

COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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Competition Enforcement Agencies Handbook 2019

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Competition Enforcement Agencies Handbook 2019

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CONTENTS

Albania.....	1	El Salvador.....	88
Algeria.....	5	Estonia.....	91
Argentina.....	8	European Union.....	94
Armenia.....	11	Andrzej Kmiecik and Andreas Reindl Van Bael & Bellis	
Australia.....	17	Faroe Islands.....	109
Austria.....	21	Fiji.....	110
Azerbaijan.....	24	Finland.....	111
Barbados.....	26	France.....	114
Belarus.....	28	Gambia.....	119
Belgium.....	29	Germany.....	121
Bosnia and Herzegovina.....	32	Greece.....	127
Botswana.....	34	Honduras.....	128
Brazil.....	38	Hong Kong.....	129
Bulgaria.....	42	Hungary.....	132
Canada.....	46	Iceland.....	138
Channel Islands.....	47	India.....	142
Chile.....	50	Indonesia.....	146
China.....	54	Ireland.....	149
Colombia.....	57	Israel.....	153
COMESA.....	63	D Ziv Abramovich Lapidot, Melchior, Abramovich & Co	
Costa Rica.....	66	Italy.....	162
Croatia.....	67	Jamaica.....	165
Cyprus.....	70	Japan.....	167
Czech Republic.....	73	Setsuko Yufu, Tatsuo Yamashima, Saori Hanada and Masayuki Matsuura Atsumi & Sakai	
Denmark.....	77	Jordan.....	176
Ecuador.....	80	Kazakhstan.....	178
EFTA.....	84	Kenya.....	179
Egypt.....	87	Korea.....	182

Kosovo	186	Serbia.....	280
Latvia	187	Seychelles	284
Lithuania	192	Singapore	287
Luxembourg.....	195	Slovakia	290
Macedonia	196	Slovenia	295
Malaysia	199	South Africa	298
Malta.....	201	<i>Maryanne Angumuthoo and Shakti Wood</i>	
Mauritius	203	Bowmans	
Mexico	207	Spain.....	306
Moldova.....	212	Sri Lanka	310
Mongolia	215	Swaziland	312
Montenegro	216	Sweden.....	315
Morocco	219	Switzerland	320
Namibia.....	220	Taiwan	325
Netherlands	221	Tanzania	328
New Zealand.....	224	Thailand.....	329
Nicaragua.....	228	Turkey	330
Norway	229	<i>Gönenç Gürkaynak and K Korhan Yıldırım</i>	
Panama	233	ELIG Gürkaynak Attorneys-at-Law	
Papua New Guinea	235	Ukraine	343
Peru	236	United Kingdom	348
Philippines	241	<i>Becket McGrath and Christine Graham</i>	
Poland	242	Cooley	
Portugal.....	248	United States.....	359
<i>Gonçalo Anastácio and Luís Seifert Guincho</i>		<i>David Meyer and Mary Kaiser</i>	
SRS Advogados		Morrison & Foerster LLP	
Romania.....	256	Uruguay.....	373
Russia.....	261	Uzbekistan	375
Saudi Arabia	279	Venezuela.....	376
		Vietnam	377
		Yemen.....	378
		Zambia.....	379

Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

The information listed is correct as of April 2019.

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Overview

Gönenç Gürkaynak and K Korhan Yıldırım

ELIG Gürkaynak Attorneys-at-Law

The Law on Protection of Competition No. 4054 (the Competition Law) of 13 December 1994 is designed to prevent agreements, decisions and practices that have, as their purpose or effect:

- the prevention, restriction or distortion of competition in the markets for goods or services within Turkey;
- the abuse of dominance by undertakings dominant in a relevant market; and
- concentrations creating or strengthening a dominant position and significantly lessening competition in the whole territory of Turkey or a part thereof.

The Competition Board is the decision-making body of the Competition Authority.

