

Peter Behrens (ed.)

The adaption of competition rules in new and future member states to European Union Law (V)

Turkey

von Çiğdem Boga



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*To my dear parents,
to my lovely sister ...*

*Canım anneme ve babama,
sevgili kardesime ...*

Foreword

The Association Agreement between the European Union and Turkey dates back to 1964. At that time it was a major step forward towards the transformation of the Turkish economy into a market economy. The center piece of this transformation process was the establishment of legal institutions which are the indispensable underpinnings of a market system. Competition rules play a particularly important role in this regard. It is therefore not surprising that the Association Agreement itself contained competition rules modeled after the competition rules of the European Union. Their purpose is the protection of the economic freedom of undertakings and their right to compete as well as the protection of interstate trade against restraints of competition. In addition to the treaty rules against restraints of competition, the Association Agreement also provides for the obligation to adjust Turkey's internal competition law to the competition rules of the European Union in order to create a level playing field for undertakings engaging in interstate business transactions.

This study is part of a series of similar studies all of which analyze the process of adjustment of national competition laws of those States that have entered into an Association Agreement with the European Union. The present study is based on the development of Turkish competition law over the last 50 years. The author sets out in much detail this development as well as the present state of Turkish competition law and provides an in depth comparative analysis of the competition laws of Turkey and the European Union in order to identify similarities as well as discrepancies that may still have to be overcome. The analysis is not limited to the legal rules as such but also includes their interpretation and implementation by the Turkish and European competition authorities and courts. The study is designed not only to satisfy a scholarly interest in the development of competition law in Turkey and to thereby enhance our general understanding of the Turkish system of competition. It is also designed to satisfy the need of legal practitioners and undertakings for first hand information, a need that is increasingly felt according to the progressing mutual economic integration of Turkey and the European Union within the framework of the Customs Union that they have established.

This study is part of a research project conducted at the Institute for European Integration of the Europa-Kolleg Hamburg. It is designed to cover

Foreword

all Central and Eastern European countries as well the neighbouring states of the EU. Some of these studies have already been published; others will follow. The implementation of the research project, including this study on Turkish competition law, would not have been possible without considerable financial support from the German Academic Exchange Service (Deutscher Akademischer Austauschdienst - DAAD) and from the Foundation Europa-Kolleg Hamburg. I wish to express my appreciation to both of them. Special thanks go to my assistant Deborah Haring for her invaluable support in preparing this publication.

Hamburg, October 2014

Peter Behrens

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Hamburg, October 2014

Çiğdem Boga

About the author

Çiğdem Boga graduated from Istanbul University in Turkey with a major in Turkish law. In 2009, she obtained the LL.M degree in European Legal Studies at the Europa-Kolleg Hamburg, at the University of Hamburg, Germany. In 2014, Çiğdem Boga earned the degree of Doctor iuris (Ph.D. in Law) at the Faculty of Law of the University of Hamburg. She was granted a German Academic Exchange Service (DAAD) Scholarship for the completion of her Ph.D. thesis which is published in this volume. Currently Çiğdem Boga continues her second law degree at the Faculty of Law of the University of Hamburg with a perspective of being admitted to legal practice in Germany as a German lawyer.

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Abbreviations

Art	Article
AVC	Average Variable Cost
CFI	Court of First Instance
CMLRev.	Common Market Law Review
CLRev.	Competition Law Review
COM	Commission Document
CUD	Customs Union Decision
EBOR	European Business Organization Law Review
EC	European Community
ECJ	European Court of Justice
ECJour.	European Competition Journal
ECLR	European Competition Law Review
ECMR	European Community Merger Regulation
ECN	European Competition Network
ECR	European Court Reports
ed.	Editors
EEA	European Economic Area
EEC	European Economic Community
e.g.	Exempli gratiā (for example)
EU	European Union
EuZW	Europäische Zeitschrift für Wettbewerbsrecht
ff.	And the following
ICN	International Competition Network
i.e.	Id est (that is)
Ibid.	Ibidem (in the same place)
NATO	North Atlantic Treaty Organization
NCA	National Competition Authority
No	Number
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
p.	Page
para.	Paragraph
SEC	Secretariat-General Documents
SIEC	Significant Impediment of Effective Competition
SLC	Significant Lessening of Competition

Abbreviations

SSNIP	Small but Significant Non-Transitory Increase in Price
TFEU	Treaty on the Functioning of European Union
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
WuW	Wirtschaft und Wettbewerb
Yargıtay	Court of Appeals
ZWeR	Zeitschrift für Wettbewerbsrecht

Introduction

Commercial relation developments and creation of market economies throughout the world necessitate rules for the system to function effectively and efficiently. Protecting competition is important in these systems. Therefore, as also in the EU, competition law is one of Turkey's constantly developing practice areas. Aiming to create an effective and functioning internal market, EU competition rules ensure the competitiveness of markets in which undertakings may operate free from restrictions to competition. European competition law is in an ongoing process of establishing new and more efficient rules to achieve these goals.

Turkey became a candidate state to the EU in 1999, and started negotiation talks in 2004. As detailed within this study, accession to the EU requires candidate states to meet certain political, social and economic criteria. These criteria include, *inter alia*, compliance with the EU competition policy. Although Turkey is not yet a Member State of the EU¹, in light of its candidate status Turkey is under the duty of fulfilling these criteria to become a full member in the future. Furthermore, the existing relationship between Turkey and the EU, namely the Association Agreement² and the Customs Union Decision³, also require that Turkey adopt effective competition rules. Therefore, this continuous process within the EU also affects Turkey.

