

New Communiqué on *De Minimis* Rule

March 2021

Overview

In our previous [newsletter](#), we summarized and examined the key aspects of the *de minimis* principle which was introduced by the Draft Communiqué on Agreements, Concerted Practices, and Conducts of Association of Undertakings Which Do Not Appreciably Restrict Competition (the **Draft Communiqué**) on 23 October 2020. The Turkish Competition Authority (the **TCA**) collected comments and input of the stakeholders on the Draft Communiqué until 23 November 2020 and published the Communiqué on Agreements, Concerted Practices, Actions and Decisions of Associations of Undertakings Which Do Not Appreciably Restrict Competition numbered 2021/3 (the **Communiqué**) on the Official Gazette dated 16 March 2021 and numbered 31425.

Scope of the Communiqué

In comparison to the Draft Communiqué, the Communiqué provides a more precise and comprehensive definition for clear and hardcore violations that fall outside of the scope of the *de minimis* rule. According to Article 4 of the Communiqué, clear and hardcore violations include the concerted practices, acts and conducts of association of undertakings concerning:

- i. exchange of competitively sensitive information between competitors such as price determination, information on customers, suppliers, regions or trade channels, quotas and supply restrictions, collusive tendering, future pricing intentions or the planned amount of production or sale;
- ii. the determination of the buyer's fixed or minimum selling prices in the relationship between undertakings operating at different levels of the production or distribution chain,

which have the purpose of directly or indirectly prevent, distort or restrict competition in goods or services markets, or which may result in the same effect.

De Minimis Thresholds

In line with the Draft Communiqué, the Communiqué provides that the following are deemed not to restrict competition appreciably:

- Agreements between competitors where the aggregate market share of the parties to the agreement does not exceed 10% in any one of the markets affected by the agreement;
- Agreements between non-competitors where the aggregate market share of the parties to the agreement does not exceed 15% in any one of the markets affected by the agreement; or
- Decisions of association of undertakings where the aggregate market share of the members does not exceed 10% in any one of the markets affected by the decision.

In cases where it is not possible to classify the type of the agreement between the parties, the 10% threshold will be applied.

If parallel networks formed by vertical restrictions of similar nature cover more than 50% of the relevant market, the thresholds stated above will be applied as 5% in terms of agreements and decisions between both competitor and non-competitor undertakings.

Agreements or decisions will be presumed not to restrict competition if market shares of the parties or members of the association of undertakings in the relevant affected market are (i) above the thresholds specified above, and (ii) does not exceed the thresholds by more than 2% points within two consecutive calendar years, during the period of the agreement or decision.

How the market shares will be calculated?

When calculating market shares, the sales value or, where appropriate, the purchase value will be taken as a basis. If sales / purchase value information is not available, estimations based on other reliable market data can be used for the purposes of market share calculations.

In terms of the application of thresholds set out in Article 5, the market shares calculated by using the previous year's data for each calendar year in the agreement or decision period. In addition, the total market shares of economic units regulated under Article 8 of the Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Boards numbered 2010/4 (the **Communiqué No. 2010/4**) will be taken into account in the calculation of market shares.

Investigations by the TCA

Agreements and decisions which do not restrict competition in the relevant markets as per Article 5, may not be subject to investigations of the TCA.

In the event that an investigation has launched against undertakings for reasons such as failure to determine the market shares of the parties, and if it is understood during the investigation process that the market shares of the parties do not exceed the thresholds set out above, then the TCA may terminate the investigation.

The Communiqué, will also be applied to the ongoing investigations as of the date of its entry into force (i.e 16 March 2021).

Conclusion

The Communiqué has been considered as a very useful change in the Turkish competition law practice. Given the ever-increasing workload of the TCA, the Communiqué may allow the TCA to prioritize more severe violations of the competition law. The Communiqué will also reinforce Turkey's continuous work to align its legislation with the EU.

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