cases where (1) all information is not provided completely and correctly and (2) mergers and acquisitions subject to authorization are implemented without the authorization of the Board.

Persons Involved in Competition Infringement

The Regulation Project on Fines sets forth, by referring to Article 14 of the Faults Act dated 30.03.2005 and numbered 5326 [4], that fines should also be imposed on persons involved in competition infringement. However, the Competition Act states, by referring to Article 17/2 of the Faults Act, that the Board should take into account facts such as the period of the infringement or the repetition of the violation in determining the fine.

In other words, Article 17/2 of the Faults Act does not refer to persons involved in competition infringement. Thus, the reference made in the Regulation Project on Fines does not have any grounds in the Competition Act. Within this scope, it would be appropriate to amend this reference and to replace Article 14 of the Faults Act by Article 17 of the Faults Act.

Managers and Employees of Undertakings or Associations of Undertakings

The Regulation on Fines states that fines should be imposed on *“each of the managers and employees of the undertaking who were detected to have had a decisive influence on the cartel”*. However, the Regulation on Fines does not define the notion of *“decisive influence”*.

This deficiency was remedied under the Regulation Project on Fines since it states that the fine should be imposed on managers and employees of undertakings *“having a decisive influence in the creation or application of the competition infringement through acts such as coordination, organization, encouragement or persuasion”*. It must stated that this is an appropriate provision.

In addition to the above-stated, mitigating and aggravating circumstances are not mentioned in the Regulation Project on Fines. However, mitigating and aggravating circumstances enable the Board to adequately and appropriately determine the administrative fine to be imposed. Thus, it would be appropriate that mitigating and aggravating circumstances are introduced in the Regulation Project on Fines.

When will the Regulation Project on Fines Enter into Force?

The Regulation Project on Fines brings a punitive regulation and thus, it is subject to the general principles of penal law. One of the principles of penal law is the *lex mitior* principle. Within this scope, the most favored provision will be applied to investigations opened during the Regulation on Fines but still not finalized after the Regulation Project on Fines enters into force.

Conclusion

Updates in competition legislation by the Competition Authority in light of deficiencies met in practice are welcome. The submission to public opinion of the Regulation Project on Fines is one of the Competition Authority's projects to update competition legislation.

It should be noted that the Regulation Project on Fines remedies a lot of deficiencies met in practice. Nevertheless, it is important to highlight the main points below for review:

- Addition of a general preamble and article justifications in the Regulation Project on Fines;
- Content and language uniformity between the Regulation Project on Fines and the Draft Act;
- Amending of the provision which states that the turnover *“...generated at the end of the fiscal year preceding the final decision, or if that cannot be calculated, by the end of the fiscal year closest to the date of the final decision ...”* should be taken into account in the determination of the fine, such that the turnover of the undertaking's last business year during which the infringement took place will be taken into account in the determination of the fine.
- Replacing the general repetition provision by the special repetition provision;
- Deleting the provision related to deterrence;
- Deleting the provision related to participation or adding grounds for participation in the Competition Act;

-
- Determining mitigating and aggravating circumstances for managers and employees.

[1] To read the Regulation of Fines, see the following link: <http://www.rekabet.gov.tr/File/?pat...> (accessed on: 28.03.2014).

[2] To see the deficiencies in the Regulation of Fines, see **ERDEM, Ercument**: “Ceza Yönetmeliği, Avrupa Birliği Mevzuatına Gerçek Bir Uyum Mu Yoksa Bir İllüzyon Mu?”, Hukuk Postası Mayıs 2012, <http://www.erdem-erdem.av.tr/articl...> (accessed on: 28.03.2014).

[3] To reach the Regulation Project on Fines, see the following link <http://www.rekabet.gov.tr/File/?pat...> (accessed on: 27.03.2014).

[4] Faults Act regulates faults and not crimes

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