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June 24, 2020

AMENDMENTS TO THE TURKISH COMPETITON LAW ENACTED

The law regulating amendments to the Act on the Protection of Competition ("**Competition Act**") was published in the Official Gazette dated June 24, 2020 and numbered 31165 ("**Amendment Law**") and entered into force as of its publication date.

The Amendment Law has been drafted on the purposes of harmonizing the Competition Act with EU *acquis* and reflecting the amendments that are already embedded in the EU competition law to update the Turkish law.

This memorandum comprises our legal approach and evaluations regarding amendments adopted by the Amendment Law which might have importance for commercial activities of companies.[1]

EXECUTIVE SUMMARY

The main amendments introduced by the new law can be summarized as follows:

(i) Describing "*Self-Assessment*" Rule in respect of Exemption

The Amendment Law clarifies and explicitly stipulates "*Self-Assessment*" method which has been priorily accepted under the amendment made in 2005 to Article 10 of the Competition Act. In this regard, being subject to their "*self-assessment*", undertakings are not required to file exemption applications before the Competition Board ("**Board**") for the agreements, concerted practices and decisions of associations of undertakings satisfying the exemption criteria set out under Article 5 of the Competition Act. However, the option to apply to the Board for individual exemption is still available in order to ensure legal certainty.

(ii) Implementation of "*Significant Impediment to Effective Competition*" (*SIEC*) Criteria in respect of Mergers and Acquisitions

Pursuant to the Amendment Law, the two-stage "*dominance test*" is being replaced by the "*significant impediment to effective competition*" (SIEC) test in compliance with the EU legislation, to be used in examination of merger and acquisition transactions. Accordingly, mergers or acquisitions which significantly impede effective competition might be prohibited by the Board even if any dominant position is not created.

[1] The Turkish version of this note includes also a table as an annex which compares the old and new text of the law on article basis.

(iii) Expansion of Authority of the Board in respect of Competition Infringements

Under the Amendment Law, it is explicitly stipulated that the Board may impose several structural remedies alongside the behavioural remedies in respect of competition infringements. Structural remedies may be exercised as transfer of particular operations, partnership shares or assets. However, structural remedies will be imposed if behavioural remedies already exercised would be insufficient. Criteria of being "*proportionate to the infringements*" and "*necessary to terminate infringements effectively*" shall be applied for implementation of structural remedies.

(iv) Expansion of On-site Inspection Authority of the Board

Scope of on-site inspection authority of the Board in respect of competition infringements is expanded as per the Amendment Law. The Board is explicitly entitled to examine *"all kinds of data and documents stored physically and in electronic media and information systems"* and "*take their copies and physical samples",* if needed.

(v) Implementation of *"De Minimis"*[2] Principle in Investigations

As modelled on EU law*, "De minimis" (non-limiting competition significantly)* principle is adopted under the Amendment Law. Accordingly, agreements, concerted practices and decisions of associations of undertakings that are not exceeding thresholds to be determined by taking into account of criteria such as market share and turnover thresholds, will not be subject to investigation. However, "*explicit and gross infringements such as price fixing between competitors, territory or customer sharing and restriction of supply"* are exempted.

(vi) Introduction of Commitment and Settlement Mechanisms

With the Amendment Law, commitment and settlement mechanisms, which are applied to eliminate competition concerns and already exist in the EU legislation, are introduced.

Commitment Mechanism: Undertakings are allowed to submit commitments before or during an investigation in order to prevent competition impediments. In the event that such commitments convince the Board of their effectiveness for resolving the competition impediments, the Board may decide that there are no grounds for initiating an investigation any more or may terminate an existing investigation process. However, any commitments made in the event of "*explicit and gross infringements such as price fixing among competitors, territory or customer sharing and restriction of supply*" shall not be accepted by the Board.

Settlement Mechanism: During an investigation process, upon an application filed or on the own initiative of the Board, settlement procedure may be initiated for several infringements. Only the undertakings or association of undertakings admitting the scope and existence of the infringement can make settlement with the Board. In the event that an investigation procedure ends with settlement, the Board can reduce the administrative monetary fine by up to 25%.

[2] In accordance with "*de minimis*" principle modelled on EU competition law, agreements or behaviours are required to have significant effect in restricting competition for being considered as competition infringements.

GENERAL OVERVIEW OF AMENDMENTS SET OUT UNDER THE AMENDMENT LAW

I. Description of "*Self-Assessment*" Rule in relation to Exemptions

Agreements, concerted practices between undertakings, and decisions of associations of undertakings which have as their object or effect or likely effect the restriction of competition are prohibited under Article 4 of the Competition Act. As per Article 5 of the Competition Act, if the conditions of exemption are met, they may be individually exempted from provisions of Article 4 of the Competition Act. Furthermore, the Board may grant block exemptions to particular types of agreements by issuing communiques.

