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

Turkey

by Çiğdem Boga
Schriftenreihe des
EUROPA-KOLLEG HAMBURG
zur Integrationsforschung

Herausgegeben von
Prof. Dr. Peter Behrens
Prof. Dr. Thomas Bruha
Prof. Dr. Thomas Eger
Prof. Dr. Armin Hatje
Prof. Dr. Markus Kotzur
Prof. Dr. Gert Nicolaysen
Prof. Dr. Stefan Oeter
Prof. Dr. Wolf Schäfer
Prof. Dr. Thomas Straubhaar

Band 72
Peter Behrens (ed.)

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

Turkey

by Çağdem Boga

Nomos
Contents

Abbreviations 23

Introduction 25

First Part: The Basis for Harmonizing Turkish and EU Competition Rules 29
First Chapter: The History of Relations between the EU and Turkey 29
Second Chapter: National Background 44

Second Part: Prohibition of Cartels 71
First Chapter: Scope of the Prohibition 71
Second Chapter: Restriction of Competition 99
Third Chapter: Exemption from the Prohibition 118

Third Part: Abuse of Dominant Position 129
First Chapter: The Principle of Prohibition 129
Second Chapter: Dominance 131
Third Chapter: Abuse 145
Fourth Chapter: The Relationship between the Rules on the Prohibition of Cartels and the Abuse of Dominant Position 166

Fourth Part: Merger Control 169
First Chapter: Concept of Merger Control 169
Second Chapter: Prohibition of Anti-Competitive Mergers 184
Third Chapter: Powers of Investigation and Enforcement 206
Contents

Fifth Part: Enforcement of Competition Rules 219
First Chapter: Institutions 219
Second Chapter: Public Enforcement of Competition Rules 238
Third Chapter: Private Enforcement of Competition Rules 264

Sixth Part: Concluding Remarks 275
Annex: Act on the protection of competition (Excerpts) 279
Bibliography 293
Detailed Contents

Abbreviations 13

Introduction 25

First Part: The Basis for Harmonizing Turkish and EU Competition Rules 29

First Chapter: The History of Relations between the EU and Turkey 29
A. Turkey’s First Application to the European Union 29
   I. The Association Agreement and the Additional Protocol 30
   II. Customs Union 32
B. Turkey’s Second Application to the European Union 32
   I. Pre-Candidature Developments 33
   II. Turkey’s European Union Candidacy 34
      1. Copenhagen Criteria and Acquis Communitaire 35
      2. Negotiations 35
C. Competition Rules Established Through the Relationship between the European Union and Turkey 37
   I. Obligation to Approximate Competition Legislation 37
   II. Specific Provisions on Competition Matters 38
      III. Legal Status of the Association Agreement and the Customs Union Decision 39
         1. Legal Status 39
         2. Direct Applicability 41

Second Chapter: National Background 44
A. The Development of Turkish Competition Law 44
   I. Competition Matters Prior to the Adoption of the Competition Act 44
      1. Legislation Applied to Competition Matters 44
      2. Draft Acts on Competition Matters 45
   II. Legal Basis of the Competition Act 47
      1. Constitutional Requirements 48
      2. Customs Union Decision 49
   III. The Legal Character of Competition Law 49
B. The Structure of the Competition Act 50
   I. The Concept of Competition 51
Detailed Contents

1. Definition 51
2. The “More Economic Approach” Concept 53

II. The Competition Act’s Purpose and Scope of Application 56
1. The Purpose of the Competition Act 56
2. Scope of Application 57
   a) Territorial Application 57
   b) Personal Application 61

III. Substantive Provisions 62
1. Prohibition of Cartels 62
2. Abuse of Dominant Position 64
3. Merger Control 65

IV. Institutions, Procedures and Sanctions 66
1. Institutions 66
2. Powers of the Institutions 67
3. Judicial Review by the Courts 67
4. Private Law Consequences of the Competition Rules 68
   a) Invalidity 68
   b) Liability for Damages 69

