

SIGNIFICANT AMENDMENTS TO COMPETITION LAW

The Law Amending the Law on Protection of Competition (the "**Amendment Law**") was published in the Official Gazette dated 24 June 2020 and entered into force on the same day. The Amendment Law introduced many significant changes in Turkish competition law. These amendments will increase the alignment level of Law No. 4054 on Protection of Competition (the "**Competition Law**") with the European Union (the "**EU**") legislation. Indeed, the Amendment Law contains several changes which are parallel to the EU competition rules, such as the application of the "*de minimis*" exception, the "significant restriction of competition" test on merger control as well as commitment and settlement procedures. Another significant change introduced with the Amendment Law is the Competition Board's authority to apply structural and behavioural remedies on undertakings and associations of undertakings to establish competition in the market. These reforms will bring along vital changes to the implementation of competition law in Turkey.

De Minimis Rule

The amendment to Article 41 of the Competition Law ensures that agreements, concerted practices and conduct/decisions of associations of undertakings (Article 4 infringements) which have no appreciable effect on competition will not be subject to investigation. Therefore, the Competition Board will be able to choose which Article 4 infringements to investigate. This amendment, which is akin to the "*de minimis*" rule in the EU, is likely to result in fewer investigations, because the Competition Authority will only investigate agreements that have appreciable effect on competition. Hardcore competition restraints such as price fixing, region and customer sharing and supply restrictions are excluded from the scope of the exception. Accordingly, cartel agreements will be prosecuted regardless of their effects on competition.

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Specific criteria such as market share and turnover will be determined to define a threshold for Article 4 infringements that have no appreciable effect on competition. Details on these criteria will be regulated through a communiqué to be published by the Competition Authority.

Commitment and Settlement

The amendment to Article 43 of the Competition Law provides that undertakings and associations of undertakings may propose commitments to the Competition Board during the preliminary investigation or investigation phase, in order to remedy the restrictions within the scope of Articles 4 and 6 of the Competition Law. This amendment further states that if the Competition Board accepts these commitments, the Board may not initiate an investigation or may cease an ongoing investigation. This method will serve to resolve the competition concern without initiating or concluding an investigation. The Competition Board is also entitled to re-initiate an investigation if the parties do not fulfil their commitments, any material change occurs in any matter on which the decision is based, or the commitment decision relies on deficient, false or misleading information.

The commitment procedure is expected to enhance efficiency, for both the investigated parties and the Competition Board. Indeed, the commitment procedure paves the way for a rapid and effective resolution of competition problems without the need to allocate any resources for a rather lengthy investigation phase.

Besides the commitment procedure, the amendment to Article 43 also sets out a settlement procedure, which offers a 25% reduction on the imposed monetary fines if the party under investigation admits to the existence and scope of the alleged infringement. The settlement procedure may be initiated by the investigated undertakings' request or *ex officio* by the Competition Board. The Competition Board will stipulate a certain time period for the investigated parties to submit a settlement letter, in which they admit the existence and scope of the infringement.

Article 43 provides that such settlement procedure will be applicable both for the violations under Articles 4 and 6 of the Competition Law. With the settlement procedure, the undertakings will benefit from a shorter investigation period and a significant reduction over the monetary fines. On the other hand, the Competition Authority will be allocating its resources in a more effective manner with the implementation of the settlement procedure.

Both commitment and settlement procedures are expected to shorten the investigation period. However, under the commitment procedure, the Competition Board decides not to initiate an investigation or ceases an ongoing investigation, whereas the settlement procedure results with an infringement decision and a monetary fine. Therefore, under the settlement procedure, third parties that are damaged by the relevant infringement may request compensation under Article 57 of the Competition Law. On the other hand, such compensation mechanism will not be applicable under the commitment procedure, since the Competition Board would not establish an

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infringement decision. Accordingly, the commitment and settlement procedures differentiate both in terms of their processes and results.

The rules to apply to commitment and settlement procedures will be regulated through communiqués to be published by the Competition Board.

The “Significant Impediment of Effective Competition” Test Instead of the Dominance Test

With the ratification of the Amendment Law, the “Significant Impediment of Effective Competition” (SIEC) test is recognised for merger control, instead of the dominance test. Under the dominance test, to prohibit a transaction it should be established that the transaction would create or strengthen a dominant position. However, with the recent amendment there is no such requirement. Unlike the dominance test, the SIEC test, which has been applied under the EU merger regulation since 2004, paves the way for prohibiting transactions that significantly restrict competition in a specific market even though the transaction does not lead to the creation or strengthening of a dominant position. The effects of such change on the merger control regime will be determined by the Competition Board’s upcoming practice.

Authority to Impose Behavioural and Structural Measures

The amendment to Article 9 of the Competition Law authorizes the Competition Board to impose behavioural and structural measures on undertakings/associations of undertakings which violate Articles 4, 6 and 7 of the Competition Law, for the re-establishment of competition in the market. According to the amendment, the Competition Board may notify the undertakings or associations of undertakings on the “behaviours to be fulfilled or to be omitted” and “structural remedies such as transfer of specific businesses, ownership structures or assets” with its final decision. Previously, the Competition Board was entitled to impose only behavioural measures after the establishment of a violation within the scope of Articles 4 and 6 of the Competition Law. On the other hand, under Article 7 regarding merger control, the Competition Board was entitled to conditionally approve transactions, subject to the structural and behavioural remedies proposed by the transaction parties to remedy the competitive concerns raised by the transaction. With the recent amendment, the Competition Board is now entitled to impose structural measures for the violations of Articles 4 and 6 and unilaterally impose structural and behavioural remedies to concentrations which may be contrary to Article 7.

However, the wording of the relevant amendment limits this power by introducing proportionality and materiality criteria, for behavioural and structural measures. Accordingly, behavioural and structural measures must be proportional to the violation and necessary to effectively end the violation. In addition, the amendment states that the structural measures are only applicable if the previously applied behavioural measures are not adequate.

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Redefining On-site Inspection Powers

The Amendment Law also alters Article 15 of the Competition Law regarding the Competition Board's on-site inspection authority, stating that "*all kinds of information and documents kept at undertakings' or associations of undertakings' electrical environment and IT systems may be inspected and copied*". Previously, the Competition Authority officials were investigating undertakings' IT systems and electronic documents although this was not explicitly stated in the Competition Law and this procedure was approved by the Council of State in many cases. This amendment is aimed to update the wording of Article 15 to reflect the current practice.

Conclusion

These amendments are a step forward towards the modernization of the Competition Law and compliance with the EU competition legislation. Introduction of the "*de minimis*" rule, commitment mechanism and settlement procedure, which are significant changes in the Competition Law, will facilitate the allocation of resources for the Competition Authority and undertakings. That said, details on how these amendments will be implemented, will be determined by communiqués to be published by the Competition Board. The Board's practice in the near future will clarify the effects of these behavioural/structural remedies and "the significant restriction of competition" test on merger control.

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