The Competition Authority recently released Communiqué No. 2019/1 on the Communiqué Concerning the Increase of the Minimum Administrative Fines Specified in Paragraph 1 of Article 16 of the Competition Law, to be valid until 31 December 2019 (Communiqué No. 2019/1). Communiqué No. 2019/1 enters an amendment to the minimum administrative fines to bring them in line with the current economic parameters. The Competition Authority also released the Communiqué on Payments of Joint Stock and Limited Companies Communiqué No. 2017/4, that sets out a new procedure on payments to be made by joint stock or limited companies to the Competition Authority. In case a new company is established or a company increases its capital, such company's legal entity is obliged to pay four per 10,000 of its raised or increased capital to the Competition Authority. According to the Communiqué, the chambers of commerce, which the company submits its foundation or capital increase to, are entitled to collect the payment on behalf of the Competition Authority.

There is also a draft Competition Law that is expected to bring about significant amendments to some of the fundamental competition rules. After a long wait on the sidelines, the draft law was finally put on the parliament's agenda in late 2013 and it was officially submitted to the presidency of the Turkish parliament on 23 January 2014. The draft law proposes

several significant changes in merger control (eg, the introduction of a *de minimis* rule and the 'significant impediment of effective competition' (SIEC) test) and investigation procedures (eg, the introduction of the settlement procedure). The draft law is designed to be more compatible with the way the law is being enforced. It also aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes that promise a more efficient procedure in terms of time and resource allocation. Legislative discussions and consultations on the draft law are still ongoing at the commission level. However, it remains unknown whether the Turkish parliament or the government will renew the draft law. It could be anticipated that the main topics to be held in the discussions on the potential new draft competition law will not significantly differ from the changes that were introduced by the previous draft.

Additionally, the Competition Authority released the draft Regulation on Administrative Monetary Fines and draft Guidelines on Vertical Agreements for public consultation. The draft guidelines are designed to introduce principles for most favoured customer clauses, agency agreements and internet sales. The draft Regulation on Administrative Monetary Fines is akin to and closely modelled after the European Commission's Guidelines on the method of setting fines imposed under article 23(2)(a) of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). It provides a new calculation method for administrative monetary fines that would result in the explicit recognition of the parental liability principle. The regulation also introduces new aggravating and mitigating factors. Additionally, the regulation obliges the Competition Board to reduce the monetary fine in case of existing mitigating factors. The Competition Authority has not yet announced the date on which this regulation will enter into force. However, an implementation is not expected before the draft law on the renewal of the Turkish Competition Law enters into force. Finally, the Competition Authority is also working on revisions of

secondary legislation such as Communiqué No. 2010/3 on the Right to Access the Case File and the Protection of Commercial Secrets.

The Competition Authority

The Competition Authority has public legal personality as well as administrative and financial autonomy. The authority consists of the Competition Board, presidency and service units. A total of approximately 360 people are employed at the authority, including competition experts, assistant experts, lawyers, board members, reporters and technical personnel. Several divisions with sector-specific work distribution handle competition law enforcement work through around 150 case handlers. The annual budget of the authority for 2019 was increased to 96 million lira.

The Competition Board

The Competition Board comprises seven members, including a chairman and a deputy chairman. The term of office of the chairman, deputy chairmen and members of the board is six years. A member whose term has expired is eligible for re-election.

The duties and the powers of the Competition Board can be categorised into three main areas:

- preventing the violation of competition;
- agreements, decisions and concerted practices that have as their purpose or effect the prevention, restriction or distortion of competition, which are, in principle, deemed illegal (Competition Law, article 4); and
- any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services, which is also unlawful and prohibited (Competition Law, article 6).

Undertakings and associations of undertakings condemned by the board for violating articles 4 and 6 of the Competition Law may be given administrative fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (or, if this is not calculable, in the financial year nearest the date of the fining decision). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. The Competition Board may also order structural or behavioural remedies, or both, to protect competition and restore it to its state before the violation. The

Competition Authority launched approximately 350 investigations in the past 20 years. The sectors that are most investigated include:

- transportation;
- nutrition;
- agriculture;
- food and beverages;
- construction materials;
- pharmaceuticals and healthcare services or products; and
- information and communication technologies.

The overall fines imposed by the Turkish Competition Authority thus far total approximately 3 billion lira.

