Turkish Competition Law

Gönenç Gürkaynak

Foreword by Richard Whish
Introduction by Eleanor M. Fox
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Mr. Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 80 lawyers based in Istanbul, Turkey. He is also an academician, teaching law & economics and competition law at undergraduate and graduate levels at two universities in Turkey.

Mr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He then received his LL.M. degree from Harvard Law School, and he is qualified to practice in Istanbul, New York, Brussels and England and Wales. 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. He has been practicing law in multiple jurisdictions as an attorney for more than 25 years, with Turkey being the center of gravity of his practice particularly for the last 15 years.

Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 52 lawyers. He has unparalleled experience in Turkish competition law counseling through more than 500 files before the Turkish Competition Authority in more than 25 years of competition law experience, since the establishment of the Turkish Competition Authority. Every year Mr. Gürkaynak represents multinational companies and large domestic clients in more than 30 written and oral defenses in investigations of the Turkish Competition Authority, about 20 antitrust appeal cases in the high administrative courts, and over 90 merger control 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 EU competition law topics.

Mr. Gürkaynak has authored five books: “A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective” published by the Turkish Competition Authority; “Fundamental Concepts of Anglo-American Law”, “The Academic Gift Book of ELIG Gürkaynak Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Turkey” and “The Second Academic Gift Book of ELIG Gürkaynak Attorneys-at-Law on Selected Contemporary Competition Law Matters” published by Legal Publishing; and this treatise on Turkish Competition Law published by Concurrences. Mr. Gürkaynak has also published more than 200 academic articles in English and in Turkish by various international and local publishers.
I was delighted to be asked by Gönenç Gürkaynak to write a Foreword to this excellent new book on Turkish Competition Law.

I have watched the development of Turkish Competition Law with great interest over many years. I remember the discussions around the adoption of Law No. 4054 of 1994 on the Protection of Competition, and have had the pleasure of visiting Turkey on numerous occasions since then to participate in competition law conferences and to provide lectures and training on aspects of the law; some of those visits were in the early years after Law No. 4054 was adopted, when competition law was a little-known subject in the country. It was an extremely interesting time, when lawyers, economists and other interested stakeholders were having to come to terms with the new concepts and processes that competition law entails. It has also been a great pleasure to have taught a significant number of excellent Turkish students at King’s College London over many years, whose career developments I have followed with great interest.

Turkish competition law is unusual in that it is rooted in Article 16 of the Turkish Constitution, which places a duty and responsibility on the state to take measures ‘to ensure and promote the sound, orderly functioning of the money, credit, goods and services markets’ and to prevent ‘the formation, in practice or by agreement, of monopolies and cartels in the market’. Of course there has been another powerful influence on the development of Turkish competition law, that is to say Turkey’s relationship with the European Union. Whether and when accession to the EU might occur is of course very much in doubt; as I write this Foreword in October of 2021 it seems to be a remote possibility in the foreseeable future. However, insofar as Turkey is required by the Ankara Agreement of 1963 and the Customs Union Agreement of 1995 to align its competition law with that of the EU, much of the necessary groundwork has been done, with the exception of the creation of a regime for the scrutiny of state aid to match Articles 107 to 109 TFEU.

Various amendments to the Law of 1994 have been proposed and made over the intervening years. Of particular importance is Law No. 7246 of 16 June 2020. The 2020 Law introduces a de minimis principle into Article of the legislation, which prohibits anti-competitive agreements; this will enable the Competition Authority to make better use of its resources, as it will be able to exercise its prosecutorial discretion not to take action in cases where any harm to competition would be insignificant in its effect. The changes to the law introduce two useful new possibilities for the Authority. The first is the possibility for the Turkish Authority to accept legally-binding commitments from undertakings under investigation that they will change their market behaviour in the future; in return the case will be closed, without a formal finding of infringement (or non-infringement). The introduction of a commitments procedure in Article 9
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of EU Regulation 1/2003 has proved to be a very useful tool for the European Commiss-
ion, and the Turkish Authority will no doubt draw upon the Commission’s experience
to date when deciding how and when to use its new power. It is important to note that
the commitments procedure will not be available for ‘hard-core’ infringements of Turkish
Competition Law, mirroring the position in the EU. Commitments were accepted in
a decision involving Coca-Cola Satış ve Dağıtım A.Ş in September 2021.

