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Yıl/Years

SIGNIFICANT AMENDMENTS HAVE BEEN MADE TO LAW NO. 4054 ON THE PROTECTION OF COMPETITION

The "Law Amending the Law on the Protection of Competition," which provides significant changes to the Law No. 4054 on the Protection of Competition ("Law No. 4054"), has been published in the Official Gazette and entered into force on 24 July 2020. With various similarities to as well as substantial differences from the previous legislative proposals submitted to the parliament amending Law No. 4054, this law envisages the harmonization of Law No. 4054 with the European Union Law along with important changes regarding the organization and personnel of the Competition Authority ("Authority").

AMENDMENT REGARDING THE CONTROL REGIME OF MERGERS AND ACQUISITIONS

Prior to the amendment, in order for a merger or an acquisition transaction **("Concentration")** to be in violation of competition law as per Article 7 of Law No. 4054 titled "Mergers and Acquisitions", such Concentration would have to create a dominant position or strengthen a preexisting dominant position. Examinations and evaluations made by the Competition Board **("Board")** on a Concentration in this respect were known as "dominant position tests." With the amendment made to Article 7 of Law No. 4054, the Board will be able to ban certain Concentrations even if they do not create a dominant position or strengthen an existing one. As such, with the new amendment, the Board will be able to ban Concentrations that do not result in the creation of a dominant position or that strengthen an already existing one but are nonetheless expected to result in a significant impediment of effective competition. Upon this amendment, the Board now has the power to ban Concentrations that it believes will reduce the number of competitors in oligopolistic markets, increase market transparency, or that prevent the fostering of a competitive market or pave the way for behaviors that restrict competition. By way of this amendment, the Significant Impediment of Effective Competition (SIEC) Test, which was implemented in the European Union's competition law upon the enforcement of the "Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings" has now been reflected into Turkish competition law. Following the implementation of this test, all Concentrations that may cause a significant impediment of competition and that will consequently increase prices and reduce consumer options and innovation are expected to be subject to more in-depth scrutiny by the Board.

AMENDMENT TO THE CONTROL REGIME OF COMPETITIVELY RESTRICTIVE AGREEMENTS, CONCERTED PRACTICES, AND DECISIONS

Prior to the amendment, as per Article 4 of Law No. 4054 titled "Agreements, Concerted Practices, and Decisions Restricting Competition," agreements and concerted practices of undertakings and decisions and practices made by associations of undertakings that had the restriction of competition as their object or effect or likely effect, regardless of their market shares or revenue, were subject to the Board's review and were imposed with administrative fines. With the new paragraph added to Article 41 of Law No. 4054, the Board may decide not to investigate agreements and concerted practices of undertakings and decisions and practices of association of undertakings that do not restrict competition significantly, considering certain criteria such as the undertakings' market shares and revenues. Explicit and hardcore restrictions such as price fixing, market or consumer sharing, or limitation of supply are excluded from violations that may be subject to a decision not to initiate an investigation. The new paragraph added to Article 41 of Law No. 4054 intends to enable the Board to focus on actions taken by larger undertakings instead of smaller ones by paying attention to violations that are more likely to negatively affect the market rather than those that will not significantly restrict competition. With this approach, also known as the "de minimis" principle in European Union competition law, public costs and transaction costs are expected to decrease. The thresholds to consider while deciding not to initiate investigations will be determined by a communiqué, which will be issued later on by the Authority.

AMENDMENT REGARDING THE EXEMPTION REGIME

As per Article 5 of Law No. 4054 titled "Exemption," when certain conditions are met, the Board may grant an exemption to the agreements and concerted practices of undertakings or decisions and practices of associations of undertakings that are prohibited under Article 4. With the amendment to Article 5 of Law No. 4054, the existing "self-evaluation method" regarding exemption conditions has been explicitly enumerated in the law. Further to this amendment, when a dispute is brought before the courts, undertakings are granted with the right to object based on the exemption and the courts are given the power to grant an exemption to undertakings upon their own evaluation. At this stage, how the relationship between the evaluation for the conditions of exemption made by the courts and the evaluation made by the Board will be regulated remains unclear.

AMENDMENT REGARDING THE REMEDIES THAT THE BOARD CAN REQUEST FROM UNDERTAKINGS

Prior to the amendment, as per Article 9 of the Law No. 4054 titled “Termination of Infringement,” in cases where the Board detects a violation, it could have requested for the undertakings to fulfill or avoid certain behaviors in order to return market conditions to the conditions that existed prior to the violation. With the amendment, the Board has been granted the power to request for undertakings to fulfill both behavioral and structural remedies. The structural remedies that can be requested by the Board may be in the form of assignment of certain practices, share capital, or assets. It is evident that the structural remedies that can be requested by the Board would interfere with the undertakings’ property rights and their freedom of establishment. Hence, the Board is expected to use its new power as an exceptional tool in line with global practice. In fact, in the new version of Law No. 4054, it is stipulated that structural remedies can only be imposed if the behavioral remedies yield no results, and thereby, the purpose is to offer structural remedies a secondary and exceptional role. If a final decision is rendered affirming that the behavioral remedies have been ineffective, a minimum of 6 months will be given to the undertakings or the association of undertakings to comply with the structural remedy.

