Overview on Turkish Competition Law

Turkey, Procedures, Exemption (individual), Dominance (notion), Exemption (block), Institutions, Privatisation, All business sectors

Constitution of the Republic of Turkey

Act on the Protection of Competition, adopted on December 7th, 1994; Official Gazette of December 13th, 1994, n° 22140

http://www.rekabet.gov.tr/word/ekan...

Grounds for the Act on the Protection of Competition

http://www.rekabet.gov.tr/word/egro...

Turkish Competition Authority (Rekabet Kuruma)

Competition Authority's Communiques, Guidelines and Annual Reports

Thesis of Competition Experts

INTRODUCTION

Turkish Competition Law is based on Article 167/I of the Turkish Constitution [1] which regulates the prevention of monopolization and cartelization.

Act on Protection of Competition] ("Act") has been adopted and entered into force on December 13, 1994. Since then, it has been amended several times. The Act is deeply influenced by EC Competition Regulations, since the Act was enacted as an effort for harmonization of its competition law with EC regulations. The European Court of Justice and European Commission decisions are also evaluated as precedents.

The aims of the Act is to prevent agreements, decisions and practices destroying or restricting competition, the abuse of dominant position, to control the concentrations and to preserve competition by preparing secondary legislation.

The leading and most important aim of the Act is protection of competitive conjuncture or free competition.

The Communiqués of the Competition Board (CB) forms secondary legislation.
I. COMPETENT BODIES

The Competition Authority (CA) is the competent regulatory body which has an autonomous statute. The CA has begun its operations in 1997. During the last decade, the CA made great progress by developing a reputation as one of the Turkey's most effective autonomous agencies, and establishing a competition culture through its publications, investigations, decisions and competition advocacy. Its uptrend has been also stated in the OECD's Country Peer Review of Competition Law and Policy in Turkey dated August 2005.

Act vests the CA's decision-making competence to the CB, which is the executive organ of the CA. The CB's decisions can be considered as semi-judicial decisions granted by an administrative body, which is very similar to European Commission's decisions. Thus, these decisions are subject to the appeal procedure before the State Council.

Law enforcement procedures on the below mentioned issues can be triggered by a compliant or at the CB's own initiative. The CA has broad investigative powers, including search of corporate premises based on a permitting court order.

II. APPLICATION

Turkish Competition law mainly concerns 4 principal anticompetitive behaviours:

(i) prohibition of agreements, concerted practices and decisions restricting the competition (Act art. 4); Exemptions are also provided (Act art.5),

(ii) prohibition of the abuse of dominant position (Act art. 6),

(iii) mergers and acquisitions (Act art. 7) and

(iv) privatization (Communiqué n° 1998/4 and 1998/5 [2]). Only the first two subjects would be dealt herein.

A. Agreements and Concerted Practices

The Act prohibits agreements between undertakings, decisions by undertaking associations and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a market.

The CB has competence of investigating agreements, concerted practices and decisions and either granting negative clearance or declaring them as infringing the competition and demanding the termination of infringement and penalizing fines to parties.

Art. 4 includes a non-exclusive list of anti-competitive practices. Thus, the horizontal anti-competitive practices include price fixing, market division, concerted control of supply and demand, boycotts, preventing new entrants to the market. Additionally, the vertical anti-competitive practices are mentioned as resale price fixing, discrimination between persons with equal status for equal rights, tying, impeding competitors or potential entrants.

Another major derivation from EC legislation is regarding the concerted practices presumption under the Act. Art. 4 states
that in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice. Thus, this presumption shifts burden of proof from the CA to the individual undertaking being investigated.

The CB, in one of its earliest decisions, concerning the cartel of cement industry, declared that the concerted practices between producers of cement regarding production, prices and distribution of market share, infringed competition and imposed a fine (Aegean Region Cement Producers, Decision of 17 June 1999 and n° 99-30/276-166a).

In one of its most recent decisions, the CB has investigated an allegation of passive sales prohibition. It is alleged that Danone has prohibited its agents from selling water outside of their contractual territory. In the light of its investigation within the scope of Communiqué n° 2002/2 on Group Exemption Regarding Vertical Agreements [3], the CB has assessed that there was no prohibition of passive sales and stated that the agents' refusal to demands outside of its territory was based on high transport costs (Danone, Decision of 16 March 2006 and n° 06-19/235-58).

Exemptions

In line with Art. 81.3 EC, te CB may individually exempt agreements, practices and decisions from the application of the Act, if they produce useful effects on production and distribution of products and services and contribute in technical and economical improvement, while not eliminating competition in a relevant market and allowing consumers benefit from such results.

In parallel, the CB has adopted group exemptions for the distribution and servicing of motor vehicles [4], vertical agreements (cited above), research and the development agreements [5].

The Act also empowers the CB to declare negative clearances in cases where law is not violated.

At present, Turkey's legislation on agreements diverges from the EU legislation because in the Council Regulation (EC) n° 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJEU L 1, 4 January 2003, p. 1-25) EU eliminated the grant of individual exemptions and negative clearances by the Commission. The only similar regulation is regarding the block exemptions.

However, with the 2005 amendment of the Act, the "obligation to notify agreements restricting competition" and the "need to request exemption in order for the Board to grant an exemption" have been abolished.

B. Dominant position

In parallel with EU law, Turkish legislation also prohibits abuse of dominant position by violating the rights of other actors and consumers.

In the decision of Turkcell, relating to the GSM market, the CB decided that Turkcell abuses its dominant position in the market because it prevented its distributors from selling the telephones with simcards of the other GSM operators and conducting campaigns for the simcards of other operators (Turkcell, Decision of 20 July 2001, n°01-35/347-95). This decision is significant for providing the clients a freedom of choice regarding the products they buy.

Another CB's decision is regarding the abuse of dominant position by Belko- a subsidiary of the Ankara Municipality. Belko had the exclusivity to distribute coal in Ankara. Thus, it was selling the coal at a very high price which was % 60-70 more expensive than the coal sold in other cities. The CB has annulled its exclusivity and pronounced a fine to Belko.
decision immediately showed its affirmative effects on competition by giving rise to decrease of coal prices in Ankara (Belko, Decision of 6 April 2001, n° 01-17/150-39).

BBD-Biryay-Yaysat decision is a landmark. The mentioned undertakings were in a dominant position in newspaper and magazine distribution market. These undertakings has forced their agents to not to sell newspapers and magazines which were distributed by other undertakings. The CB has assessed this prohibition as an abuse of dominant position (BBD-Biryay- Yaysat, Decision of 17 July 2000, n° 00-26/292-162).

See also, the Interview of the President of the Turkish Competition Authority, published in Concurrences, n°1-2006

[1] Article 167-1 The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets.


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