A new system named "*self-assessment*" has been implemented with amendment made to Article 10 of the Competition Act in 2005. In accordance with this system, undertakings are not required to apply to the Board for an exemption, in the event that exemption conditions set out under Article 5 of the Competition Act are fulfilled, as a result of their self-assessment. The option to apply to the Board for individual exemption is still available. Thus, in accordance with the amendment made in 2005, agreements and decisions limiting competition that are in the scope of block exemption communiqués are enabled to benefit automatically from block exemption. Also, notification requirement to the Board has been removed. For agreements and decisions that are not in the scope of block exemption communiqués, undertakings and association of undertakings are required to make self-assessment for individual exemption. *In other words, there is no obligation of notification for these agreements and decisions.* However, undertakings and associations of undertakings may apply to the Board in order to maintain legal certainty.

With the Amendment Law, Article 5 of the Competition Act has been revised and below issues, which are already being implemented, have been clearly regulated:

(i) In the event that conditions of exemptions stated in Article 5 exist, agreements, concerted practices and decisions of associations of undertakings limiting competition are exempt from the provisions of Article 4 and

(ii) Associations of undertakings may also apply to the Board for determination of their compliance with conditions of exemption.

Therefore, in accordance with the amendments made in Article 5 of the Competition Act with the Amendment Law, wording of Article 5 of the Competition Act has been revised with an aim to ensure legal certainty in respect of "self-assessment" rule and to make this rule clear.

II. Implementation of "*Significant Impediment to Effective Competition*" (SIEC) Criteria with regard to Mergers and Acquisitions

Article 7 of the Competition Act stipulates the conditions under which mergers and acquisitions will be subject to the inspection of the Board. Accordingly, two-stage test is applied and a merger and acquisition transaction is subject to authorization of the the Board if **(i)** creates a dominant position or strengthen dominant position and **(ii)** lessens competition significantly in the relevant market as a result.

As per Amendment Law, **two-stage "*dominance test*"** is being replaced by the **"*significant impediment to effective competition test*"** as adopted in EU legislation in relation to merger and acquisition transactions exceeding a particular scale. **In this scope, with the Amendment Law, key criterion for a merger or acquisition to be subject to the authorization of the Board becomes being "*significant impediment to effective competition*."** Together with this test, transactions that might impede competition significantly may be prohibited in addition to transactions that result in creating dominant position or strengthening dominant position.

Therefore, merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking -except by way of inheritance- of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, in a manner to **especially create**

a dominant position or strengthen dominant position, which would result in **significant impediment to effective competition** in a market for goods or services within the whole or a part of the country, is being considered as illegal and prohibited.

With adoption of **"*significant impediment to effective competition*" test, even if a merger or acquisition transaction does not create dominant position, the Board would be entitled to intervene in if effective competition is impeded significantly.**

III. Expansion of Authority of the Board in respect of Competition Infringements

Pursuant to Article 9 of the Competition Act, the Board upon information, complaint or the request of the Ministry of Trade or on its own initiative, establishes that articles concerning *"agreements, concerted practices and decisions limiting competition" (Article 4), "abuse of dominant position" (Article 6) or "mergers or acquisitions" (Article 7)* of the Competition Act are infringed, it is entitled to investigate infringements, take interim measures or final decision in order to maintain the situation before the infringement. The Amendment Law revises this article and expands authority of the Board in respect of competition infringements.

In this scope, **Board shall be entitled to impose two types of remedies referred as behavioural and structural remedies**. Thereafter, the Board might impose;

(i) Behavioural remedies to be fulfilled or avoided so as to establish competitive environment and
(ii) Structural remedies such as transfer of particular operations, partnership shares or assets

to those undertakings being involved in activities prohibited in the Competition Act, as a result of its investigation.

Nevertheless, structural remedies will only be imposed if behavioural remedies already exercised are insufficient. However, such remedies are required to be "*proportionate to the infringements*" and "*essential to terminate infringements effectively*" in order to be exercised by the Board.

In conclusion, pursuant to the amendments made with the Amendment Law, it is considered that the scope of power of the Board is expanded to ensure effective competition. However, in order to ensure **legal security** for undertakings, it is important in practice that such powerful remedies result in transfer of partnership shares or assets of undertakings are required to be imposed only in abovementioned exceptional conditions.

IV. Expansion of the Board's On-site Inspection Authority

Under Article 15 of the Competition Act, the Board may perform examinations at the premises of undertakings or associations of undertakings if deemed necessary, for carrying out its duties to protect competition. In this regard, the Board may examine the books and any documents of such undertakings. Besides, written or oral statements on particular issues may be requested and on-site examination of any assets of undertakings may be performed.

