Competition Law Applications And Encountered Problems In Turkey In The Perspective Of Business Concerns And Personal Consumers

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Abstract

In Turkey in the concept of European Union adaptation process, Law No.4054 on the Protection of Competition has came into effect in 1994. Then in 1997 Turkish Competition Autority has been established. Turkish Competition Law is parallel to competition law's rules of Europen Union Agreement. In this concept the actions that are forbidded and has monetary penalties are like belows:

1. Agreements, Concerted Practices, and Decisions Which are Restricted Competition
2. Abuse of Dominant Position
3. Merger and Acquisitions That Are Causing Dominant Position or Strengthening of Dominant Position

In Turkish Competition Law administrative monetory penalties are being applied to the actions which are lessening competition. These penalities can be up to 10% of the firm's revenue according to the action's importance.

In this study a general overview will be made for Turkish Competition Law and sample cases of Turkish Competition Authority will be considered. These cases will be analysed in the perspective of business concerns and personal consumers. In the end problems and solution offerings will be discussed.

Keywords: Turkish Competition Law, Personal Consumer, Business Concerns

Competition Law Enforcements and Problems Encountered in terms of Undertakings and Ultimate Consumers in Turkey

Introduction

The 4054th Law concerning the Protection of Competition (LCPC) within the context of the adoption process to the European Union (UE) went into effect in 1994. In the sequel, the Turkish Competition Authority was formed in 1997. The LCPC offers parallelism with the competition rules in the UE Agreement.[31] In this case, the actions prohibited and subjected to pecuniary fines with LCPC are listed as follows[32]:

1. Agreement Limiting Competition, Concerted Practice and Decisions (a4.)
2. The Abuse of Dominant Position (a6.)
3. Merger and Acquisition to be such as to Create or Strengthen the Dominant Position (a7.)

In the Turkish Law, administrative pecuniary fines are applied for distortion of competition[33]. The subject fines can reach up to 10% of the endorsements of the concerned undertaking based on the significance of the action (LCPC a16.)[34]. Also, up to 5% of the fine (given to the undertaking or undertaking union) is applied as administrative pecuniary fine on the undertaking detected with determinant effects of violation or the undertaking union administrators or workers. Otherwise, those who suffer from competition violation can claim for damages against the concerning undertakings (LCPC a.57). In the claim by the sufferers, the judge may rule compensation on a threefold rate of the damage caused, the profit made from those who caused the damage or the procurable profit on the requisition of the sufferers (LCPC a.58). The aim of the threefold sanction besides creating a deterrent effect on competition violations is to encourage the sufferers to claim for damages[35].

Since the Turkish Competition Authority has been founded, within this 19-year process, it has applied pecuniary fines in many industries. Some of these are connected to industries holding an important place in the economy. However, pecuniary fines cannot be deterrent enough to prevent competition violations. This situation can appear especially when the income that could be received from competition violation is higher than the rate of the pecuniary fine. At this point, damage actions gain importance. The risk of undertakings paying a substantial amount of compensation could have a

[31] Güven P., Rekabet Hukuku, Ankara, 2005, p. 35.

[32] Topçuoğlu, M., Rekabeti Kısıtlayan Teşebbüsler Arası İşbirliği Davranışları ve Hukuki Sonuçları, Ankara, 2001, p. 84; Sanlı, K. C., Rekabetin Korunması Hakkındaki Kanunda Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği, Ankara 2000, p. 27.

[33] Topçuoğlu, M., p. 88.

[34] Aslan, İ. Y., Rekabet Hukuku, Bursa, 2005, p. 637.

[35] Şahin, M., Rekabet Hukukunda Tazminat Talepleri, İstanbul 2013, p. 198.

deterrent effect on competition violations. However, the restraints of sufferers claiming damage decrease this effect. In this study, general information on Turkish competition authority will be given and competition law applications in terms of undertakings and the problems encountered will be mentioned.

