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NOTE ON THE NEW AMENDMENTS

ON THE LAW ON PROTECTION OF COMPETITION

The Law on Protection of Competition No. 4054 ("**Competition Law**"), which has been in force for 26 years, had been subject to several amendments in time. Recently, with the entry into force of the Law No. 7246 on June 24, 2020, the long-awaited and fundamental amendments have been made to the Competition Law. As a result of these amendments, essential novelties affecting the undertakings have been introduced and some new arrangements have been made regarding the organizational structure of the Competition Board.

In this Note, we will briefly explain the new arrangements that are, in our view, the most important ones concerning undertakings.

1. The Commitment Mechanism

As is known, in the application of Article 7 regarding the control of mergers & acquisitions, in the event that any transaction causes concerns from competition law perspective, the Competition Board has the option to allow the transaction by obtaining some commitments from the relevant parties to eliminate such concerns. With the recent amendment on Article 43 of the Competition Law, it is now possible to apply the commitment mechanism in case of breach of Article 4 (*Agreements, Concerted Practices and Decisions Restricting Competition*) and Article 6 (*Abuse of Dominant Position*).

Thus, during any pre-investigation or investigation process, it will be possible for the undertakings and associations of undertakings to voluntarily offer commitments to the Board in order to eliminate anti-competitive concerns within the scope of Article 4 or 6 of Competition Law. However, it should be noted that commitments will not be accepted in case of hard-core violations such as price fixing, territory or customer sharing and restriction of supply.

The commitment will be binding on the undertaking(s) if and once accepted by the Competition Board. So, submission of commitment is now a mechanism that allows the parties to close an ongoing investigation under Article 4 or Article 6.

It is important to note that the Competition Board is entitled to re-initiate the investigation in case (i) any material change occurs in any of the underlying elements of its decision, (ii) the relevant undertaking or association of undertakings violate their commitment, or (iii) it is understood that the

decision was made based on missing, false or misleading documents and information submitted by the relevant parties. As a result of the re-initiated investigation, the sanction to be imposed is likely to be more severe.

The Competition Board is expected to issue a communiqué that will include more detailed provisions regarding the implementation of the commitment mechanism.

2. Settlement Mechanism

With the amendment of Article 43 of Competition Law, the settlement mechanism has been foreseen as a new tool to be applied upon the request of the relevant undertaking(s) or *ex officio* by the Board when an investigation is initiated. While the commitment mechanism is not applicable in case of hard-core violations, the settlement mechanism is applicable also for such cases. Unlike the commitment mechanism, the settlement mechanism can only be applied if a violation is determined by the Board.

For the application of this mechanism, it is a condition precedent for the relevant undertaking(s) to admit the existence and scope of the violation. This mechanism may be applied only until the notification of the investigation report. If settlement is initiated, the Board will grant a deadline to the parties against whom the investigation is carried on and ask them to submit a settlement letter where they admit the violation and its scope. If the deadline granted by the Board is missed, the settlement letter will not be taken into consideration. The investigation will be closed by a final decision which includes the determination of the violation and the administrative fine. As a result of settlement, a reduction up 25% may be applied over the fine to be imposed on the relevant party(ies). It should also be noted that application of such reduction does not affect the application of the reduction in case of down payment as per the Misdemeanor Law. Please also note that this ratio is 10% in the practice of the European Commission.

If the investigation process is closed as a result of settlement, the parties do not have the right to refer this decision to the courts; i.e. the settlement decision is not subject to judicial review.

The Competition Board will issue a regulation that will include the details on the implementation of the settlement mechanism.

3. Structural Measures

Behavioral measures are obligations imposed on undertakings to behave in a certain way or to refrain from doing certain acts (e.g. taking out certain anti-competitive provisions in their agreement). As for structural measures; these are obligations intended to make changes in the structural bodies of the relevant undertakings (e.g. transferring shares to third parties).

The structural measures are exceptionally applied in the competition practice in the world to the extent behavioral measures are not sufficient to permanently eliminate competition law infringements. The amendment of Article 9 of the Competition Law has granted the authority to the Competition Board to eliminate violations of competition by applying structural measures.

