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Recent Amendments Introduced to the Law No. 4054 on Protection of Competition

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After rounds of revisions and failed attempts of enactment over a span of several years, the proposal for an amendment to the Law No. 4054 on Protection of Competition ("***Law no. 4054***") ("***Amendment Proposal***") has finally been approved by the Turkish parliament, namely the Grand National Assembly of Turkey. On June 16, 2020, the amendments passed through the parliament and entered into force on June 24, 2020 ("***Amendment Law***").[1] According to the recital of the Amendment Proposal, these amendments aim at reflecting in the Law No. 4054, the Authority's experience in over 20 years of enforcement and bringing Turkish competition law closer to the EU law.[2]

The Amendment Law essentially (i) clarifies certain mechanisms in the Law no. 4054 which might have led to legal uncertainty in practice to a certain extent, and (ii) introduces new mechanisms as to the selection of cases for the Authority to focus on, a new substantive test for merger control, behavioral and structural remedies for anti-competitive conduct and procedural tools enabling the Board to end its proceedings in certain cases without going the whole nine yards when the parties opt for commitments or settlement. The Amendment Law also includes certain provisions concerning the organizational structure and personnel of the Authority.

The most prominent changes introduced by the Amendment Law are as follows:

- ***De minimis principle***

One of the most important amendments in the Amendment Law is the introduction of the "*de minimis*" principle. With this amendment, the Turkish Competition Board ("***Board***") will be

[1] The Amendment Law was published on the Official Gazette dated June 24, 2020 and numbered 31165.
[2] Available at: https://www2.tbmm.gov.tr/d27/2/2-2875.pdf, last accessed on June 17, 2020.

able to decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. This principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Turkish Competition Authority ("***Authority***") appears to aim steering its direction, as well as public resources, to more significant violations.

Introduction of the "*de minimis*" principle appears to be a more appropriate (and legally less controversial) measure for the Authority to prioritize cases, which has previously used Article 9(3) of the Law No. 4054 to terminate a pre-investigation on procedural efficiency grounds, among others, when the infringement affects only a small market.[3] Article 9(3), however, is an interim measure to be used by the Board to explain to companies how to terminate the infringement until the final decision is made. It still remains to be seen whether the introduction of the *de minimis* exception will end this excessive use of Article 9(3) altogether given that, for instance, hard core restrictions in small markets will still not benefit from the *de minimis* provision.

The Amendment Law refers to "turnover" and "market share" thresholds for the *de minimis* exception but leaves the setting of the threshold to the Board. It is therefore not yet clear how the Board will define the limits of the safe harbor the new law has introduced. That said, given the goal of the Amendment Law to bring the Law No. 4054 closer to the EU law, it would be fair to expect that the threshold will be inspired by the European Commission's ("***Commission***") 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 harbor, except for hardcore restrictions. When cumulative foreclosure effects of parallel

[3] See, e.g., Izmir Container Transporters Decision, (20-01/3-2, 02.01.2020).

networks are concerned, these thresholds are reduced to 5%.[4] This notice could be a reference point for the Board to determine the *de minimis* threshold for Turkish law.

- ***SIEC test***

In line with the EU 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 for the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. With this new test, the Board will be able to prohibit not only transactions that may result in creating a dominant position or strengthening an existing dominant position, but also those that can 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.[5] 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.

- ***Behavioral and Structural Remedies for Anti-competitive Conduct***

The Amendment Law aims to grant the Board the power to order structural remedies for anti-competitive conduct infringing Articles 4, 6 and 7 of the Law No. 4054, provided that behavioral remedies are first applied and failed. Further, if the Board determines with a final decision that behavioral remedies have failed, undertakings or association of undertakings will be granted at least 6 months to comply with structural remedies. Both behavioral and

[4] The Commission also has another notice on the effect on trade, (Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty; OJ C 101, 27.4.2004, p. 81–96), which provides that even agreements including a restriction by object may fall outside the scope of Article 101 if the parties' combined market share is 5% or less and their aggregate annual turnover is EUR 40 million or less. Given that the Amendment Law excludes hardcore restrictions from the safe harbor, however, De Minimis Notice appears to be a more likely reference point for the Authority than the Notice on the Effect on Trade.

