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Turkey: private practice perspective

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GCR Global Competition Review

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. 2021/1 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 2021 (Communiqué No. 2021/1). Communiqué No. 2021/1 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 the 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 to enact it over a span of several years; the draft version of Law No. 7246 was first put on the Turkish 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 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 and implemented, 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 powers 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. Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition (De Minimis Communiqué), which sets out the principles of the de minimis rule, came into force upon its publication on 16 March 2021. With this amendment, the Board is now 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 provided under the De Minimis Communiqué. However, the Authority reserves the discretion to launch investigations especially in the case of hard-core violations such as price fixing, territory or customer sharing and restriction of supply. The De Minimis Communiqué serves to grant the Board the opportunity to focus on more significant competition law matters, as well as bringing the Turkish competition law closer to the standards in EU competition law on which it is modelled.

With this new mechanism, now there is room for certain conducts that only have limited effects on competition to be excluded from the field of the Authority. A new order whereby the Authority is no longer necessarily involved in establishing unlawfulness that arises from agreements, concerted practices or decisions of associations of undertakings that do not exceed the market share and turnover threshold and consequently, have limited effects, has been established. These developments regarding the 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 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. 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. 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 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. On 16 March 2021, the Authority issued Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position. The Communiqué brings a definitive list of the excluded types of infringements. Accordingly, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing or the restriction of supply. 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, or (iii) realisation that the decision was decided on deficient, incorrect or fallacious information provided by parties. Second, Law No. 7246 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 the 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. Moreover, the Authority recently published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which sets forth the general principles with respect to the examination, processing and storage of data and documents held in the electronic media and information systems, during the on-site inspections.

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 have been made with regard to the investigation procedure and the timelines for 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 powers of the Authority during on-site inspections. However, the most significant discussion point would be whether 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 382 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 184 case handlers. The annual budget of the authority for 2021 was increased to 137,500,000 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 (Law No. 4054, article 6).

Undertakings and associations of undertakings condemned by the Board for violating articles 4 and 6 of 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's annual report for 2020 stated that the Board decided a total of 65 cases relating to competition law violations in 2020. Of those, 36 cases were subject to article 4 of Law 4054 and seven cases were subject to both article 4 and article 6 of Law 4054. The sectors that came under the most intensive scrutiny were, in the following order:

- logistics, storage and post (including port services, transportation, etc);
- chemistry and mining (including petroleum, fuel, etc); and
- the machine industry (including household appliances, electronics, etc).

Finally, the Board issued monetary fines amounting to a total of approximately 2.24 billion Turkish lira in 2020.

The Authority launched several sector inquiries as part of its duty to protect competition on Turkish markets. As a result, the Authority published sector reports concerning sectors such as e-marketplace platforms, 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 for detected sector-specific problems. The last three sector reports related to the expo, nut and television broadcasting sectors. Additionally, the Authority published its preliminary report regarding e-marketplace platforms on 7 May 2021 and on 5 February 2021 a preliminary report on the FMCG sector was published. The Authority's preliminary report on the sector inquiry regarding e-marketplace platforms indicates that 'digital platforms become the main gateway to reach markets and customers' and provided that 'The characteristics of e-marketplaces arising from the platform economy that differ from traditional markets as well as the business models they adopt make it difficult to understand how competition works in this area.' Similarly, the Board finds that the digital sector has different competitive dynamics and thus has a different and more complex structure and operation as compared to provisions of a traditional legislative landscape. The Authority's intention to put the digital economy, including big tech platforms, under scrutiny in the near future can also be observed from its enforcement track record in recent years concerning platforms.

Merger control

The relevant legislation on merger control is article 7 of the Law No. 4054 and 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 Board where either the entire Turkish turnover of the parties to the transaction exceeds 100 million Turkish 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 2020, the Board reviewed 220 transactions in total, including: (i) 190 mergers and acquisitions that were approved unconditionally; (ii) one transaction that was approved conditionally; and (iii) one transaction that was not approved. Twenty-eight of the deals were out of the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to a lack of change in control).

Law No. 4054 provides for a suspension requirement. If the parties to a transaction that requires the approval of the 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. A monetary fine imposed due to violation of the suspension requirement shall in no event be less than 34,809 Turkish lira in 2021.

If the 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 Board shall be deemed legally invalid with all its legal consequences.

Exemptions and negative clearances

The Board may decide to exempt agreements, decisions of associations of undertakings and concerted practices from the application of the provisions of 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, 2008/2, 2008/3, 2013/3, 2016/5 and 2017/3).

Appeal

Final decisions of the 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 Board. Filing an administrative action does not automatically stay the execution of the Board's decision. Upon request of the plaintiff, however, 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.

ELIG Gürkaynak Attorneys-at-Law

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.

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.

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