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Turkey Overview

Gönenç Gürkaynak and K Korhan Yıldırım
ELIG Gürkaynak Attorneys-at-Law

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GCR INSIGHT

The Law on Protection of Competition No. 4054 (Law No. 4054) of 13 December 1994 is designed to prevent agreements, decisions and practices that have, as their purpose or effect:

- the prevention, restriction or distortion of competition in the markets for goods or services within Turkey;
- the abuse of dominance by undertakings dominant in a relevant market; and
- concentrations creating or strengthening a dominant position and significantly lessening competition in the whole territory of Turkey or a part thereof.

The Competition Board (Board) is the decision-making body of the Competition Authority (Authority).

The Competition Authority released Communiqué No. 2020/1 on the Communiqué Concerning the Increase in the Minimum Administrative Fines Specified in paragraph 1 of article 16 of Law No. 4054 on 31 December 2019, to be valid until 31 December 2020 (Communiqué No. 2020/1). Communiqué No. 2020/1 introduced an amendment to the previous minimum administrative fine to bring them in line with the current economic parameters.

Law No. 7246 on Amending Law No. 4054 (Law No. 7246), which brought about significant amendments to some of the fundamental competition rules that would help with the convergence of the enforcement of Authority with that in the EU, was published in the Official Gazette on 24 June 2020 and entered into force as of its publication. After rounds of revisions and failed attempts of enactment over a span of several years; the draft version of Law No. 7246 was first put on the parliament's agenda in late 2013, and its latest version was officially submitted to the Presidency of the Turkish Parliament on 14 May 2020. It was finally approved by the Turkish parliament, namely the Grand National Assembly of Turkey, on 16 June 2020.

Law No. 7246 is designed to be more compatible with the way the law is actually being enforced/implemented and aims to further comply with the EU competition law legislation on which it is closely modelled and align with the amendments in EU competition law. It introduces several new dimensions and changes that promise a procedure that is more efficient in terms of time and resource allocation as well as the amendments serving further clarification on the authorities of the Authority during on-site inspections.

Amendments enacted by Law No. 7246

According to the recital of Law No. 7246, amendments aimed at reflecting in Law No. 4054 the Authority's experience in over 20 years of enforcement and bringing Turkish competition law closer to European Union (EU) law. Law No. 7246 essentially (i) clarifies certain mechanisms in Law No. 4054 that 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, behavioural and structural remedies for anticompetitive 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. Law No. 7246 also includes certain provisions concerning the organisational structure and personnel of the Authority. The most prominent changes introduced by this proposal are as follows:

De minimis principle

One of the most important amendments in the Law is the introduction of the de minimis principle. Subsequent to its introduction on 24 June 2020; the Authority submitted the Draft Communiqué on Agreements, Concerted Practices, Act and Conducts of Association of Undertakings that Do Not Restrict Competition Considerably (Draft Communiqué) which sets out the principles of the de minimis rule, to public consultation on 23 October 2020. With this amendment, the Board will be able to decide not to launch a full-fledged investigation for agreements, concerted practices or decisions of association of undertakings that do not exceed the market share and turnover thresholds that will be determined by the Board. However, the Authority reserves the discretion to launch investigations especially In case of hard-ore violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Authority appears to aim at steering its direction, as well as public resources, towards more significant violations.

With this new mechanism, now there is a room for certain conducts that only have limited effects on the competition to be excluded from the field of the Authority. A new order where the Authority is no longer necessarily involved in establishing unlawfulness that arise from the agreements, concerted practices or decisions of association of undertakings that do not exceed the market share and turnover threshold and consequently, have limited effects is procured. These developments in de minimis principle constitute one of the most recent

examples demonstrating that the Authority is no longer the sole competent authority in the implementation of the Law No. 4054.

SIEC test

In line with the EU law, Law No. 7246 replaces the current dominance test with the "significant impediment of effective competition" (SIEC) test. This amendment aims to allow a more reliable assessment for 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.

Behavioural and structural remedies for anticompetitive conduct

Law No. 7246 aims to grant the Board the power to order structural remedies for anticompetitive conduct infringing articles 4, 6 and 7 of Law No. 4054, provided that behavioural remedies are first applied and have failed. Both behavioural and structural remedies should be proportionate and necessary to cease the infringement effectively.