In the amendment, the lawmaker uses the wording “will” resort to structural remedies where behavioral remedies are ineffective. In addition, it should be emphasized that the determination process of the insufficiency of behavioral remedies is largely ambiguous. The fact that the same administrative body has been granted with both the powers to decide (i) what kind of behavioral remedy will be requested and (ii) what kind of structural remedies will be implemented if the behavioral remedies are ineffective has resulted in discussions on the rights and legal security of the undertakings. The answer to how the Board and the courts will interpret the new legislation and how the rights of establishment and property of the undertakings will be secured is expected to be clarified in the upcoming decisions.

COMMITMENT AND SETTLEMENT MECHANISMS

Prior to the amendment, as per Article 43 of Law No. 4054 titled “the Commencement of the Investigation by the Board,” when an investigation had commenced against an undertaking due to competition concerns and when a violation was determined thereupon, the Board had to conclude the investigation and impose a monetary fine on the undertaking in accordance with the Regulation on Fines to Apply in cases of Agreements, Concerted Practices, and Decisions Limiting Competition, and Abuse of Dominant Position. With the new paragraph added to Article 43 of Law No. 4054, it became possible for undertakings to propose a commitment during the pre-investigation or the investigation phases and for the investigation to be concluded without the imposition of fines. According to the new paragraph, in the event that the undertakings provide persuasive commitments that eliminate competitive concerns, the Board may decide to either not open an investigation during the pre-investigation phase or to terminate the investigation during the investigation phase by making such commitments binding upon the undertakings. With that said, explicit and hardcore violations that undoubtedly harm consumer welfare, such as price fixing, market or consumer sharing, or restriction of supply, are excluded from the implementation of this provision.

With the new amendment to Law No. 4054, the options to (i) not initiate an investigation for violations that are not hardcore violations, (ii) terminate an ongoing investigation without imposing a monetary fine, or (iii) terminate an ongoing investigation within the scope of the commitment given by undertakings have been introduced with the abovementioned de minimis principle the and commitment mechanism (especially for undertakings with smaller market shares). That said, it should be stressed that these new procedural rules will not be applicable for hardcore violations such as price fixing or market sharing.

A “settlement” mechanism, which did not exist in the previous legislation, has been included to the investigation process with another amendment to Article 43 of Law No. 4054. As per the new provision, until the investigation report is served to the parties, the Board will consider the possible procedural benefits that may occur with a rapid conclusion of the investigation and different opinions regarding the existence and scope of the violation and will be able to opt for settlement either upon request or ex officio with the undertakings that have admitted the existence and the scope of the violation. The distinctive feature of settlements that differ from a commitment is that the undertakings are expected to admit the existence of a violation in order to benefit from the settlement. Under the commitment mechanism, there is no violation that is defined while under the settlement mechanism the violation is defined and undertakings are expected to admit its existence. After the Board adopts a decision regarding the implementation of the settlement process, undertakings will be given a definite term during which they will submit a settlement petition to the Board. At the end of the settlement process, an investigation will be concluded with a decision ruling on the determination of the violation and issuing a monetary fine. To conclude the settlement process, the monetary fine to be imposed may be subject to a reduction of up to 25% of the fine that would be issued if the settlement process was not implemented. However, it should be noted that the monetary fine and provisions specified in the settlement petition cannot be challenged before courts. At this point, undertakings are expected to conduct a cost-benefit analysis weighing the pros and cons of waiting for the a lawsuit to complete and opting for the settlement process. Other principles and rules regarding the settlement mechanism, particularly the fate of third party damages incurring due to a competition law violation that is terminated via settlement, will be determined by a regulation to be issued by the Board.

CLARIFICATION OF THE COMPETITION AUTHORITY’S ON-SITE EXAMINATION POWERS

With the amendment to Article 15 of Law No. 4054 regarding the powers the Authority may exert during on-site examinations to collect evidence, the Authority’s personnel is authorized to examine any book, data, or document of the undertakings or association of undertakings that are kept either in a physical or electronic database or in an information system and may take copies or physical samples thereof within the course of their examination. Although it is possible to say that the new provision is not significantly different from the previous provision considering that the Authority’s personnel previously conducted on-site examinations in this manner, it has now been clarified that particularly the data and documents that are kept electronically may be copied within the scope of the investigation. It remains a question whether this amendment will reflect the Authority’s tendency to conduct investigations in the upcoming years based on data and statistical analyses rather than documents and communication evidence.

NEW ERA IN TURKISH COMPETITION LAW

The amendments to Law No. 4054 that we concisely explained above are considered a vital step to harmonizing Turkey's legislation with that of the European Union. It is still unknown how these changes will be implemented in practice, especially with the structural remedies to be brought by the Authority and with the courts' application of the exemption procedure in addition to what kind of provisions the secondary legislation will entail. With these amendments, it seems that the Authority plans to continue with its detailed scrutiny and examination on markets and will maintain its aggressive role in preventing competition restrictions in line with the approach we stressed in our legal update titled "The Turkish Competition Authority's Stance Amidst The Covid-19 Pandemic."

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