Second Part: Prohibition of Cartels 71

First Chapter: Scope of the Prohibition 71
A. The principle of prohibition 71
B. Addressees of the Prohibition 72
   I. Undertakings 72
      1. Definition 72
      2. Economic Activity 74
      3. Economic Independence 75
      4. State Owned Entities 76
   II. Association of Undertakings 78
C. Types of Prohibited Conduct 80
   I. Agreements 80
      1. Concept of Agreement 80
      2. Types of Agreements 82
         a) Horizontal Agreements 83
         b) Vertical Agreements 84
      3. Agreements in Specific Conditions 85
         a) Unilateral Conduct 85
         b) Single Overall Agreement 87
   II. Decisions by Association of Undertakings 88
      1. Concept of Decision 88
      2. Anti-Competitive Practices of Associations of Undertakings 89
### Detailed Contents

III. Concerted Practices 91
1. Concept of Concerted Practice 91
2. Elements of Concerted Practice 92
   a) Existence of at Least Two Undertakings 93
   b) Parallel Behaviour 93
   c) Contact between Undertakings 94
   d) Restriction of Competition 95
3. Circumstantial Evidence 96
4. The Relation between Agreements and Concerted Practices 97

Second Chapter: Restriction of Competition 99
A. The Object or Effect of Prevention, Restriction or Distortion of Competition 99
   I. Restriction by Object 99
   II. Restriction by Effect 100
   III. Restriction of Potential Competition 101
   IV. De Minimis Doctrine: Appreciable Effect on Competition 102
B. Horizontal Agreements: Cartel Agreements 104
   I. Introduction 104
   II. Fixing Prices and Other Trade Conditions 104
   III. Market Sharing Agreements 106
      1. Territorial Allocation of Markets 107
      2. Allocation of Customers and Products 107
   IV. Limitation and Control of Production 108
   V. Prevention of New Entrants and Collective Boycotts 108
   VI. Discrimination 109
C. Vertical Agreements 110
   I. Introduction 110
   II. Distribution Agreements 111
      1. Exclusive Distribution 111
      2. Selective Distribution 113
      3. Resale Price Fixing 114
   III. Exclusive Supply Agreements 115
   IV. Agency Agreements 116

Third Chapter: Exemption from the Prohibition 118
A. Individual Exemption 118
   I. Notification 119
   II. The Conditions of Exemption 120
      1. Beneficial Effects 120
      2. Welfare of the Consumer 121
      3. Indispensability of the Restriction 121

17
Detailed Contents

4. Preserving the Effective Competition on the Substantial Part of the Market 122
   III. Duration of the Exemption 122
   B. Block Exemption 123
      I. Legal Structure of the Block Exemption Legislation 124
      II. The Block Exemption Legislation on Vertical Agreements 125
      III. Withdrawal of the Block Exemption 126

Third Part: Abuse of Dominant Position 129

First Chapter: The Principle of Prohibition 129

Second Chapter: Dominance 131
   A. Definition of Dominant Position 131
      I. Monopoly 131
      II. Leading Position 132
   B. Determining Dominance 132
      I. Relevant Market 132
         1. Introduction 132
         2. Product Market 134
            a) Definition 134
            b) Demand Substitution 135
            c) Supply Elasticity/Substitution 136
         3. Geographic Market 137
      II. Market Power 139
         1. Market Shares 139
            a) Own Market Shares 139
            b) Relative Market Shares 140
         2. Entry Barriers and Potential Competition 141
   C. Collective Dominance 142

Third Chapter: Abuse 145
   A. Definition of Abuse 145
   B. Special Responsibility of a Dominant Undertaking 147
   C. Abusive Practices 147
      I. Introduction 147
      II. Unfair Prices 148
         1. Predatory Pricing 148
         2. Excessive Prices 151
         3. Price Discrimination 153
            a) Definition 153
            b) Selective Price Cutting 153
c) Discounts and Rebates 154
   aa) Volume Rebates/Discounts 154
   bb) Loyalty (Fidelity) Rebates 155
   cc) Target Rebate Schemes 156
III. Refusal to Supply 157
   1. Refusal to Supply an Existing Customer 158
   2. Essential Facilities Doctrine 159
IV. Tying 161
   1. Introduction 161
   2. Elements of Abuse 162
      a) Two Separate Products 162
      b) Tying Products 163
      c) Sufficient Economic Power 164
      d) Restriction of Competition 164
      e) Absence of Objective Justifications 165

