Competition Newsletter - March 2021

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Turkey has amended its Competition Act: how does it affect you?

Winston Churchill once said “To improve is to change; to be perfect is to change often”. Being a year of change, 2020 featured a substantive makeover of the Turkish Competition Act (“**Act**”), which has been in discussion since 2008 and accepted as of June 16, 2020.

Merger control review

Important amendments took place on the merger control regime of Turkey. Accordingly, the Turkish Competition Authority (“**TCA**”) shifted from the dominance test, which focuses on whether the transaction creates or strengthens a dominant position to the test of significantly impeding effective competition. This new approach is more aligned with the EU system and may prohibit transactions that restrict competition even without creating/strengthening a dominant position.

Settlement mechanism

The amendments also brought the long-awaited settlement mechanism to Turkish competition law. Accordingly, parties may submit their settlement submissions including the acceptance of violation until the delivery of the investigation report. The TCA is entitled to reduce the administrative fine up to 25%, once the settlement submission is filed. Investigated parties shall be cautious in the settlement submissions, considering that the interaction between settlement submissions and potential damages actions for such violations remains to be seen.

Remedies against competition law violations

By virtue of the new amendments, the TCA is now entitled to impose behavioral and structural remedies upon entities in the case of a competition law violation. Accordingly, the TCA may order entities to implement certain behaviors at the end of an investigation (behavioral remedy) in an effort to re-establish competition on the market. If the behavioral commitments are not sufficient, the TCA may order the relevant entities to transfer their shares or assets (structural remedy).

Commitment mechanism

Another important change in the Act was the introduction of the commitment mechanism. With this amendment, entities may offer commitments in the course of preliminary investigation or investigation process for the infringements other than per se violations (such as price-fixing, allocation of markets or customers). The proposed commitments

may become binding if they are deemed to address the competition law concerns. That said, the TCA may reopen the proceedings where (i) there has been a change in any of the facts, (ii) the concerned entities act contrary to their commitments or (iii) the decision was based on incorrect information.

De Minimis

For the first time in its enforcement history, a de minimis rule has been incorporated into competition law. Accordingly, the TCA is now entitled not to initiate an investigation into agreements, concerted practices, and practices of associations of undertakings that are below a certain turnover and a market share threshold. De minimis can only be applied for agreements and practices that are not hard-core restrictions to competition (such as price agreements, allocation of markets/customers, and control of supply). With this amendment, the Competition Authority can now allocate its resources to more significant investigations. Similar to the EU, the market share threshold is 10% for agreements between competitors and 15% for agreements between non-competitors. The TCA may still decide to initiate proceedings despite the thresholds, if it deems it necessary.

Increased investigative powers

Lastly, the amendments featured an increase in the TCA's ability to collect data during on-site inspections. Accordingly, documents and information kept in the electronic environment are included in the investigative scope and the TCA is empowered to seize any data kept within physical and electronic environment and information systems during an on-site inspection.

Under the magnifying glass: Enforcement trends in 2020?

In 2020, the TCA concluded a number of high-profile investigations against undertakings in the markets for search engines, domestic appliances, mail/freight transportation and fuel oil.

Another probe for Google

Following the footsteps of the EU, the TCA launched an investigation regarding concerns that Google had abused its dominant position in the general search services market by excluding its competitors from the online comparison shopping services market. Google was found to prevent competitors from entering the Google Shopping Unit under equal conditions. The investigated actions included displaying and positioning ads from competing shopping websites in lower/less-visible lines of the search results page. Google is now expected to fulfill certain obligations to terminate the infringement and ensure competition on the market.

Information exchange in domestic appliances

The TCA also investigated the leading domestic appliances manufacturers, Arçelik and Vestel, following concerns of anti-competitive information exchange. The TCA discovered that a regional manager of Arçelik conveyed unsolicited information to its competitor, Vestel. The TCA decided the undertakings had not violated the Act because Arçelik notified the TCA when it discovered that such information had been conveyed to Vestel and evidence supports that Arçelik independently set its prices even during the time the competitively sensitive information was disclosed to the competitor.