Settlement and commitment

Law No. 7246 introduces two new mechanisms that are inspired by the EU law and aim to enable the Board to close 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 dominance. Depending on the sufficiency and the timing of commitments, the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to close an ongoing 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 the restriction of supply. The Board will provide the details of these new procedures by secondary legislation. The Board may reopen an investigation in the following cases: (i) substantial change in any aspect of the basis of the decision, (ii) non-compliance with the commitments, (iii) realisation that the decision was decided on deficient, incorrect or fallacious information provided by parties. Second, Law No. 7246 also introduces the settlement procedure. This would enable the Board, ex officio or upon parties' request, to initiate the settlement procedure. Parties that admit an infringement can apply for the settlement procedure until the official service of investigation report. The Board will set a deadline for the submission of settlement letter and, if settled, the investigation concerned 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 per cent.

On-site investigation process

Law No. 7246 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 preamble to Law No. 7246 as it indicates that the amendment adds "further" clarification on the powers of the Authority, which are particularly important for discovering cartels.

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

Certain changes are brought with in the investigation procedures and the timelines with the amendments. This includes an option to double the time period for the submission of the Authority's additional opinion (currently 15 days).

Law No. 7246 contains elements that would help with the convergence of the enforcement of the 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. It introduces several new dimensions and changes that promise a procedure that is more efficient in terms of time and resource allocation as well as the amendments serving further clarification on the authorities of the Authority during on-site inspections. However, the most significant discussion point would be if behavioural remedies necessarily have to be tried and proven to fail as a pre-condition for the Authority to be able to introduce structural remedies in a given matter.

Additionally, the Authority published the Guidelines on Vertical Agreements, which are designed to introduce principles for most favoured customer clauses, agency agreements and internet sales.

The Authority

The Authority has public legal personality as well as administrative and financial autonomy. The Authority consists of the Board, presidency and service units. A total of approximately 372 people are employed at the authority, including competition experts, assistant experts, lawyers, board members, reporters and technical personnel. Several divisions with sector-specific work distribution handle competition law enforcement work through around 160 case handlers. The annual budget of the authority for 2020 was increased to 115,750,000 Turkish lira.

The Board

The Board comprises seven members, including a chairman and a deputy chairman. The term of office of the chairman, deputy chairmen and members of the board is six years. A member whose term has expired is eligible for re-election.

The duties and the powers of the Board can be categorised into three main areas:

- preventing the violation of competition;
- agreements, decisions and concerted practices that have as their purpose or effect the prevention, restriction or distortion of competition, which are, in principle, deemed illegal (Law No. 4054, article 4); and
- any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services, which is also unlawful and prohibited (The Law No. 4054, article 6).

Undertakings and associations of undertakings condemned by the Board for violating articles 4 and 6 of the Law No. 4054 may be given administrative fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (or, if this is not calculable, in the financial year nearest the date of the fining decision). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. The Board may also order structural or behavioural remedies, or both, to protect competition and restore it to its state before the violation. The Authority launched approximately 350 investigations in the past 20 years. The sectors that are most investigated include:

- transportation;
- nutrition;
- agriculture;
- food and beverages;
- construction materials;
- pharmaceuticals and healthcare services or products; and
- information and communication technologies.

The overall fines imposed by the Turkish Competition Authority thus far total approximately 5.54 billion Turkish Liras.

The Competition Authority launched several sector inquiries as part of its duty to protect competition on Turkish markets. As a result, the Competition Authority published sector reports concerning sectors such as the retail sector for fast-moving consumer goods, the motor vehicles sector, the pharmaceuticals sector and the natural gas sector. The Authority's primary goal in conducting these inquiries is to detect impediments to competition on the reviewed markets and to prepare suggestions against detected sector-specific problems. In 2019, the Authority published a sector report on fair sector. In 2018, the Competition Authority also launched a sector inquiry into licensing of musical works broadcasted in public places and radio television establishments, which is still ongoing. Very recently, the Authority launched a sector inquiry into e-marketplace platforms.