A second new possibility for the Authority is the introduction of a settlement procedure
(not to be confused with commitments), whereby the parties to an investigation can admit
their infringement of the prohibitions in the Competition Act and waive the formalities
of a full-contested procedure in return for a reduction of the fine(s) they would otherwise
have paid. In the Turkish system the ‘discount’ will be higher (up to 25%) than in the
EU (10%). Unlike in the EU settling parties in Turkey will have to agree that they will
not appeal against the Authority’s final decision. I note with interest that the first case
was decided under the settlement procedure in August of 2021 in a case involving Türk
Philips Ticaret A.Ş. and various other undertakings found to have infringed Article 4 of
the Competition Act. It will be interesting to see in the future how many cases will be
settled: in the EU it is now clear that a majority of cartel cases tend to be settled rather
than being taken through the fully contentious procedure.

The Law of 2020 introduces other significant amendments to the original law of 1994,
for example in relation to on-site inspections and the system of merger control. Vari-
ous Communiqués from the Competition Authority supplement these amendments. The
Turkish Authority has been and remains an active one, and has not shied away from major
investigations of significant international firms; apart from Coca-Cola and Philips, already
referred to, the Authority has been investigating Google and the practices of concern
to the European Commission in its Google Shopping and Google Android decisions.
The recent changes to Turkish Competition Law equip the Competition Authority with
much the same toolkit as the European Commission’s. This excellent, comprehensive and
timely book will be invaluable to anyone interested in the future of Turkish Competition
Law. The authors (and publishers) are to be congratulated on bringing this book to the
market as quickly as they have done.
INTRODUCTION

ELEANOR M. FOX

New York University School of Law

It is my great pleasure to write the introduction to this monumental new book by Gönenç Gürkaynak. It is a special pleasure not only because the book is an extraordinary, incomparable treatise that is sure to make its mark in explaining and even guiding the competition law of Turkey and beyond, but because this is the twentieth anniversary of my meeting its remarkable author, Gonenc Gurkaynak.

I first met Gönenç when he was a dripping wet young Harvard graduate student arriving at my house in a sudden downpour accompanying his wife-to-be Serra, who was my student at New York University School of Law. Since then, I have watched Gönenç’s illustrious career begin and blossom. I observed his contributions to and influence on the competition community around the world. I watched and admired his forming his own competition law firm and building it into one of the finest in Turkey and a player in the world. I admire his being not only a practitioner and advisor but a scholar and teacher, and certainly not a technocratic competition-law-only expert but a constitutional and civil rights expert concerned with human rights and free speech.

The publication of Gönenç’s Turkish Competition Law is an event of moment. The book is an all-encompassing treatise. It is the first treatise of its kind on the entirety of Turkish competition law. It spans all matters of Turkish competition law, from practical details and procedures to institutions, to all aspects of substantive competition law with nuances of analysis, to guidelines and other guidance as well as the cases that light the path.

The book is beautifully conceived, organized, and written, and had to be a long and hard labor of love. Despite aspects of the subject matter that you might think tedious and dull, reading the book is never tedious and dull. The book is essentially interesting and engaging, no doubt due to the master intellect, filled with experience, behind the words.

The competition law of the European Union was the model for Turkish competition law. Therefore, not surprisingly, frequent reference is made to the competition law of the EU. Occasional reference and comparisons are made with the antitrust law of the United States. Accordingly, the Treatise is not just a one-nation work; it is also a comparative work. It promises to be indispensable to practitioners, advisors, and teachers of Turkish competition law and practitioners and advisors everywhere in the world whose transactions have effects in Turkey. It is of important interest to everyone in the competition law/policy community for its insightful exposition and analysis, including comparative analysis, of competition law and its institutions.
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The book is an essential guide for practitioners and academics alike, and for all interested in the future of Turkish competition law in a globalized economy. For its comparative analysis and insights, it is of value to the entire competition community.

Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 80 lawyers based in Istanbul, Turkey.