[5] The Impact of the New Substantive Test in European Merger Control, Lars-Hendrik Röller and Miguel De La Mano, European Competition Journal, April 2006, p.17 et seq. https://ec.europa.eu/dgs/competition/economist/merger_control_test.pdf

structural remedies should be proportionate to and necessary to end the infringement effectively. This amendment is in line with the EC Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[6], but takes a step further to provide assurance to the companies that structural remedies for competition law infringements will only be applied when behavioral remedies have first been tried but proved to be ineffective.

A curious point as to this remedy provision added to Article 9 is its potential implications for Article 11 of the Law No. 4054, which also concerns the Board'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 Board to dissolve a notifiable merger that has been realized without the Board's approval through several methods including divestitures, and there is no precondition of trying out behavioral remedies first. With the Amendment Law, however, Article 9 now introduces "first behavioral, then structural remedy" rule also for Article 7 violations. How the Board will reconcile these two provisions in practice remains to be seen.

- ***Settlement and Commitment***

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

The first mechanism is the commitment procedure. It will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6 of the Law No. 4054, prohibiting restrictive agreements and abuse of

[6] The EC Regulation No. 1/2003 provides that the 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" (Recital 12 and Article 7.1).

dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch 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 or and the restriction of supply. The Board will provide the details of these new procedures by secondary legislation. Additionally, the Board may reopen an investigation in the following cases: (i) substantial change in any aspect of the basis of the decision, (ii) the relevant undertakings' non-compliance with the commitments, (iii) realization that the decision was decided on deficient, incorrect or fallacious information provided by the parties. Second, the Amendment Law also introduces the settlement procedure. As the relevant provision is added to Article 43 concerning investigations of anticompetitive conduct in general, and that the Amendment Law does not limit the settlement option to cartels only, it appears that this new procedure will also be applicable to "other infringements" under Article 4 and abuse of dominance cases under Article 6.

The new law will enable the Board, *ex officio* or upon parties' request, to initiate the settlement procedure. Unlike the commitment procedure, settlement could only be offered 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 Board 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 Board can reduce the administrative monetary fine by up to 25%. Other procedures and principles regarding settlement will be determined by the Board's secondary legislation. That said, technically both commitments and settlement could be offered in the ongoing proceedings as the Amendment Law is effective as of June 24, 2020.

- ***On-Site Inspection Process***

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

- ***Self-Assessment Procedure***

Before the amendment, Law No. 4054 stipulated that the Board may individually exempt certain agreements, concerted practices and decisions of associations of undertakings, which left it somewhat unclear whether "self-assessment" is applicable. 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 Board for individual exemption is still available.

- ***Time extension for the Authority's Additional Opinion in Investigations***

Prior to the Amendment Law, the Law No. 4054 granted the investigated parties a right to request for a time extension for their second and third written defenses, which are submitted in response to the Authortiy's investigation report (akin to the Statement of Objections of the Commission) and the so-called "additional opinion" respectively. On the Authority's side, it has 6 months to finalize their investigation report but this period can be extended with an additional 6 months by the Board. As regards the additional opinion, the Authority used to have only 15 days to provide this document. The Amendment Law now also includes an option to double the time period for the submission of the Authority's additional opinion. Accordingly, provided that it is justified, the Authority will now have up to 30 days to submit its additional opinion in full-fledged investigations.

- ***Conclusion***

The Amendment Law contains elements that would help with the convergence of the enforcement of Authority with that in the EU. It is designed to be more compatible with the way the law is actually being applied and aims to further comply with the EU competition law legislation on which it is closely modelled and align with the amendments in the EU competition law. It introduces several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation as well as the amendments serving further clarification on the scope of the Authority's power during on-site inspections.

That said, the new law will no doubt raise a number of question marks over the implementation of the new substantive test for mergers and the new procedures related to anticompetitive conduct proceedings. The Authority's secondary legislation is expected to shed some light on these practical concerns.

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