Turkish Competition Authority Overview

The actions prohibited and subjected to pecuniary fines in LCPC are as follows:

- Agreement Limiting Competition, Concerted Practice and Decisions (a4.)
- The Abuse of Dominant Position (a6.)
- The Merger and Acquisition to be such as to Create or Strengthen the Dominant Position (a7.)

The 4th article of LCPC forbids the agreement, concerted practice and associations of undertaking decisions "aiming to prevent, damage, or restrain competition directly or indirectly or to be such as to cause or be able to cause this effect".

Thus, for

- Agreements between undertakings
- Concerted Practices between undertakings and
- undertaking union decisions

to be forbidden, it has been resolved that in a certain product and service market they need to be activities which aim to

- Restrain
- Damage or
- Limit

the competition or be such as to cause or be able to cause such an effect[36].

Here, for an agreement, concerted action or decision to be counted incompatible, it should be pointed out that it is definitely unnecessary to be applied. In this case, actions not yet applied and therefore not restraining actions "aiming to limit competition" will be counted against the Law, it is not required to wait and see the effects of this application.

After it is indicated that the competition violating agreement, concerted action and undertaking union decisions in article 4 of LCPC are forbidden, examples have been given regarding in what cases these kinds of violations will be in question. Among these are:

- Determination of Price and other Commercial Provisions
- Sharing Markets
- Controlling Supply and Demand
- Exclusionary Applications

[36] İnan, N., Piker, M. B., Rekabet Hukuku El Kitabı, 2007, p. 25.

- Discriminatory Applications
- Putting Additional Obligations and Conditions

For undertakings found in dominant position as per article 6 of LCPC to misuse this power they possess in a way to limit the competition in the market is forbidden as per article 6 of LCPC. Therefore, preventing undertakings in dominant position from misusing these powers to batten upon other undertakings and consumers or pushing them outside of the market is demanded. The definition of the phrase "misuse" in article 6 of LCPC has not been given[37], instead examples of misuse situations that are come across most have been given. These are situations such as,

- Exclusionary Applications
- Discrimination
- Setting forth Additional (Abnormal) Obligations
- Damaging Competition in another Market due to a Dominant Position in a Market
- Limiting Production, Marketing or Technical Progress.

At last, in article 7 of LCPC "The Acquisition and Joining to be such as to Create or Strengthen the Dominant Position" has been forbidden. The type of joining and acquisition processes which can be permitted have been arranged in the Declaration issued by the Competition Authority.

Not only have the competition damaging actions been indicated in LCPC, but the sanctions to be applied due to these actions have also been stated. It could be said that in the Turkish Competition Law a binary sanction system has been adopted. These are two types such as administrative sanctions and private law sanctions.

Pecuniary fines are the most important of the administrative sanctions. Sanctions applied in some countries such as prison sentence[38] and prohibition of management[39] are not applied in our law.

Pecuniary fines have been itemized in article 16 of LCPC. According to this, a pecuniary fine of up to 10% of the yearly gross income stated at the end of the financial year from the previous year of the final judgement order

[37] European Court of Justice, Hoffmann- In the La Roche case has defined misuse as "every action that could damage, limit, or prevent competition of a dominant position and could provide itself with unjust advantages". See also Aslan, p. 396.

[38] For example, prison sentences can be given for competition damaging action in the USA. For more information, please see Gökşin K., ABD, AB ve Türk Rekabet Hukukunda Kartellerle Mücadele, Rekabet Kurumu Uzmanlık Tezi No: 213, Rekabet Kurumu, Ankara, 2003, p.7, 84.