In this context, in the event that the Competition Board determines an infringement of Article 4, 6 or 7 of the Competition Law and if behavioral measures cannot permanently eliminate such

infringement, then the Board is entitled to apply structural measures, such as asking the relevant undertaking to transfer certain business or shares and assets to third parties. On the other hand, in the event that it is possible to prevent the violation by using behavioral measures, no structural measure can be taken. At this point, it should be emphasized that while applying both structural measures and behavioral measures, the principle of proportionality must always be considered.

4. New Test in the Control of Concentrations

The Turkish Competition Board used to apply the "*dominance test*" for concentration transactions when its consent was required as per Article 7 of the Competition Law. With the amendment made by the Law No. 7246, in line with the EU law, "*significant impediment of effective competition*" (SIEC) test will be applied instead of the dominance test.

Accordingly, the Board will be able to ban the concentration transactions which do not result in creation or strengthening of dominant position but which may significantly impede competition in a market.

We expect that the application of this new test will be clarified with the secondary legislation (communiqué, guidelines) to be issued by the Competition Board.

5. Self Assessment Procedure

Article 5 of the Competition Law regulates the conditions whereby an agreement, concerted practice or decision of association of undertakings that is in breach of Article 4 can be exempted from the application of this Article, in other words, situations where these will not be considered as anti-competitive.

In line with the EU law, the principle of *self-assessment* of the undertakings for the application of the exemption mechanism has been introduced by the Law No. 7246, or better said, strengthened with the recent amendments. In fact, as is well known, the obligation of notification to the Competition Board for the application of an exemption was already removed by the amendments made in 2005. Since then, the undertakings used to make their own assessment and apply to the Competition Board if they needed to. We note that this principle has been clarified with the recent amendments. The revised version of Article 5 explicitly determines that in case the conditions for an exemption are satisfied, relevant agreement, concerted practice or decision of association of undertakings shall benefit from an exemption and that the Competition Board does not have a discretionary power in such cases.

In addition, the wording stating that "*the exemption shall be granted by the Board*" has been removed from Article 5. Such change is interpreted that the Board's exclusive authority concerning exemption mechanism has been abolished and thus the courts are also entitled to decide on this matter. Since 1999, the Supreme Court has constantly decided that, in compensation cases related to damages caused by breach of competition, the Competition Board was the authority that should take the decision related to exemption and that the courts should consider the matter as a prejudicial question. We wonder if/how the Supreme Court will change its approach on this matter following the recent amendments.

6. De minimis

De minimis rule, regulated under the EU law, has always been a discussion topic since the first years of entry into force of the Competition Law in Turkey. The rule has finally been introduced to the Competition Law with the recent amendments. Accordingly, the Competition Board has been granted the authority to decide on not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the market share and turnover thresholds that will be determined by the Board. The aim with the introduction of *de minimis* is to allow the Board to give its priority to major infringements.

We should note that the principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply.

We await a secondary legislation whereby the Board will determine the market share and turnover thresholds that will be covered by *de minimis* rule.

7. On-site investigation process

As per the amendments made in Article 15 of the Competition Law, the current practice of the Competition Board in on-site investigations has been legalized. Accordingly, during on-site inspections, the Board can *inspect and make copies of* ***all information and documents in companies' physical records as well as those in electronic space and IT systems***. Thus, the authority of the Board to collect evidences has been extended so as to cover electronic data.

CONCLUSION

As briefly explained above, the recent amendments have introduced new mechanisms that did not previously exist; and also amended some already existing provisions in the Competition Law so as to respond to the current needs. In addition, we note that on some points, the past practice of the Competition Board has been legalised under the Competition Law.

It should be stated that the main purpose of the amendments is to align the Competition Law with the EU *acquis communautaire*. Further, the amendments aim to enable the Competition Board to function more efficiently in terms of time and resource allocation.

We hope that the secondary legislation that will clarify the application of the new mechanisms will be issued by the Competition Board as soon as is possible.

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In the light of the above, please do not hesitate to contact us should you have any question on the application of the Competition Law in Turkey.

Best regards

Tabak & Ongan Law Office