A new watchdog joins the ranks of enforcers in Turkey in the fight against the COVID-19 fallout

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Turkey adopted a new law on April 17, 2020 to introduce more measures to fight the social and economic disruption of the COVID-19 outbreak. One of the most significant changes the Law No. 7244 on Amendment of Certain Laws ("***COVID-19 Law***") [1] brings about is related to the consumer goods. With an amendment to the Law on Regulation of Retail Trade ("***LRRT***"); this new law prohibits producers, suppliers and retailers from (i) excessively increasing prices and (ii) engaging in any activity that will restrict consumers' access to products and distort competition, in particular through "stocking" products. An Unfair Price Assessment Board ("***UPAB***") will be established to enforce these new prohibitions and impose administrative monetary fines in case of violations, which are also set by the new law.

While the COVID-19 Law announces that a secondary law is under way to explain how these new measures will be implemented, a number of questions already come to mind as to its implications for competition law. First and foremost, what happens when certain conduct of producers, suppliers or retailers infringe both LRRT's new clause and the Law No. 4054 on the Protection of Competition (the "***Law No. 4054***")? Which law will prevail? As the Turkish Competition Authority has openly declared war against potential abuses of the current crisis in the detriment of competition and consumers,[2] it appears that investigations by both enforcers in these markets are on the horizon.

This new law could lead to two main areas of overlap between LRRT and the Law No. 4054:

[1] For the full text of the COVID-19 Law, see https://www.resmigazete.gov.tr/eskiler/2020/04/20200417-2.htm.
[2] See the statement from Birol Küle, the president of the Turkish Competition Authority, on the prices of fruits and vegetables on March 25, 2020 (available at https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-baskani-birol-kule-nin-ya-19def560896eea11811700505694b4c6) and the press release of the Turkish Competition Authority on March 23, 2020 on - excessive prices in food markets (available at https://www.rekabet.gov.tr/tr/Guncel/kamuoyuna-duyuru-3b18d865266dea11811700505694b4c6).

i. **Anti-competitive collusions:** the new clause the COVID-19 Law introduces in the LRRT prohibits "excessive price increases". There is currently no definition in the new law or other clauses of the LRRT on what "excessive" means. Any price level above competitive prices therefore could arguably fall under the prohibition in the COVID-19 Law.

Price fixing, as well as other anti-competitive agreements, concerted practices or decisions of trade associations on the conditions of purchase or sale are prohibited under Article 4 of the Law No. 4054. Accordingly, collusions among competitors on price fixing would in most cases result in prices above the competitive level, unless they are aiming to exclude a potential/existing competitor from the market by lowering prices. Accordingly, "excessive" price increases resulting from collusion among competitors can violate both LRRT and the Law No. 4054.

Article 4 of the Law No. 4054 also prohibits collusion aiming to control the amount of supply or demand for goods or services, or to determine these outside the market. Accordingly, if producers, suppliers or retailers increase prices excessively, reduce supply or restrict competition through anticompetitive agreements, concerted practices or decisions of trade agreements, such conduct could be captured by both the LRRT and the Law No. 4054.

ii. **Abuse of dominant position**: If such excessive price increases, supply restriction or other anti-competitive practices preventing consumers' access to products or services result from a unilateral conduct, enforcement of these two laws can also overlap in the field of "abuse of dominance". Indeed, excessive pricing[3] that distort competition and harm consumers and refusing to supply[4] by a dominant firm can infringe Article 6 of

[3] *See e.g.*, Chamber 10 of the Council of State, *BELKO*, 2001/4817 E., 2003/4770 K (5.12.2003); the Competition Board's *Fuar* (27.10.2016; 16-35/604-269), ASKI-1 (13.3.2001; 01-12/114-29) and ASKI-2 (26.5.2005; 36/484-155) decisions.

[4] Refusing to supply by a dominant firm can infringe Article 6 if this (i) relates to a product or service that is indispensable for competing in the downstream market, (ii) is likely to lead to the elimination of effective competition in the downstream market, and (iii) is likely to lead to consumer harm [see e.g., the Board's *Maysan* (20.06.2019;19-22/353-159) and *Unilever* (28.08.2012; 12-42/1257-409) decisions].

the Law No. 4054, depending on whether the conditions provided in the law and precedent are met.