[39] Prohibition of Management is the manager of the undertakings with competition violating actions being disqualified for a certain period of time. For detailed info please see Kortunay A., Şahin M., "Rekabet Hukukunda Alternatif Bir Yaptırım: Teşebbüs Yöneticilerinin Görevden Uzaklaştırılması (Yöneticilik Yapma Yasağı), Rekabet Hukukunda Güncel Gelişmeler Sempozyumu- IX, 6 Mayıs 2011, Kayseri, pp.137-164.

is given to the undertakings or the undertaking unions which act against the forbidden actions of LCPC. Also, up to 5% of the fine (given to the undertaking or undertaking union) is applied as administrative pecuniary fine on the undertaking detected with determinant effects of violation or the undertaking union administrators or workers.[40]

The private law sanctions that can surface for the reason of contradiction to LCPC are "invalidity" and "claim". According to LCPC article 56, every kind of agreement and decision of undertaking unions contradictory to article 4 of LCPC is invalid.

Otherwise, those who suffer from competition violation can claim for damages against the concerning undertakings (LCPC a.57). In the claim by the sufferers, the judge may rule compensation on a threefold rate of the damage caused, the profit made from those who caused the damage or the procurable profit on the requisition of the sufferers (LCPC a.58). The aim of the threefold sanction besides creating a deterrent effect on competition violations is to encourage the sufferers to claim for damages.

Examples from Applications

Since the Turkish Competition Authority has been founded, within this 19-year process, it has applied pecuniary fine in many industries. The amount of cases in the context of the 4th and 6th articles of the Competition Authority between 2011-2014 is 259+283+303+142+163= 1150 fines have been given to 52 of them. According to this, the fine rate is around 5%.[41] This state is most importantly due to the applications made to the Competition Authority for reasons that are not in the context of LCPC. It is possible to say that the fact that the Competition Authority in Turkey does not have a deep rooted history (when compared to America and EU countries) is an important factor with this situation.

Some cases in which pecuniary fine is applied by the Competition Authority are related to important industries in the economy and the fines given have been in great amounts. For example, in 2008 in the context of the misuse of dominant position (about price squeeze), a 12,4 Million TL (about 7 million Euro) fine was given to Turk Telekom and its subsidiary company TT-Net.

Likewise, investigations were started for 23 automotive companies in 2011 in the context of the article regarding Agreement Limiting Competition, Concerted Action and Decisions (LCPC a. 4). A total fine of

[40] Pecuniary fines as per article 16 of LCPC are not limited to this. Other fines will be applied in cases of contradiction to other obligations undertakings are required to fulfill to LCPC (for example, giving misleading information at dispensation applications or preventing viewing).

[41] Resource: www.rekabet.gov.tr

277 Million TL (about 130 million Euro) was given to 15 of these companies (for reasons as negotiating about price strategies for the future, negotiating about stock, goals, and sales strategies).

Again in 2013 within the context of the same article a fine of 1.1 Billion TL (about 450 million Euro) was given to 12 banks (for reasons of determining their interest rates together).

A couple of months before the Competition Authority started an investigation in order to investigate if insurance companies were in agreement/concerted action due to the extreme rise in traffic insurance rates[42].

With statistical data regarding claims for damages due to competition violation not being found it is understood through the number of court decisions that the number of them are not so many.

Evaluations in terms of Undertakings and Ultimate Consumers

The direct and primary aim of the Competition Authority is to provide and protect competition order. An efficient competition environment before everything causes effectivity in production and resource allocation. Also, it encourages production on less cost and technological advancement. As a result of this, the possibility of being able to buy quality products and service for a cheaper price. Therefore, the welfare of consumers and social welfare increases.[43]

Apart from these, the competition order enables the safety of opponent and (especially) small undertakings by means of forbidding the dominant undertakings from misuse of their economic powers and to eliminate the barriers of entering the market. Also, it is known that the competitive environment is advantageous in decreasing the inflation.