Merger control

The relevant legislation on merger control is article 7 of Law No. 4054 and the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) published by the Authority. Communiqué No. 2010/4 is now the primary instrument for assessing merger cases in Turkey. The thresholds for merger filings were amended on 29 December 2012. Under the merger control regime, a merger filing is required before the Competition Board where either the entire Turkish turnover of the parties to the transaction exceeds 100 million lira and their Turkish turnovers exceed 30 million lira, separately; or the entire Turkish turnover of the transferred assets or businesses in acquisitions, and at least one of the parties to the transaction in mergers, exceeds 30 million lira and the worldwide turnover of the other party exceeds 500 million lira.

After the amendments, the regulation no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement. The parties no longer need to check to see whether the transaction results in an affected market. This amendment is designed to have an impact on notifiability analyses only. The concept of an affected market still carries weight in terms of the substantive competitive assessment and the notification form. The amendment has resulted in a noteworthy drop in the number of merger filings. While the Competition Board analysed 303 filings in 2012, the average number of filings for the following five years was approximately 195. Although the drop in the filings might also be caused by other events with direct or indirect effects on economic activities in Turkey, it is fair to say that the amendment of the filing requirements had an effect on the number of merger notifications. According to the annual report of 2019, 208 mergers were filed with the Competition Authority; although a slight decrease is observed compared to the previous year, this still means that the decreasing trend seems to have stopped.

The Law No. 4054 provides for a suspension requirement. If the parties to a transaction that requires the approval of the Competition Board close the transaction without the approval of the board, a fixed monetary fine of 0.01 per cent of the acquirer's Turkish turnover generated in the financial year preceding the date of the fining decision applies (if this is not calculable, in the financial year nearest the date of the fining decision). In the event of a merger, the fine applies to both merging parties. The minimum fine for 2019 is 26,027 lira.

If the Competition Board reaches the conclusion that the transaction closed before clearance creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned may also receive administrative monetary fines of up to 10 per cent of their Turkish turnover generated in the financial year specified above. In such a situation, employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. In any case, a notifiable merger or acquisition not notified to and approved by the Competition Board shall be deemed legally invalid with all its legal consequences.

Exemptions and negative clearances

The Competition Board may decide to exempt agreements, decisions of associations of undertakings and concerted practices from the application of the provisions of the Law No. 4054, article 4.

Exemption decisions may be granted for a certain period of time or for an indefinite period. They may also be conditional upon the satisfaction of particular conditions or obligations (or both), such as structural or behavioural remedies.

Certain categories of agreements and decisions are subject to a block exemption regime under block exemption communiqués (Communiqués Nos. 2002/2, 2003/2, 2017/3, 2008/2, 2008/3 and 2013/3).

Appeal

Final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to judicial review before the competent administrative court in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Competition Board. Filing an administrative action does not automatically stay the execution of the Competition Board's decision. However, upon request of the plaintiff, the court, on providing its justifications, may decide to stay the execution if the implementation of the decision is likely to cause irreparable damage, and if the decision is highly likely to be against the law.

Gönenç Gürkaynak

ELIG Gürkaynak Attorneys-at-Law

Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School and is qualified to practice in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). 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.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 merger 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 EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

K Korhan Yıldırım

ELIG Gürkaynak Attorneys-at-Law

K Korhan Yıldırım is a partner at ELIG Gürkaynak Attorneys-at-Law. He graduated from Galatasaray University Faculty of Law in 2005 and was admitted to the Istanbul Bar in 2006.

He has been working with ELIG Gürkaynak for more than 14 years and has been a partner in the competition law and regulatory department since January 2014.

Mr Yıldırım has extensive experience in all areas of competition law including cartel agreements, abuse of dominance, concentrations and joint ventures. He has represented various multinational and national companies before the Turkish Competition Authority, administrative courts and the High State Court. Mr Yıldırım has given numerous legal opinions and trainings in relation to compliance to competition law rules. Mr Yıldırım has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conference and symposia. He is fluent in English and French.

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our partner, Mr Gönenç Gürkaynak, along with two partners, five counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

Over the past year, ELIG Gürkaynak has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence projects in investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 antitrust education seminars to employees of its clients.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

Çitlenbik Sokak No: 12
Yıldız Mahallesi
Besiktas 34349
Istanbul
Turkey
Tel: +90 212 327 17 24
Fax: +90 212 327 17 25

www.elig.com

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

K Korhan Yıldırım
korhan.yildirim@elig.com