Fourth Chapter: The Relationship between the Rules on the
Prohibition of Cartels and the Abuse of Dominant
Position 166
A. Introduction 166
B. Differences between the Prohibitions 167
   I. Collusion – Unilateral Behaviour 167
   II. Exemption - Objective Justifications 167

Fourth Part: Merger Control 169
First Chapter: Concept of Merger Control 169
A. Introduction 169
   I. Aim of Merger Control 170
   II. “Merger” or “Economic Concentration” – Broad Definition of Merger 172
B. Characteristics of Mergers 173
   I. Change of Control 174
      1. Decisive Influence 174
      2. Lasting Basis 175
   II. Types of Control 176
      1. Sole Control 176
      2. Joint Control 177
   III. Independent Undertakings 179
C. Types of Mergers 180
   I. Horizontal Mergers 180
   II. Vertical Mergers 181
Detailed Contents

III. Conglomerate Mergers 182

Second Chapter: Prohibition of Anti-Competitive Mergers 184
A. Mergers Subject to Permission from Competition Authorities 184
   I. Turnover thresholds 184
      1. General principle 184
      2. One-Stop-Shop Principle 188
   II. Restriction of Competition 189
      1. Dominance 189
      2. Substantive Test: SIEC 190
      3. Failing Company Defence 192
B. Notification of Concentrations 193
   I. Notification 193
      1. Implementation of Concentration 194
      2. Failure to Notify 195
   II. Permission of Competition Authorities 196
      1. Suspension Principle 197
      2. Conditions and Obligations Attached to Permission 198
      3. Ancillary Restraints 199
   III. Prohibition of Concentrations 202
   IV. Negative Clearance 203

Third Chapter: Powers of Investigation and Enforcement 206
A. Introduction 206
B. Phases of Investigation 206
   I. Pre-Notification Contacts 206
   II. Preliminary Examination 207
   III. Final Examination 209
      1. Preliminary Inquiry 209
      2. Investigation 209
C. Powers of Investigation 210
   I. Information Request 210
   II. On-the-spot Inspections 212
   III. Administrative Fines and Periodic Penalty Payments 213
      1. Administrative Fines 214
      2. Periodic Penalty Payments 215
D. Private Law Consequences of Anti-Competitive Mergers 216
   I. Validity of Concentrations 216
   II. Liability for Damages 217
Fifth Part: Enforcement of Competition Rules 219

First Chapter: Institutions 219
A. Public Enforcement vs. Private Enforcement 219
B. Competition Authorities in the European Union 220
   I. Cartel Regulation 1/2003 and Decentralization of the Enforcement of EU Competition Rules 220
   II. Commission 222
   III. National Competition Authorities 223
C. Turkish Competition Institutions 224
   I. Competition Authority 225
   II. Competition Board 227
D. National Courts and their Relation with Competition Authorities 228
   I. Competition Board – National Courts 229
   II. Commission – National Courts 233

Second Chapter: Public Enforcement of Competition Rules 238
A. Enforcement Procedures 238
   I. Investigation Process 238
      1. Phases of Investigation 239
      2. Collection of Evidence: Powers of Investigation 242
         a) Request for Information 242
         b) On-the-Spot Inspections 243
   II. Decisional Process 246
      1. Written Statements and Oral Hearings 246
      2. Final Decision 247
         a) Introduction 247
         b) Termination of Infringement 248
         c) Administrative Fines and Penalty Payments 250
B. Leniency Programmes 252
   I. Introduction 252
   II. Types of Leniency 254
      1. Immunity from Fines 255
      2. Reduction of Fines 256
C. Judicial Review 257
   I. Jurisdiction 258
   II. Parties in Judicial Review 261
   III. Annulment Grounds 261
   IV. Effects of Judicial Review on Decisions of Competition Authorities 262
Detailed Contents

Third Chapter: Private Enforcement of Competition Rules 264
A. Invalidity and Unjust Enrichment 264
B. Liability for Damages 268

Sixth Part: Concluding Remarks 275

Annex 279

Act on the protection of competition (Excerpts) 279

Bibliography 293