

# GEDİK & ERAKSOY

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## *Changes to Competition Act on the Way*

*After experiencing few failures along the way, the long-winded story of the proposed changes to the Act No 4054 on the protection of competition (Act No 4054) has finally come to an end.*

### **Background**

On 23 January 2014, the Draft Act on the amendment of the Act No. 4054 (**Draft Act**) was proposed to the Turkish Parliament by the Prime Ministry. The Draft Act includes significant changes which aim to solve the competition law problems experienced in practice and which are also in line with Turkey's commitments under the accession process to European Union (EU). The Parliament is expected to enact the Draft Act in a couple of months.

### **Significant Changes Introduced**

The key amendments can be summarized as follows:

- “De Minimis” Rule

The Draft Act introduces a “de minimis” rule to the current regime. Pursuant to this rule, agreements of minor importance which do not appreciably restrict competition may not be investigated by the Turkish Competition Authority (TCA). In order to apply this rule, the Turkish Competition Board (TCB) will first issue a communiqué in which it will quantify, with the help of market share and turnover thresholds, what does not amount to an appreciable restriction of competition under the Act No 4054.

- “SIEC” Test

The Act No 4054 prohibits mergers that create or strengthen a dominant position as a result of which effective competition would be significantly impeded. The former EU Merger Regulation had the same wording but it was criticised for putting dominance as a single and sufficient criterion in assessing mergers. Therefore the substantive test in analysing mergers, known as the “SIEC” test, was reformulated in 2004. Under the EU's current regime, only mergers which would significantly impede effective competition, in particular by the creation or strengthening of a dominant position, are prohibited. Thus, the lessening of competition became the main factor of analysis under the SIEC test, allowing more room for economics and efficiency-based analysis. The same approach is now being introduced by the Draft Act in Turkey.

- Timeline in Merger Notifications

Under the Act No 4054, once a notification for a merger or acquisition transaction is submitted to the TCA, it is obliged to decide on the matter in 15 days. However, the law also stipulates that, in case of silence by the

Authority, a concentration shall not become legally valid and take effect until 30 days following the notification. Therefore there is controversy as to what happens if the Board decides on a matter after 15 days but before the 30-day deadline. The Draft Act fills this legal loophole by removing the 15-day period and setting the deadline at 30 days in both situations.

With regard to timeline in Phase-II investigations, where the TCB would like to further investigate the relevant merger or acquisition transaction before deciding on the matter, the investigation process is currently the same as for cartels and abuse of dominance cases. This has been widely criticised, given that the process is long and detailed. Now, with the Draft Act, the TCB has to finalise its evaluation within 4 months at the latest.

- Settlement Procedure

One of the most significant changes introduced by the Draft Act is the settlement procedure. Pursuant to this rule, before the investigation report is released, the TCB may settle with the relevant parties who acknowledge their participation in, and liability for, conduct which violates Act No 4054. It should be noted that the current version of the rule differs from the EU position in two respects. First, the settlement procedure is not limited to cartel cases and second, the parties do not have the right to appeal the decision of the TCB if they choose to settle. Other details of the settlement procedure will be set by a regulation of the Board.

- Power to Affix a Seal in Dawn Raids

The TCA's on-spot inspection powers have been widened by the Draft Act. Under the new rules, the officials from TCA are now able to seal all equipment (i.e. computers, closets, drawers) containing sensitive data or information for 24 hours.

- Variable Fines Instead of Fixed Fines

Under the current regime in Turkey, a fixed amount of monetary fine by 0.1% or 0.5% of annual gross revenues of the relevant company can be imposed where: (i) incomplete, false or misleading information or documents are provided to the TCA; or (ii) a merger or acquisition transaction which is subject to the TCB's approval is realised without its approval. These fines for procedural violations may sometimes cause to unjust situations in which the fines are even higher than the ones imposed for the actual anti-competitive conduct (e.g. the cartel activity or abuse of dominance). The Draft Act provides for the same method of determining the level of fine to be applied to these procedural violations as for fines imposed for substantive violations, i.e. a variable fine up to a certain amount. Now, under the new regime, a monetary fine of *up to* 0.1% or *up to* 0.5% of annual gross revenues of the relevant company will be applied in these situations.

- Timeline in Investigations

Taking into account the critics on the long duration of investigations, the investigation period in the Act No 4054 is decreased by the Draft Act from 6 months to 4 months. However, the TCB may still extend this period (but only up to 4 months this time) on a one-time only basis, if it is deemed necessary. Moreover, contrary to the current regime, the TCB can close the investigation in accordance with the suggestions of the case handlers but before the release of the investigation report under the Draft Act.

- Commitments

Another important feature that the Draft Act introduces to the Act No 4054 is the commitment decision. Pursuant to this rule, the TCB may not open an investigation or close an existing one, if it accepts the commitments made by the parties to bring a suspect behaviour to an end and to satisfy the TCB's concerns arising from the conduct that is under investigation. Commitment decisions render the commitments legally binding and conclude that there are no longer grounds for action by the TCB.

With regard to commitments in merger cases, it is made clear in the Draft Act that the TCB cannot give conditional clearance unless the parties themselves submit commitments. In fact, the TCB has been applying the same approach in practice for the last couple of years, but this is the first time that it is introduced to law.

- **Private Damage Actions**

The Act No 4054 already has a rule granting the parties injured by competition violations the right to file for triple damages. However, according to the Draft Act, the injured parties will now be able to claim damages only if they can prove that the relevant damage is caused by the intent or gross negligence of the party who breached the Act No 4054. The Draft Act also makes it clear that the right to seek damages is only granted to parties which suffer directly as a result of the anti-competitive conduct. Thus the Draft Act rules out the “indirect purchaser” theory under Turkish competition law. In addition, the injured party cannot request triple damages if the defendant benefits from leniency under the Draft Act.

### ***Effect on the Market***

The Draft Act has two main goals; (i) to simplify the applicable Turkish competition legislation and (ii) to align the Turkish rules with those of the EU. Within this scope, global “hot topics” (i.e. settlements, commitments, and the “de minimis” rule) are introduced to Turkish competition law. Although the Draft Act still contains some loose ends on the application of the new rules, these are expected to be solved by the Parliament (or by the TCA with its secondary legislation) along the way. As a result, the Draft Act appears to heat up competition law awareness and enforcement in Turkey.

## **Gedik & Eraksoy Avukatlık Ortaklığı**

Kanyon Ofis Binası, Kat 6,  
Office No: 1015 - 1023  
Büyükdere Caddesi No.: 185  
TR-34394 Levent, Istanbul  
Turkey

Tel +90 212 371 2950  
Fax +90 212 371 2955

[www.gedikeraksoy.com](http://www.gedikeraksoy.com)

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**Hakkı Gedik**  
Partner, Gedik & Eraksoy

**Contact**  
Tel +90 212 371 2953  
hakkı.gedik@gedikeraksoy.com



**Gökhan Eraksoy**  
Partner, Gedik & Eraksoy

**Contact**  
Tel +90 212 371 2952  
gokhan.eraksoy@gedikeraksoy.com



**Emre Önal**  
Senior Associate- Istanbul

**Contact**  
Tel +90 212 371 2965  
Emre.onal@gedikeraksoy.com