

## Law Bulletin

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### **DRAFT “*DE MINIMIS*” COMMUNIQUÉ PUBLISHED FOR PUBLIC CONSULTATION**

One of the most significant changes to Law No. 4054 on the Protection of Competition (the “**Competition Law**”) made in June 2020, was the integration of a rule similar to the “*de minimis*” exemption set out under the EU legislation. Accordingly, pursuant to the amendment to Article 41 of the Competition Law, agreements, concerted practices and association of undertakings’ decisions that do not significantly restrict competition in the market may not be subject to an investigation as per the “*de minimis*” rule. The amendment also sets forth that the procedures and principles of the “*de minimis*” rule will be further regulated through a communiqué to be published by the Competition Board. On 23 October 2020, the Turkish Competition Authority published the Draft Communiqué on Agreements, Concerted Practices and Association of Undertakings’ Decisions That Do Not Significantly Restrict Competition (the “**Draft Communiqué**”), for public consultation.<sup>1</sup>

#### **Scope of the Draft Communiqué**

The Draft Communiqué clarifies the grounds of the “*de minimis*” rule’s application, while reserving that the “*de minimis*” rule will not be applicable for hardcore competition law restraints including price fixing between competitors, territory/customer sharing and restrictions of supply. According

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<sup>1</sup> Please click the following link to access the Draft Communiqué:

<https://www.rekabet.gov.tr/Dosya/geneldosya/rekabeti-kayda-deger-olcude-kisitlamayan-anlasmalara-iliskin-teblig-taslagi-pdf>

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to the Draft Communiqué, the following agreements are considered as not being significantly restricting competition and, thus, may not be subject to an investigation:

- (i) agreements<sup>2</sup> between competitors, the combined market share of which does not exceed 10% in any of the markets affected by the agreement; and
- (ii) agreements between non-competitors where the market share of each undertaking does not exceed 15% in any of the markets affected by the agreement

If it is not possible to determine whether or not the agreement is executed between competitors, then the parties' combined market share should not exceed 10% in any of the markets affected by the agreement for the application of the "*de minimis*" rule.

That being said, if parallel networks of similar vertical restraints cover more than 50% of the relevant market, the parties' market shares each should not exceed 5% so as to be considered as not being significantly restricting competition.

In addition, even if the parties' market shares exceed the thresholds specified under the Draft Communiqué during two consecutive calendar years of the agreement period, the parties may still benefit from the "*de minimis*" exception as long as these thresholds are not exceeded by more than two percent.

If the foregoing conditions are met, the Competition Board may decide not to launch an investigation regarding the relevant agreement, concerted practice or association of undertakings' decision, or may cease an ongoing investigation if it is determined that parties' market shares are below the thresholds. However, according to the Draft Communiqué, the Competition Board, at its discretion, may also launch an investigation when it deems necessary, even if the market share thresholds specified above are not exceeded.

## **Relationship between the Draft Communiqué and EU "*De Minimis*" Regulation**

The Draft Communiqué takes significant steps in terms of compliance with the EU competition legislation and modernization of competition law with regard to the "*de minimis*" rule. Indeed, the principles set out under the Draft Communiqué are quite similar to the EU Commission's notice regarding the "*de minimis*" exception, particularly in terms of market share thresholds.<sup>3</sup>

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<sup>2</sup> The term "agreements" means the agreements, concerted practices and association of undertakings' decisions which are specified within the scope of Article 4 of the Competition Law.

<sup>3</sup> Please click the following link to access the relevant regulation:  
<https://ec.europa.eu/competition/antitrust/legislation/deminimis.html>

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On the other hand, the Draft Communiqué differs from the EU Commission's "*de minimis*" notice in some respects. The EU Commission does not consider agreements, concerted practices and association of undertakings' decisions which restrict competition *by object* within the scope of "*de minimis*" and thus vertical restraints such as resale price maintenance do not benefit from the "*de minimis*" exception. However, according to the Draft Communiqué, the "*de minimis*" exception will not be applied to hardcore restrictions solely between competitors. Therefore, the Draft Communiqué provides a wider scope of application for the "*de minimis*" exception when compared to the EU legislation.

Another difference between the Draft Communiqué and EU Commission's notice is that while the EU "*de minimis*" legislation provides a "safe harbour" for undertakings below the market share thresholds, the Draft Communiqué is formulated in a way that does not provide such an absolute exemption for undertakings. Even if the thresholds specified in the Draft Communiqué are not exceeded, the Competition Board may still decide to launch an investigation by considering the case specifics.

The public may submit opinions on the Draft Communiqué by 23 November 2020. The application of the "*de minimis*" rule, which will enable a more efficient use of resources for both the Turkish Competition Authority and undertakings, will certainly play a crucial role in protecting competition by concentrating on violations that have significant effects on the markets.

## CONTACT

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