Recent amendments to law on protection of competition

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Introduction

After rounds of revisions and failed enactment attempts over a span of several years, the proposal for amendments to Law 4054 on the Protection of Competition has finally been approved by Parliament, specifically the Grand National Assembly of Turkey. The latest version of the proposal was submitted to Parliament on 15 May 2020.

The amendments passed through Parliament on 16 June 2020 and entered into force on 24 June 2020 (Amendment Law).**(1)** According to the proposal's recital, the amendments to Law 4054 aim to embody the Turkish Competition Authority's (TCA's) 20-plus years' enforcement experience and bring Turkish competition law closer to EU competition law. Essentially, the Amendment Law clarifies certain mechanisms in Law 4054 which may have led to legal uncertainty in practice and introduces:

- new mechanisms regarding the TCA's selection of cases;
- a new substantive test for merger control;
- behavioural and structural remedies for anti-competitive conduct; and
- procedural tools to enable the TCA to end its proceedings in certain cases with greater ease when the parties opt for commitments or settlement.

The Amendment Law also includes certain provisions concerning the TCA's organisational structure and personnel. The most prominent changes introduced by the law are set out below.

De minimis principle

One of the most important amendments in the Amendment Law is the introduction of the so-called '*de minimis*' principle. With this amendment, the TCA will be able to decide against a full-fledged investigation for agreements, concerted practices or decisions of association of undertakings which do not exceed the market share and turnover thresholds determined by the TCA. This principle will not apply to hardcore violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the TCA appears to be shifting its focus, as well as public resources, to more significant violations.

The introduction of the *de minimis* principle appears to be a more appropriate (and legally less controversial) measure for the TCA to prioritise cases. The authority previously used Article 9(3) of Law 4054 to terminate a pre-investigation on procedural efficiency grounds, among others, where the infringement affects only a small market.**(2)** However, Article 9(3) is an interim measure to be used by the TCA to explain to companies how to terminate an infringement until the final decision is made. It remains to be seen whether the introduction of the *de minimis* principle will end this excessive use of Article 9(3) altogether, given that, for instance, hardcore restrictions in small markets will still not benefit from the *de minimis* principle.

The Amendment Law refers to 'turnover' and 'market share' thresholds for the *de minimis* principle,

but leaves the setting of the threshold to the TCA. Therefore, it remains unclear how the authority will define the limits of the safe harbour introduced by the new law. That said, given the goal of the Amendment Law to bring Law 4054 closer to EU law, it would be fair to expect that the threshold will be inspired by the European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (*De Minimis* Notice). According to the *De Minimis* Notice, agreements between competitors with a combined market share of less than 10% and those between non-competitors whose aggregate market share does not exceed 15% can benefit from the safe harbour, except for hardcore restrictions. When cumulative foreclosure effects of parallel networks are concerned, these thresholds are reduced to 5%.**(3)** This notice could be a reference point for the TCA to determine the *de minimis* threshold for Turkish law.

SIEC test

In line with EU competition law, the Amendment Law replaces the current dominance test with the significant impediment of effective competition (SIEC) test. This amendment aims to allow a more reliable assessment of unilateral and cooperation effects that could arise as a result of mergers or acquisitions. With this new test, the TCA will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much the competition is impeded as a result of a transaction.**(4)** Thus, pro-competitive mergers and acquisitions might benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with *de minimis* impact may also benefit from the new approach.

Behavioural and structural remedies for anti-competitive conduct

The Amendment Law aims to empower the TCA to order structural remedies for anti-competitive conduct that violates Articles 4, 6 and 7 of Law 4054, provided that behavioural remedies are applied first but ultimately fail. Further, if the TCA determines with a final decision that behavioural remedies have failed, undertakings or association of undertakings will be granted at least six months to comply with structural remedies. Both behavioural and structural remedies should be proportionate and necessary to end the infringement effectively. This amendment is in line with EU Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the TFEU,**(5)** but takes a step further to provide assurance to companies that structural remedies for competition law infringements will be applied only when behavioural remedies have first been tried but proved to be ineffective.

A curious point as to this remedy provision added to Article 9 of Law 4054 is its potential implications for Article 11 of Law 4054, which also concerns the TCA's power to impose remedies for gun jumping in mergers (that results in an infringement of Article 7 concerning mandatory notification of mergers exceeding jurisdictional thresholds). Article 11 allows the TCA to dissolve a notifiable merger that has been realised without the authority's approval through several methods including divestitures and there is no precondition of trying out behavioural remedies first. However, under the Amendment Law, Article 9 now introduces a "first behavioral, then structural remedy" rule also for Article 7 violations. How the TCA will reconcile these two provisions in practice remains to be seen.

