GEDİK & ERAKSOY

Significant Changes Introduced to the Law on the Protection of Competition

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Background

The long-winded story of the proposed amendments to the Law No. 4054 on Protection of Competition (the **Competition Law**) has finally come to an end. On 16 June 2020, the Turkish Parliament passed the Law No. 7246 on the Amendment of Law on the Protection of Competition (the **Law No. 7246**). The amendments proposed by the Law No. 7246, which came into force through publication on the Official Gazette on 24 June 2020, are by and large in line with the European Commission's practice and introduce significant changes that aim to solve competition law problems experienced in practice.

Significant Changes Introduced

The key amendments introduced by the Law No. 7246 can be summarized as follows:

➢ Self-Assessment in Individiual Exemptions

Article 5 of the Competition Law sets out the conditions for potentially anti-competitive agreements, concerted practices and decisions of associations of undertakings to benefit from an individual exemption (i.e., an immunity) from the application of Article 4, which prohibits anti-competitive agreements, concerted practices and decisions of associations of undertakings. Up until 2005, undertakings or associations of undertakings had been under the obligation to notify the Turkish Competition Authority (the **TCA**) so that the Competition Board (the **Board**), the decision making body of the TCA, could issue a decision declaring that the relevant agreements, concerted practices or decisions gualify for individual exemption. When this notification obligation was removed from the text of the law in 2005, it was interpreted by all stakeholders (including the scholars, practicioners, and even the enforcers such as the TCA and the courts) that parties could now make self-assessment to decide whether their relevant practices are immune from enforcement under Article 5 of the Competition Law. However, the wording of Article 5 was a bit vague in that sense because the relevant provision still seemed to require the Board's decision to conclude that the conditions for individual exemption are met. Therefore, the Law No. 7246, by way of minor changes to the wording of the Article 5 of the Competition Law, clarifies this procedure and makes it clear that self-assessment is possible. However, it looks like there is a by-product of this change: by enhancing the possibility of self-assessment and diminishing the requirement for a decision of the Board, the Law No. 7246 paves the way for civil courts intervening into this area and making their own individual exemption assessments in follow-on damages actions stemming from violations of Article 4. The future will show how private enforcement practice will evolve on this area.

➢ SIEC Test in Merger Reviews

Competition Law prohibits mergers that create or strengthen a dominant position as a result of which effective competition would be significantly impeded. The former EU Merger Regulation had the same wording, but it was criticised for putting dominance as a single and sufficient criterion in assessing mergers. Therefore, the substantive test in analysing mergers, known as "SIEC" test, was reformulated in 2004. Under the EU's current regime, only mergers which would significantly impede effective

competition, in particular by the creation or strengthening of a dominant position, are prohibited. Thus, the lessening of competition became the main factor of analysis under the SIEC test, allowing more room for economics and efficiency-based analysis. The same approach, is now adopted in the Competition Law. Therefore, from now on, the TCA will be able to prohibit a transaction which significantly reduces competition, even though it does not necessarily creates or strengthens a dominant position.

➢ Structural Remedies to Eliminate Anti-Competitive Conduct

In addition to the TCA's existing powers, which allowed the TCA to impose behaviroral remedies, the Law No. 7246 empowers the TCA to also impose structural remedies to fix market failures caused by anti-competitive conducts of the undertakings (*i.e.* anti-competitive agreements, abuses of dominant position, mergers impeding competition). In this regard, for example, the TCA can now force an undertaking to sell a business unit, which the TCA believes has been the source of anti-competitive conduct. However, it should be stressed that, as per the amended provision, the TCA is authorised to impose structural remedies only if behavioural remedies are insufficient. Therefore, structural remedies will have to be treated as last-resort remedies.

➢ Settlement and Commitment Procedures in TCA Investigations

One of the most significant changes introduced by the Law No. 7246 is the option to reach a settlement with the TCA during an investigation. Pursuant to this rule, before the investigation report is duly served to the investigated parties, the TCA may, *ex officio* or upon parties' request, settle with such parties who acknowledge their participation in, and liability for, conduct which violates the Competition Law. Following the settlement procedure will lead to a decution in the administrative monetary fine to be applied to the relevant party by up to 25%. It should, however, be noted that completion of the settlement procedure will preclude parties from filing a lawsuit before the competent courts against the TCA's decision, which will include the determination of violation and imposition of an administrative fine.

Another important feature brought by the Law No. 7246 is the commitment mechanism during the TCA investigations. This mechanism allows the Board to not open an investigation or close an existing one, if the Board accepts the commitments made by the parties to bring a suspected behaviour to an end and to satisfy the Board's concerns arising from the anti-competitive conduct that may be subject to an investigation. However, the Board is entitled to reopen the proceedings if: (i) any of the facts that was a basis of the decision significantly changes, (ii) the undertaking concerned does not comply with its commitments or (iii) it becomes evident that the decision (i.e. not opening or terminating an existing investigation) was based on fallacious information. It should also be noted that this mechanism will not be applicable for hard-core restrictions on competition, such as price-fixing, market sharing, or supply restriction. Pursuant to the amended Article 43 of the Competition Law, TCA will set the details of commitment mechanism by way of a communiqué.

➢ On-site Investigation Procedures

As per the amended Article 15 of the Competition Law, the TCA may seize and obtain copies of any physical or electronic data and documents during on-site investigations. The previous wording of the relevant provision did not include a reference to electronic data. However, this will not lead to a significant change in practice as the TCA has been taking copies of electronic data (such as e-mail exchanges) for long time. Although heated debates have been taking place on media in terms of private property-related concerns, the Law No. 7246 only sets the legal framework of the TCA's current practice

and do not bring any structural changes to the on-site investigation procedures. According to the parliamentary commission minutes regarding the amendment discussions in which the President of the TCA's statements may also be found, private properties, such as personal mobile phones and computers, are not within the scope of the TCA's on-site investigation powers. However, it should be noted that, as seen in some of the recent Board decisions, the TCA can review and take a copy of the exchanges made through media platforms (such as Whatsapp) from the company mobile phones and computers.

- **"*De Minimis*" Principle**

The Law No. 7246 further introduces the "*de minimis*" principle to the current regime. Pursuant to this principle, agreements of minor importance in terms of competitive concerns which do not appreciably restrict competition may not be investigated by the TCA. It should however be noted that this principle will not apply to hard-core restrictions on competition, such as price-fixing, market sharing, or supply restriction. According to the amended Article 41 of the Competition Law, in order to apply this rule, TCA will issue a communiqué in which it will quantify, with the help of market share and turnover thresholds, what does not amount to an appreciable restriction of competition under the Competition Law.

Conclusion

The Law No. 7246 aligns Turkish competition legislation with those of the EU, and sets the legal framework of current practices. Undoubtfully, the Law No. 7246 contains certain loose ends as to implementation of the newly introduced mechanisms and procedures, but these are expected to be clarified by the TCA, by way of issuing secondary legislation and guidelines.

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