Courier companies fined by the TCA

Another investigation was conducted against numerous undertakings operating in the mail/freight transport market. The TCA decided to impose an administrative fine on some of the biggest undertakings in the market (i.e. TNT, UPS, DHL and Yurtiçi Kargo) for violating the act via customer allocation. The TCA also ruled that these undertakings had banned the reselling firms from offering services to customers marked as active in their own accounts.

Highest fine ever!

Last but definitely not least, undertakings operating in the fuel distribution market also received scrutiny over claims of determining resale prices of their distributors. Opet, BP, Petrol Ofisi (Vitol) and Shell were hit with administrative fines upon determination that pump prices charged by the distributors were largely equal to prices “recommended” by these undertakings supplying fuel oil. The total fine imposed on these undertakings amounts to TL 1.5 billion (approximately 167 million Euro), which marks the highest fine imposed in enforcement history.

Excessive prices: the Commission makes legally binding the commitments offered by Aspen to reduce the prices of six cancer medicines by 73% over 10 years

On May 15, 2017, the European Commission announced the opening of an investigation into potential anti-competitive practices committed by Aspen, a South African pharmaceutical company marketing many medicines in several European Union countries.

The procedure notably concerned the imposition by Aspen of excessive prices for six essential cancer medicines used to treat leukemia and other forms of blood cancers. The allegations concerned the use of abusive negotiation processes with national authorities of different countries to impose such excessive prices, while this company was in a dominant position.

In its investigation, the Commission found that as of 2012 Aspen started to increase significantly its prices in all the countries where it marketed these medicines. An in-depth analysis of Aspen’s accounting revealed that its margin exceeded 300% on average without any legitimate justification for such profits (in particular, given that the medicines were no longer covered by a patent for many years and the research and development investment had been amortized in full).

In July 2020, Aspen proposed a series of commitments to the Commission that the company then adjusted after consulting with other market players. These commitments were made legally binding by the Commission and published on February 10, 2021. A trustee has been charged by the Commission with monitoring their compliance by Aspen.

The commitments notably include a significant reduction of the net prices charged by Aspen for the medicines in question in a number of countries of the European Economic Area (whose maximum net amount is precisely defined). These new amounts represent on average a 73% reduction compared to the prices previously charged.

Aspen cannot exceed the prices fixed by the Commission for 10 years.

The laboratory also undertakes to continue supplying the relevant countries for five years from October 1, 2019, the effective date of the commitments. After this first five-year period, Aspen will have the choice between continuing the supply of these medicines for a further five-year period or offering its marketing authorization for one or all of the relevant medicines to other suppliers. Under this last option, Aspen will be required to inform the National Regulatory Authority of its intention to stop the marketing of its products 18 months before the effective date.

The duration of participation in a concerted

practice of a company that only participated in one anticompetitive meeting depends on the understanding that the other participants have regarding its intentions

This is the position adopted by the French Supreme Court (Cour de Cassation) in the famous flours case.

For the record, on March 13, 2021, VK Mühlen, along with other companies in the sector, was condemned by the French Competition Authority for having participated in a concerted practice between German and French millers that consisted in limiting flour imports between France and Germany.

In its appeal against the decision rendered by the Paris Court of Appeal of July 4, 2019, on referral after annulment, Goodmills (formerly VK Mühlen) in particular contested what the Court of Appeal ruled regarding the duration of its participation in the offense. Although it was invited to (only) some of the twelve cartel meetings organized between May 2002 and June 2008 (that is the fifth, the seventh and the tenth), VK Mühlen actually participated **in only one of them**, the sixth, on September 24, 2003.

In its decision, the French Supreme Court dismissed VK Mühlen's appeal and approved the Court of Appeal's reasoning, under which the duration of participation should have as a starting point the sixth meeting that this company attended, and as an end point, the date of the invitation to the eleventh meeting. According to the French Supreme Court, it is from this last date that VK Mühlen had "shown with sufficient clarity that it had distanced itself from the concerted practice and that its attitude was interpreted as such by the other participants", so that the other parties to the concerted practice could no longer consider that VK Mühlen still shared their goals and was ready to assume the risks thereof. Although it was undisputed that this company did not control the sending of the invitations, it should and could have, according to the judges, made its position clear to the sender of these invitations and the other members of the concerted practices. In other words, and although it is not always easy in practice, it should have distanced itself expressly from the anti-competitive concerted practice by stating that it no longer wished to be invited to these meetings...

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