Settlement and commitment

The Amendment Law introduces two new mechanisms inspired by EU competition law which aim to enable the TCA to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is a commitment procedure. This will allow undertakings or an association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the TCA's competitive concerns under Articles 4 and 6 of Law 4054, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the TCA can decide against launching a full-fledged investigation following the preliminary investigation or to end an on-going investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing and the restriction of supply. The TCA will provide the details of these new procedures by secondary legislation and may reopen an investigation in the following cases:

- a substantial change in any aspect of the basis of the decision;
- the relevant undertakings' non-compliance with the commitments; or

- the decision was based on deficient, incorrect or fallacious information provided by the parties.

The new law will enable the TCA, *ex officio* or at the parties' request, to initiate a settlement procedure. Unlike the commitment procedure, settlement could be offered only in full-fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The TCA will set a deadline for the submission of the settlement letter and, if settled, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the TCA can reduce the administrative monetary fine by up to 25%. Other procedures and principles regarding settlement will be determined by the TCA's secondary legislation. That said, technically both commitments and settlement could be offered in the ongoing proceedings as the Amendment Law went into effect on 24 June 2020.

On-site investigation process

The Amendment Law also includes an explicit provision that during on-site inspections, the TCA can inspect and make copies of all information and documents in companies' physical records, as well as those held electronically and on IT systems, which the TCA already does in practice. This power is also confirmed in the Amendment Law's preamble, which indicates that the amendment serves "further" clarification on the TCA's powers, which are particularly important for discovering cartels. Therefore, based on the TCA's current practice, this does not constitute a novelty.

Self-assessment procedure

Before the amendment, Law 4054 stipulated that the TCA may individually exempt certain agreements, concerted practices and decisions of associations of undertakings, which left it somewhat unclear whether 'self-assessment' applied. The amendments aim to provide legal certainty as to the individual exemption regime by clarifying that the self-assessment principle applies to agreements (as well as concerted practices and decisions of associations of undertakings) that may potentially restrict competition. The option to apply to the TCA for individual exemption is still available.

Time extension for TCA's additional opinions in investigations

Prior to the Amendment Law, Law 4054 granted the investigated parties a right to request for a time extension for their second and third written defences, which are submitted in response to the TCA's investigation report (akin to a European Commission statement of objections) and the so-called 'additional opinion', respectively. The TCA has six months to finalise their investigation report, but the board can extend this period by an additional six months. Regarding its additional opinion, the TCA used to have only 15 days to provide this document. The Amendment Law now includes an option to double the time period for the TCA to submit its additional opinion. Accordingly, provided that it is justified, the TCA will now have up to 30 days to submit its additional opinion in full-fledged investigations.

Comment

The Amendment Law contains elements that would increase the convergence of TCA and EU competition authority enforcement procedures. It is designed to be more compatible with the way the law is being applied in practice and aims to further comply with EU competition law, on which it is closely modelled, and align with EU competition law amendments in the EU competition laws. It introduces several new dimensions and changes which promise a procedure that is more efficient, both in terms of time and resource allocation, and further clarifies the TCA's powers during on-site inspections.

That said, the new law will no doubt raise a number of questions about the implementation of the new substantive test for mergers and the new procedures relating to anti-competitive conduct proceedings. The TCA's secondary legislation is expected to shed additional light on these practical concerns.

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Endnotes

(1) The Amendment Law was published in *Official Gazette* 31165, 24 June 2020.

(2) For example, see the Izmir Container Transporters decision (20-01/3-2), 2 January 2020.

(3) The European Commission also has another notice on the effect on trade (namely, Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the TFEU; OJ C 101, 27 April 2004, p 81-96), which provides that even agreements including a restriction by object may fall outside the scope of Article 101 of the TFEU if the parties' combined market share is 5% or less and their aggregate annual turnover is €40 million or less. However, given that the Amendment Law excludes hardcore restrictions from the safe harbour, the *De Minimis* Notice appears to be a more likely reference point for the TCA than the notice on the effect on trade.

(4) 'The Impact of the New Substantive Test in European Merger Control', Lars-Hendrik Röller and Miguel De La Mano, *European Competition Journal,* April 2006, p17 *et seq*. Available here.

(5) According to Recital 12 and Article 7.1 of the EC Regulation 1/2003, the European Commission has:

> *power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.*

The content of this article is intended to provide a general guide to the subject matter. Parties should seek specialist advice about specific circumstances.
