GD LAW

ISTANBUL

The content of this document is intended to provide a general guide to the Turkish Competition Law and does not constitute a legal opinion. A separate legal advice should be sought under any specific circumstances.

TURKISH COMPETITION LAW

The Law No. 4054 on the Protection of Competition ("***Law No. 4054***") is the statutory basis of the competition law in Turkey. Turkish Competition Authority ("***Authority***") and the Competition Board ("***Board***") which is the decision-making body of Authority, are responsible for the application of Law No. 4054 which aims to prevent agreements, decisions and practices that are preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by dominant undertakings in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions.

Agreements, Concerted Practices and Decisions Restricting Competition

Article 4 of Law No. 4054, which is closely modelled on Article 101 of Treaty on Functioning of European Union ("***TFEU***"), prohibits agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services in Turkey. Anti-competitive agreements including the price-fixing, market allocation and bid rigging have consistently considered as *per se* illegal by the Board. Unlike TFEU, Article 4 does not refer to appreciable effect and thus excludes *de minimis* exception.

The prohibition does not apply to the agreements that benefits from either a block exemption or an individual exemption. The current block exemption communiques are:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2008/3 in relation to the Insurance Sector;
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
- Block Exemption Communiqué No. 2016/5 on R&D Agreements and
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector.

Concerted practices also fall within the prohibition of Article 4 of Law No. 4054. The Board, through the "presumption of concerted practice" can shift the burden of proof to the undertakings concerned where the Board fails to prove the existence of an agreement. In such case, each undertaking

may relieve itself of the responsibility by proving that its market behaviour is based on economic and rational facts.

The prohibition does not apply to the agreements that benefits from an individual exemption and parties are allowed to do a self-assessment to analyse whether a given agreement fulfils the necessary conditions of individual exemption. Parties can also apply to the Board to reach legal certainty. The conditions, which must be met cumulatively, for an individual exemption as per Article 5 of Law No. 4054 are:

- the agreement should ensure new developments or improvements in the production or distribution of goods,
- it should allow consumers a fair share of the resulting benefit,
- it should not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and
- it should not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

In case of an infringement of Article 4 of Law No. 4054, the Board impose administrate monetary fines on undertaking concerns up to 10% of their Turkish turnover generated in the previous financial year. Employees and managers of the undertakings or association of undertakings that had a determining effect on the violation are also fined up to 5% of the fine imposed on the undertaking or association of undertaking. Moreover, any party injured from the violation of Article 4 of Law No. 4054 can bring an action for treble damages against infringers.

Abuse of Dominance

The main legislation applicable to the unilateral abusive conduct of the dominant players is the Article 6 of Law No. 4054 which prohibits any abuse by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices. Article 6 of Law No. 4054 is closely modelled on Article 102 of TFEU and even though it does not include the definition of abuse, it provides five different example of abusive behaviour which are:

- directly or indirectly preventing entries into the market or hindering the activities of the competitors in the market;
- directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

- forcing buyers to purchase another good or service together with a good or service, or making contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services, or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;
- distorting competitive conditions in another market by taking advantage of financial, technological and commercial superiorities in the dominated market; and
- limiting production, marketing or technical development to the prejudice of consumers.

Article 6 of Law No. 4054 does not recognise any sector-specific abuses or defences and provisions of Article 6 of Law No. 4054 is applicable to the all sectors. Even though certain sector specific regulators may have competence the regulate the market to ensure the effective functioning of the free market, such regulations do not exclude the applicability of Article 6 of Law No. 4054.

Once the Board finds a violation of Article 6 of Law No. 4054, the Board shall impose an administrative monetary fine on undertaking concerned up to 10% of its Turkish turnover generated in the previous financial year. Moreover, employees and managers of the undertaking that had a determining effect on the violation of Article 6 of Law No. 4054 are also fined up to 5% of the fine imposed on the undertaking concerned. Together with the monetary sanction, the Board is authorised to take all necessary measures to terminate the abusive conduct, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures to restore the level of competition as before the infringement. Moreover, any party injured from the violation of Article 6 of Law No. 4054 can bring an action for treble damages against the dominant undertaking infringing Article 6 of Law No. 4054.

Merger Control

Under Turkish competition law regime, the relevant legislations regulating the mergers and acquisitions, are Article 7 of Law No. 4054 and the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"). According to Article 7 of the Law No. 4054, merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view

to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.