The Competition Authority launched several sector inquiries as part of its duty to protect competition on Turkish markets. As a result, the Competition Authority published sector reports concerning sectors such as the retail sector for fast-moving consumer goods, the motor vehicles sector, the pharmaceuticals sector and the natural gas sector. The Competition Authority's primary goal in conducting these inquiries is to detect impediments that negatively affect competition on the reviewed markets and to prepare suggestions against detected sector-specific problems. In 2018, the Competition Authority published a sector report on hazelnut sector. In 2018, the Competition Authority also launched a sector inquiries into licensing of musical works broadcasted in public places and radio television establishments.

Merger control

The thresholds for merger filings were amended on 29 December 2012. Under the new merger control regime, a merger filing is required before the Competition Board where either the entire Turkish turnover of the parties to the transaction exceeds 100 million lira and their Turkish turnovers exceed 30 million lira, separately; or the entire Turkish turnover of the transferred assets or businesses in acquisitions, and at least one of the parties to the transaction in mergers, exceeds 30 million lira and the worldwide turnover of the other party exceeds 500 million lira.

After the amendments, the regulation no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement. The parties no longer need to check to see whether the transaction results in an affected market. This amendment is designed to have an impact on notifiability analyses only. The concept of affected market still carries weight in terms of the substantive competitive assessment and the notification form.

The amendment has resulted in a noteworthy drop in the number of merger filings. While the Competition Board analysed 303 filings in 2012, average number of filings for the following five years was approximately 195. Although the drop in the filings might also be caused by other events with direct or indirect effects on economic activities in Turkey, it is fair to say that the amendment of the filing requirements had an effect on the number of merger notifications. According to the annual report of 2018, 223 mergers were filed with the Competition Authority, which means the decreasing trend seems to have stopped.

The Competition Law provides for a suspension requirement. If the parties to a transaction that requires the approval of the Competition Board close the transaction without the approval of the board, a fixed monetary fine of 0.1 per cent of the acquirer's Turkish turnover generated in the financial year preceding the date of the fining decision applies (if this is not calculable, in the financial year nearest the date of the fining decision). In the event of a merger, the fine applies to both merging parties. The minimum fine for 2019 is 26,027 lira.

If the Competition Board reaches the conclusion that the transaction closed before clearance creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned may also receive administrative monetary fines of up to 10 per cent of their Turkish turnover generated in the financial year specified above. In such a situation, employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. In any case, a notifiable merger or acquisition not notified to and approved by the Competition Board shall be deemed legally invalid with all its legal consequences.

Exemptions and negative clearances

The Competition Board may decide to exempt agreements, decisions of associations of undertakings and concerted practices from the application of the provisions of the Competition Law, article 4.

Exemption decisions may be granted for a certain period of time or for an indefinite period. They may also be conditional upon the satisfaction of particular conditions or obligations (or both), such as structural or behavioural remedies.

Certain categories of agreements and decisions are subject to a block exemption regime under block exemption communiqués (Communiqués Nos. 2002/2, 2003/2, 2017/3, 2008/2, 2008/3 and 2013/3).

Appeal

Final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to judicial review before the competent administrative court in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Competition Board. Filing an administrative action does not automatically stay the execution of the Competition Board's decision. However, upon request of the plaintiff, the court, on providing its justifications, may decide to stay the execution if the implementation of the decision is likely to cause irreparable damage, and if the decision is highly likely to be against the law.



Gönenç Gürkaynak
ELIG Gürkaynak Attorneys-at-Law

Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School and is qualified to practice in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.



K Korhan Yıldırım
ELIG Gürkaynak Attorneys-at-Law

K Korhan Yıldırım is a partner at ELIG Gürkaynak Attorneys-at-Law. He graduated from Galatasaray University Faculty of Law in 2005 and was admitted to the Istanbul Bar in 2006.

He has been working with ELIG Gürkaynak for more than 14 years and has been a partner in the competition law and regulatory department since January 2014.

Mr Yıldırım has extensive experience in all areas of competition law including cartel agreements, abuse of dominance, concentrations and joint ventures. He has represented various multinational and national companies before the Turkish Competition Authority, Administrative Courts and the High State Court. Mr Yıldırım has given numerous legal opinions and trainings in relation to compliance to competition law rules. Mr Yıldırım has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conference and symposia. He is fluent in English and French.

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ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our partner, Mr Gönenç Gürkaynak, along with four partners, two counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

Over the past year, ELIG Gürkaynak has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence projects in investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 antitrust education seminars to employees of its clients.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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