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Türkiye: economist perspective

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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 Türkiye;
- 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 Türkiye or a part thereof.

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

The Competition Authority released Communiqué No. 2023/1 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 2023, to be valid until 31 December 2023 (Communiqué No. 2023/1). Communiqué No. 2023/1 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) 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. It 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 Türkiye 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 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.

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

An important amendment 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 replaced the previous 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 is now 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 introduced 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 allows 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 introduced the settlement procedure. This enables 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 the settlement letter and, if settled, the investigation concerned will be closed with a final decision, including the finding of a violation and an 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.

The Turkish Constitutional Court (Constitutional Court) recently issued a decision on 20 June 2023 (2019/40991), which may have implications for the standard of due process in the Authority's dawn raid practices. The decision requires the Authority to obtain a court decision (a warrant) before conducting dawn raids.

Until now, the Authority's standard practice allowed its case handlers to conduct dawn raids with a certificate of authorisation issued by the Board, which was in compliance with Law No. 4054. However, the Constitutional Court found that the provision of Law No. 4054, which allowed dawn raids without a court decision, is unconstitutional as it violated article 21 of the Turkish Constitution protecting the immunity of domicile.

Although the Authority's existing practice was found to be compliant with the law, the relevant provisions of Law No. 4054 are likely to be amended to align with the Constitutional Court's decision. In the meantime, the Authority will have to apply to the Criminal Court of Peace to obtain a warrant before conducting dawn raids, a process already foreseen by Law No. 4054 and occasionally applied by the Authority when undertakings refuse to cooperate.

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 as to 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 481 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 288 case handlers. The annual budget of the authority for 2023 was increased to 559,953,000 Turkish lira.

The Board

The Board comprises seven members, including a chairman and a deputy chairman. The term of office of the chairman, deputy chairman 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 decision statistics for 2022 stated that the Board decided a total of 78 cases relating to competition law violations in 2022. Of those, 64 cases were subject to article 4 of Law 4054, 14 cases were subject to article 6 of Law 4054 and six 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:

- the food industry;
- the machine industry (including household appliances, electronics, etc); and
- information technologies and platform services.

Finally, the Board issued monetary fines amounting to a total of approximately 1.85 billion Turkish lira in 2022.

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 (FMGC), 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 FMGC, e-marketplace platforms and fresh vegetables and fruits sectors. The Authority's final report on the sector inquiry regarding e-marketplace platforms indicates that 'digital platforms become the main gateway reaffirms its earlier assessments from the Preliminary Report concerning the market structure and 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 applicable legislation on merger control is Law No. 4054 and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4). On 4 March 2022, the Authority published Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (Communiqué No. 2022/2). The Communiqué No. 2022/2 introduced new rules concerning the Turkish merger control regime that fundamentally affect merger control notifications submitted to the Authority. Two of the most significant developments that Communiqué No. 2022/2 entail, inter alia, are the introduction of threshold exemption for undertakings active in certain markets/sectors and the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Authority.

Pursuant to Communiqué No. 2022/2, a transaction must be notified before the Authority if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million lira, and the Turkish turnover of at least two of the transaction parties each exceeds 250 million lira; or
- either: (i) the Turkish turnover of the transferred assets or businesses in the acquisition exceeds 250 million lira, and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira; or (ii) the Turkish turnover of any of the parties in the merger exceeds 250 million lira, and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira.

Furthermore, the Communiqué No.2022/2 introduced a threshold exemption for undertakings that are active in certain markets or sectors. Pursuant to the Communiqué 2022/2, the turnover threshold of 250 million lira will not apply to acquired undertakings that are active in, or assets related to, the fields of digital platforms, software or gaming software,

financial technology, biotechnology, pharmacology, agricultural chemicals or health technology (target companies), if they: operate in the Turkish geographical market; or conduct research and development (R&D) activities in the Turkish geographical market; or provide services to users in the Turkish geographical market.

Communiqué No. 2022/2 does not seek a Turkish nexus in terms of the activities that render the threshold exemption. In other words, it would be sufficient for the target company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to become applicable, provided that the target company (i) generates revenue from customers located in Türkiye or (ii) conduct R&D activities in Türkiye OR (iii) provide services to the Turkish users in any fields other than above-mentioned ones. Accordingly, Communiqué No. 2022/2 does not require (i) generating revenue from customers located in Türkiye, (ii) conducting R&D activities in Türkiye or (iii) providing services to Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

According to the Authority's decision statistics for 2022, the Board reviewed 238 transactions in total, including: (i) 209 mergers and acquisitions that were approved unconditionally; (ii) two transactions that were approved conditionally; and (iii) one transaction that was not approved. Thirty-four 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 105,688 Turkish lira in 2023.

If the Board reaches the conclusion that the transaction closed before clearance significantly impedes effective 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 article 4 of Law no. 4054.

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.

Gönenç Gürkaynak

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Dr Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at- Law, a leading law firm of 95 lawyers based in Istanbul, Türkiye. Dr Gürkaynak graduated from Ankara University, faculty of law, in 1997 and was called to the Istanbul Bar in 1998. Dr Gürkaynak received his LLM degree from Harvard Law School, and was admitted to the: Istanbul Bar in 1998; American Bar Association in 2002; New York Bar in 2002 (currently non-practising; registered); Brussels Bar in 2003–2004 (B List; not maintained); and Law Society of England & Wales in 2004 (currently non-practising; registered). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Dr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Dr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 56 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 25 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Dr 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 European Commission competition law topics.

Dr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has six books, which are A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective (published by the Turkish Competition Authority), Fundamental Concepts of Anglo-American Law, The Academic Gift Book of ELIG, Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Türkiye, The Second Academic Gift Book of ELIG Gürkaynak Attorneys-at-Law on Selected Contemporary Competition Law Matters (published by Legal Publishing), Turkish Competition Law (published in November 2021 by Concurrences in Paris) and Rekabet Hukuku (published in October 2022). He has also published more than 200 articles in English and Turkish with various international and local publishers. Dr Gürkaynak holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures at other universities in Türkiye.

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

He has been working at the firm for more than 17 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 training sessions in relation to compliance with competition law rules. He has also authored and coauthored many articles on competition law and merger control matters and is a frequent speaker at various conferences and symposia. He is fluent in English and French.

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Mr Görkem Yardım is a counsel at ELIG Gürkaynak Attorneys-at-Law. Mr Yardım graduated from Ihsan Doğramacı Bilkent University's faculty of law in 2011.

He was admitted to the Ankara Bar in 2012 and later transferred to Istanbul Bar. He obtained his first LLM degree in law and economics from Ihsan Doğramacı Bilkent University in 2013. He was granted a scholarship by Jean Monnet Scholarship Programme and then obtained his second LLM degree from King's College, London, in 2014.

Mr Yardım joined ELIG Gürkaynak Attorneys-at-Law in 2014. He has extensive experience in merger and acquisition filings, competition law compliance matters and investigations conducted by the Turkish Competition Authority. He has represented various multinational and national companies before the Turkish Competition Authority in various sectors. He is fluent in English.

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 partner Gönenç Gürkaynak, with two partners, four 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 on a wide range of business transactions that almost always involve antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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