Authority adopted the dominance test where the focus is whether a transaction creates or strengthens a dominant position and significantly lessens the competition in the market. Communiqué No. 2010/4 is published by the Board based on the Article 7 of Law No. 4054. Article 5 of the Communiqué No. 2010/4 sheds light to the transactions which are considered as merger or acquisition. According to the aforementioned provision, acquisition of direct or indirect control over an undertaking shall be considered as a merger or acquisition transaction, provided that there is a permanent change in control. Therefore, in cases where there is no change of control arising from a transaction, review and approval of the Board is not required to consummate a merger or an acquisition transaction.

Article 7 of Communiqué No. 2010/4 provides the following thresholds for a transaction to be notifiable before the Authority. A transaction will be notifiable if one of the following thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds TRY 100 million and the Turkish turnover of at least two of the transaction parties each exceeds TRY 30 million;
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY 30 million and worldwide turnover of at least one of the other parties to the transaction exceeds TRY 500 million; or the Turkish turnover of any of the parties in mergers exceeds TRY 30 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY 500 million.

A transaction exceeding the above thresholds is legally invalid unless approved by the Board. In case the parties implement a notifiable transaction without having obtained clearance from the Board, the Board imposes automatically a turnover-based monetary fine at a rate of 0.1% of the annual Turkish turnover even the transaction is not problematic from competition policy perspective. However, if the Board finds the transaction problematic, it can initiate an investigation, terminate the transaction, order remedies to restore the situation as before the consummation of the transaction and impose administrative monetary fines of up to 10% of the parties' annual Turkish turnover.

COMPETITION LAW & ECONOMICS

CD LAW represents businesses in a wide range of competition related matters including Merger Control & Joint Ventures, Cartel and Abuse of Dominance Investigations, Dawn Raids and Competition Litigation.

Merger Control & Joint Ventures

CD LAW advise on complex and high-profile merger, acquisition or joint venture transactions from a Turkish competition policy perspective and obtain clearance from Turkish Competition Authority. CD LAW continually strive to preserve each deal in its intended form applying novel commitments and seeking innovative solutions to protect its clients' strategic interests.

Cartels, Investigations and Dawn Raids

CD LAW provide assistance to its clients for the increasingly aggressive cartel enforcement of the Authority. In this regard we are providing various services. In an effort to identify potential competition law problems and the risk arising from such problems, we are conducting internal audits post dawn raids of the Authority to review of documents seized by the case handlers of the Authority. We also attend the dawn raids conducted by the Authority to ensure that its clients' rights are not violated.

We defend our clients before the Competition Board for the investigations of the Authority. We prepare the written defences and represent our clients before the Board during oral hearings.

Pre-dawn raids, we conduct Competition Compliance Programs to identify the potential problematic areas of our clients' business practices. We focus on our clients' competition law risks and provide competition compliance training. We also develop strategies aimed at obtaining full immunity under Authority's Immunity Program.

Competition Litigation

We provide assistance to our clients for the action for damages arising from the infringements of Law No. 4054 on the Protection of Competition. We also provide assistance to our clients before the Administrative Court and the Council of State for the annulment of the decisions of the Turkish Competition Board.

Att. Cihan Dogan LL.M, MSc

E-mail: cihan.dogan@cdlaw.com.tr

Mr. Cihan Dogan, the founding partner of the CD LAW, is graduated from Yeditepe University, Faculty of Law and is a member of Istanbul Bar. Mr. Dogan is currently pursuing Ph.D. Study of Private Law at Istanbul Bilgi University, Institute of Social Sciences. Mr. Dogan holds an LLM in International Commercial Law degree from City University London and an MSc in Competition and Market Regulation degree from Barcelona Graduate School of Economics.

Mr. Dogan has extensive experience on competition law matters. He involved and conducted almost every possible competition law related work including leniency applications and Phase II investigations. He has also worked on complex investigation defence works, numerous merger control filings and individual exemption applications. He also involved in conducting competition compliance programs and providing day-to-day advice, including delivering legal memorandums concerning highly sophisticated competition law related matters.

Mr. Dogan is the author of several publications on competition policy matters. His monographies published in English and Turkish by various national and international journals. He also speaks at national and international conferences on competition policy issues.

CD LAW

Gursel Mah. Imrahor Cd. No:29/A Premier Kampüs Ofis A127, 34400 Kagithane / ISTANBUL

Tel: +90 (212) 803 33 37 Fax: +90 (212) 803 33 27 E-mail: info@cdlaw.com.tr