As seen above, unlike the Law No. 4054, LRRT does not require an "agreement, concerted practice or decision restricting competition" or "dominance" for the excessive pricing or supply restriction to be prohibited. In that sense, the LRRT appears to have a wider scope of enforcement compared to the competition law.[5] That said, in the scenarios explained above, the relevant conduct can fall under the radar of both the Turkish Competition Authority ("***TCA***") and UPAB.

The concept of infringing multiple laws with a single conduct is not a novel theory for competition law. Indeed, there are cases where the TCA did investigate certain conduct that is simultaneously investigated by other authorities under different laws.[6] The Competition Board in the past took the view that the difference between the laws as to the definition of the illegal conduct and the elements to be proven allows for such simultaneous enforcement.[7] In the current case, however, there is another factor added to the complications in practice: the COVID-19 Law states that the fines under this new law will be applicable "unless there is a higher fine applicable pursuant to another law".

With the current amendment to LRRT, the UPAB will be able to impose administrative monetary fines to producers, suppliers and retailers varying from:

[5] On a separate note, the COVID-19 Law not only expands the scope of intervention as defined in the Law No. 4054, but also the LRRT itself. Indeed, the new law adds "producers" and "suppliers" to retailers as the subject of the LRRT. The LRRT, in its previous version, aimed to regulate "the activities of retailers among each other and with producers and suppliers" (Article 1 of LRRT) but not directly those of producers or suppliers. Moreover, while the LRRT used to include price-related provisions (e.g. Article 9 and 10), these provisions did not directly concern the level of prices but rather aimed at preventing deceptive pricing that could misguide consumers.

[6] See, e.g., *Medical Consumables* (16.03.2007; 07-24/236-76) where the public prosecutor's office provided the TCA with the evidence as to bid rigging in public tenders, which they collected during a criminal investigation of the same conduct. Similar simultaneous enforcements are seen also in other fields, such as GSM operators' obligation to inform customers under both the consumer protection laws enforced by the Ministry of Commerce and the Electronic Communications Law enforced by the Information Technologies and Communications Authority.

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i. TRY 10,000 (c. USD 1,447)[8] to TRY 100,000 (c. USD 14,470) if they excessively increase prices of products or services,
ii. TRY 50,000 (c. USD 7,235) to TRY 500,000 (c. USD 72,350) if they prevent consumers from accessing products by restricting supply or distorting the market balance and free competition.

On the other hand, the TCA can impose administrative fines under the Law No. 4054 starting from TRY 31,903 (c. USD 4,616) as a minimum fine up to 10% of the relevant undertaking's turnover in the financial year preceding the date of the Competition Board's decision[9] on the fine. In other words, the Law No. 4054 does not provide a fixed amount of fine unless the relevant company's turnover is too low that even 10% of it is below TRY 31,903; in which case this minimum amount would be imposed as the fine for the competition law infringement.

Accordingly, the TCA is technically able to impose a higher fine than UPAB, depending on (i) the turnover of the relevant producer, supplier or retailer; and (ii) the percentage of the fine. Neither of these factors, however, or even whether the TCA will impose any fine for that matter, is clear at the time an allegation raised against such companies. There is certainly a "possibility" for the Law No. 4054 to trigger the exception in the COVID-19 Law, but not necessarily in all cases where the scope of the two laws overlaps. How should then UPAB implement this provision?

At first glance, three potential scenarios could be observed in practice:

1. Deference to the TCA to resolve the potential overlap

When an unfair price claim is brought to UPAB, the first option could be seeking the TCA's opinion on whether the relevant claim is also within the scope of the Law No. 4054 and

[8] According to the USD/TRY exchange rate on April19, 2020.
[9] If this is not available, the Competition Board imposes the fine based on the turnover generated in the most recent financial year for which turnover can be calculated.

whether there is already a proceeding pending before the TCA on the same matter.[10] Even if there is not an ongoing proceeding, the TCA may ex officio take action against such conduct provided that it has jurisdiction over the matter.