In accordance with the Competition Act, documents that might be examined by the Board are widely stipulated. However, **as per the new insertion made by the Amendment Law, the Board is explicitly empowered to examine *"all kinds of data and documents stored physically and in electronic media and information systems"* and *"take their copies and physical samples*", if needed.**

It is considered that the amendment made with Article 15 of the Competition Act aims to expand and clarify the scope of the Board's on-site inspection power. With this amendment, providing adequate protection of both trade secrets and personal data and confidentiality in exercising this authority becomes more important.

V. Implementation of "*De Minimis*" Rule in Investigations

Pursuant to Article 40 of the Competition Act, on its own initiative or upon an application filed, the Board may decide to initiate an investigation or to conduct a preliminary inquiry for determining whether or not it is necessary to initiate an investigation. In this case, the Board decides to open an investigation or not in consequence of preliminary inquiry report prepared by rapporteurs.

In accordance with the Amendment Law, "***agreements, concerted practices and decisions of associations of undertakings not restricting markets significantly"*** may be not subject to investigation by the Board. However, this principle will not apply to hard-core exemptions such as ***"explicit and gross infringements such as price fixing between competitors, territory or customer sharing and restriction of supply"*** by taking into account the criteria such as market share and turnover thresholds. Besides, the Board will provide the details of implementation of such principle by secondary legislation.

The Board shall be entitled not to initiate investigation on alleged infringements not exceeding certain market share or turnover thresholds to be determined under the secondary legislation. **Thus, a new mechanism, which is in parallel with the implementation of "*de minimis*" rule (*not limiting competition significantly*) as modelled on EU law, is accepted and this amendment will enable the Turkish Competition Authority to focus more on major infringements.**

VI. Introduction of Commitment and Settlement Mechanisms

Pursuant to Article 43 of the Competition Act, if the Board decides that an investigation shall be conducted, such investigation process shall be completed within 6 months at the latest. Accordingly, in case of determination of an infringement distorting competition, administrative monetary fines set forth under Article 16/3 of the Competition Act shall be imposed.

The Amendment Law introduces two quite new concepts for Turkish competition law practice, "***commitment procedure***" and "***settlement mechanism***" in line with the EU practice. Although general principles are set forth under the Amendment Law, the Board is empowered to determine detailed principles and procedures with communiqués to be issued in this regard.

(i) *Commitment Mechanism*

During a preliminary inquiry or an investigation, undertakings or association of undertakings are allowed to voluntarily offer commitments to the Board in relation to their activities considered as "*agreements, concerted practices and decisions limiting competition" (Article 4)* or *"abuse of dominant position" (Article 6)* in order to resolve competition impediments.

In the event that such commitments convince the Board of their effectiveness for resolving the competition impediments, the Board may decide that there are no longer grounds for opening an investigation or may terminate an existing investigation process. In such case, such commitments shall be binding for such undertakings and association of undertakings. However, the Board will be empowered to reinitiate an investigation in the case of

a) A substantial change in any **aspect of the basis of** the decision,

b) Breach of commitments by the undertakings or association of undertakings,

c) The decision has been rendered on incomplete, incorrect or misleading information provided by the parties.

Furthermore, any commitments made in the event of "***explicit and gross infringements as price fixing among competitiors, territory or customer sharing or limitation of supply***" shall not be accepted by the Board. However, "***explicit and gross infringements where any committment shall not be accepted"*** are specified by example and the Board shall determine principles with communiqués to be issued.

(ii) Settlement Mechanism

As per the Amendment Law, while commitment mechanism may also be applied prior to initiation of an investigation process, settlement procedure may only be applied **during an investigation process** within the scope of articles 4 and 6 of the Competition Act. Settlement procedures may be initiated in the following ways:

a) On request of settlement of those concerned or

b) On the own initiative of the Board by taking into consideration procedural benefits of the rapid completion of an investigation process or by considering different views as to existence and scope of the infringement.

It should be noted that, as per the Amendment Law the Board may only make settlement with the undertakings or association of undertakings which are parties to an investigation and admitting the scope and existence of the infringement. Settlement can only be made until the notification of the investigation report.

In the event that the investigation procedure ends with settlement, the Board can reduce the administrative monetary fine by up to 25%. On the other hand, upon settlement, such parties to the settlement cannot make the administrative monetary fine imposed or issues settled under the settlement agreement to a lawsuit.

It is considered that the commitment and settlement mechanisms accepted under the Amendment Law aims to remedy anti-competitive practices more rapidly and thus, to prevent the growth of anti-competitive losses as such mechanisms involve fewer procedural steps and do not need to be based on full-fledged investigations.

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