As a result, it could be said that the aim of the competition norms is to protect the competition environment by means of the market operators' activities being bound to rules, as well as the ultimate aim being "providing financial efficiency" and therefore "maximizing social welfare (therefore consumer welfare)".[44]

Besides heavy fines of up to 10% of yearly gross income of undertakings causing competition violation, it is subject that they encounter agreements they made being void and receiving a threefold fine. Also, along with the "undertaking image against competition order" not showing itself directly as financial loss, it could also as an "indirect sanction" they can encounter. However, this is the actual problem: In case the income received

[42] Resource: www.rekabet.gov.tr
[43] Aslan, p.8.
[44] Gürkaynak, G., Türk Rekabet Hukuku Uygulaması İçin "Hukuk ve İktisat" Perspektifinen "Amaç" Tartışması, Ankara 2003, pp. 6-7, Güven, p. 32.

due to competition violation is higher than the fine to be applied, undertakings will be able to continue violating. In Turkish Law (contrary to the USA and many other countries), giving cartels prison sentences is out of the question. In this case, the deterrent effects of damage claims should be taken advantage of. The threefold fine sanction in the Turkish Law is an important instrument. However, because damage claim cases take long, are costly, and that the undertakings do not want to damage their relationship with other undertakings in the position of the client or supplier it is not a method applied to frequently (enough).

Competition violations sometimes arise from the ignorance of the undertaking managers about competition law. The fact that undertaking managers do not have enough information on competition law is not a sufficient reason to not give a fine or for the fine to be decreased. For this reason, it is important that the managing personnel are informed by specialists, and that the undertaking process and decision making mechanisms are adapted to competition law. The managing personnel being informed by specialists, and the undertaking process and decision making mechanisms being adapted to competition law is possible with competition compliance programs. In Turkey, especially after heavy fines given to banks, the importance of competition compliance programs has come to surface once again, and has started to be applied in some big/corporate companies. A competition compliance program being applied in an undertaking –on the contrary to some countries- has been regulated as a reason for fine reduction in the Turkish Competition Authority.

Substantially, consumers are the ones who are ultimately damaged by competition violations. Along with this, it is a proven fact that consumers with damage from competition violation due not want to go in the way of damage claims due to their atomized/crystalized damage. Among many reasons for this are that proving competition violation is not easy, consumers do not want to face the financial and time cost the case will cause, and that they do not have the opportunity to open a group or class action case[45]. Earning operability to damage claims is a current problem of the Turkish Competition Authority. Applications in other countries such as relieving the managers who violated competition from their duty, deduction of fines that will be given to undertakings which have paid a fine have started to be discussed in the Turkish Doctrine.

[45] For detailed information please see Kortunay, A., AB Rekabet Hukuku'nda Tazminat Davalarına Yönelik Reform Çalışmaları ve Türk Hukuku Bakımından "De Lege Ferenda" Düşünceler, Rekabet Dergisi, C.10, S.1, pp.107-138.

Conclusion

The aim of the competition norms is to protect the competition environment by means of the market operators' activities being bound to rules, as well as the ultimate aim being "providing financial efficiency" and therefore "maximizing social welfare (therefore consumer welfare)".

The 4054th Law concerning the Protection of Competition (LCPC) went into effect in 1994. The actions prohibited and subjected to pecuniary fines with LCPC are listed as follows:

4. Agreement Limiting Competition, Concerted Practice and Decisions (a4.)
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6. The Merger and Acquisition to be such as to Create or Strengthen the Dominant Position (a7.)

Fines given by the Competition Authority can reach important amounts. It is essential that competition compliance programs are applied at undertakings in order to avoid these fines. In case the income to be received by competition violation is higher than the fine to be given, undertakings will be inclined to violation. For this reason, damage claims have an important deterrence in preventing competition violation. However, the fact that proving competition violation is not easy, consumers do not want to face the financial and time cost the case will cause, and that the Turkish Law does not have the model to open a group or class action case comes to us as an important obstacle. Applications in other countries such as relieving the managers who violated competition from their duty, deduction of fines that will be given to undertakings which have paid a fine have started to be discussed in the Turkish Doctrine. It is evidential that the steps to be taken/the innovations to be done will cause important effects either in undertaking management policy or in consumer welfare.

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