If the allegedly illegal conduct falls under the Law No. 4054, this could be treated as a prejudicial matter by UPAB until the Competition Board's decision on the matter. If the TCA confirms that there is no legal basis for the authority to start proceedings, or if at the end of a proceeding, the Competition Board either rejects the allegation (meaning no fine will be imposed) or the fine resulting from these proceedings is below the maximum amount UPAB is able to impose in the relevant case, the exception provision introduced by the COVID-19 Law to the LRRT will not be triggered.

While this seems to be the most practical option, there is currently no legal obligation for UPAB to liaise with the TCA. Had the new law allowed the TCA to appoint a representative to UPAB, a de facto cooperation channel could have been established between these authorities. But this is currently not the case. Companies may therefore encounter other scenarios in practice, as explained below.

2. Parallel investigations by TCA and UPAB

Given that UPAB is not bound by a statutory obligation to seek TCA's opinion beforehand, it is possible in practice for both authorities to take action against and decide on the same allegations at the same time. In this scenario, if the TCA's investigation ends with a lower fine than the maximum amounts set by the LRRT or the Competition Board does not impose a fine at all, the result would be multiple authorities' investigating the same conduct. The focus of the matter than turn into how "excessive price increase" and "preventing consumers' access to products by anti-competitive conduct restricting supply or distorting the market balance and free competition" are defined under the LRRT. One may expect such definition to lead to an overlap between the jurisdiction of LRRT and TCA to a certain extent, although the scope

[10] A similar provision can be found in Article 7 of the Electronic Communications Law, which states that the Information Technologies and Communications Authority should seek the TCA's opinion on the potential competition violations in the electronic communications sector when required by this law.

of the LRRT appears to be broader. If there is such an overlap, this will likely trigger *non bis in idem* discussions.

If, however, the Competition Board decides on a higher fine than UPAB, UPAB's fine decision on the same matter will infringe the LRRT provision limiting UPAB's jurisdiction to cases where no other law provides a higher fine. The relevant party will then need to object to or appeal against the UPAB decision.

3. Subsequent decisions by UPAB and TCA

A third scenario could be observed in practice where the alleged excessive price increase or supply restriction is first investigated and fined by UPAB and all the potential appeals against the decision are exhausted. The TCA then starts investigating and/or decides on the same matter and imposes a fine higher than that of the UPAB (or vice versa).

In this scenario, the first decision by UPAB will be final and, given that the statutory conditions under Article 53 of the Code of Administrative Procedure for seeking renewal of the judgement are limited, it will not be possible to appeal for a renewal either. The relevant company would then need to apply to the UPAB for a potential refund on the ground that the Competition Board has imposed a higher fine for the same conduct at a later stage. If UPAB refuses to refund the applicant, the applicant will then be able to challenge the new decision UPAB has taken to reject the applicant's claim, and thus bring the case before the court.

Even if the second decision by either the Competition Board or UPAB does not result in a jurisdictional issue under the fine provision of the COVID-19 Law, this scenario may still lead to multiple fines by two administrative authorities for the same conduct subsequently. The authorities may then again face *non bis in idem* claims. It is therefore of critical importance how the relevant conduct under LRRT will be defined by the implementing regulations or UPAB decisions, and whether these definitions will overlap with the scope of the Law No. 4054.

4. Conclusion

The COVID-19 Law, despite being most welcome from a consumer protection point of view, has expanded the scope of LRRT enforcement in a way to blur the lines with the competition law enforcement. Depending on how the illegal practices in this new provision are defined, they may be captured by the jurisdiction of both the TCA and the new watchdog in the game, UPAB. One solution to mitigate these practical issues could have been appointing a TCA representative to UPAB. The new law, however, does not include TCA as one of the government agencies to be represented in this new authority. How the implementing regulations will address these issues and potential implications of the COVID-19 Law therefore remain to be seen.

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