In light of the above and considering its own constitutional provisions, Turkey adopted the competition act⁴ in 1994 and immediately began to

1 As of Juli 2013 the EU has 28 Member States, these are: Austria, Belgium, Bulgaria, Cyprus, Chech Republic, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweeden, United Kingdom. Croatia will be the 28th EU Member State after its accession to the EU on 1 July 2013, see at the official website of the EU: http://europa.eu/about-eu/countries/index_en.htm.

2 Agreement establishing an Association between the European Economic Area and Turkey, [1964] OJ 217/3687, hereinafter referred to as "Association Agreement".

3 Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ L 35/1, hereinafter referred to as "Customs Union Decision".

4 4054 sayılı Rekabetin Korunması Hakkında Kanun, Official Gazette 13.12.1994/22140, hereinafter referred to as "Competition Act".

enforce these rules. Although it has been more than fifteen years since the adoption of the Competition Act, competition policy is still a relatively under-studied area of law in Turkey. However, academic study has given more focus to this area as competition rules are seen as increasingly important tools to maintain a market economy. Especially with the privatization process in Turkey within previous years, key sectors, i.e. energy and telecommunication, are no longer state dominated. These developments require effective competition rules in order for new undertakings within these sectors to be able to enter and operate within the market.

This study focuses on the competition rules established by the Competition Act and discusses the application of the act in practice. It analyzes to what extent Turkish competition rules are influenced by EU rules and practice. Furthermore, the study aims to pinpoint similarities between the two legal systems, both in the similar structure of the competition legislation and the practices that implement the competition policies.

This study will start with a summary of the historical background of relations between Turkey and the EU beginning with the Association Agreement, including an overview of competition rules established by the Competition Act. The introduction further discusses the impact the EU's relationship with Turkey had on the drafting of Turkey's competition rules, and to what extent this relationship established duties for Turkey under the competition policy.

The subsequent parts of this study analyze both the substantive provisions of the Competition Act and the procedural aspects of its enforcement. Under the Competition Act, the activities of cartels are limited, since they are regarded as anti-competitive as well as abuses of an undertaking's dominant position. Furthermore, the act regulates anti-competitive merger's respective concentrations.

Regulation of state aids in Turkey was established through separate legislation⁵ more recently. Prior to this legislation, existing competition policy did not address state aid. Although the legislation is in place, it is as yet unimplemented. This study does not address this issue.

5 6015 sayılı Devlet Desteklerinin İzlenmesi ve Denetlenmesi Hakkında Kanun, Official Gazette 23.10.2010/27738.

Competition matters involve specific sectors and economic implications; as such, competition investigations must be both expedited and handled by experts. Turkey, therefore, established its own institutions⁶ and enforcement rules by virtue of the Competition Act. Accordingly, this study also analyzes the public enforcement procedures used by the Competition Board. Further, this study also aims to discuss the legal consequences of anti-competitive behaviour of the undertakings under the rules of private law.

In the concluding remarks the current status of Turkey's competition policy is discussed and recommendations for future amendments of competition rules which would ensure more effective protection and consistency with the EU rules are addressed.

This study examines both the substantive provisions and the procedural aspects of the Competition Act by comparing Turkey's competition policies and practices with those of the EU. This study not only includes an examination and a comparison of the established legislation in both systems, but it further examines integration of the practices of both competition authorities, namely the Commission and the Competition Board. The substantive provisions of Turkey's competition policy have been shaped and molded by the Competition Board's jurisprudence, much the same as the Commission's judicial decisions have done in the EU. Finally, this study compares reforms and amendments made to the EU's competition policy to changes made in Turkey to further understand the EU's influence on the development of Turkey's competition rules.

Turkish competition rules and practices are to a large extent parallel to those found in the EU. Both, the legislature and the Competition Board tend to follow the EU's lead in establishing competition rules and practices. Further, Turkish competition authorities follow the development of EU competition policy very closely. Both the similarities and the few dissimilarities between the two legal systems are better understood through this study's detailed analysis of specific competition provisions and practices.

6 Hereinafter referred to as "Competition Board".

First Part: The Basis for Harmonizing Turkish and EU Competition Rules⁷

First Chapter: The History of Relations between the EU and Turkey

Even compared with many Member States, Turkey has, one of the longest relationships with the EU. To understand the similarity between Turkish and EU competition law, we must examine the details of the relationship between the EU and Turkey, since the roots of this similarity and the structure of the system of Turkish competition law lie within this relationship. We can identify three different steps which Turkey has undertaken in order to create an effective system of competition law. These steps include the conclusion of the Association Agreement between Turkey and the EU, the Association Council Decision which established the Customs Union between the EU and Turkey and the candidate status of Turkey to the EU.

A. Turkey's First Application to the European Union

Turkey's first application to the predecessor of the EU, the European Economic Community ("EEC"), was made for full membership on 31 July 1959. The reason for Turkey to apply for the membership was mainly political considering its desire to become an integral part of Europe.⁸ Nevertheless, membership was also important for economic reasons.

7 With the entry into force of the Lisbon Treaty, the pillared system of the European Union was abolished and accordingly the distinction between the European Community and the EU is dismissed. Art. 1(3) of the Consolidated Version of the TFEU states that "*The Union shall replace and succeed the European Community*". Accordingly, in so far as a distinction is not necessary the terms European Community and European Union will be together referred to as "EU" throughout this study.

8 *Yeşilyurt Gündüz, Turkey's Approach Towards the EU, Perceptions 2003, p. 2.*