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Evaluations on recent amendments to the Law No: 4054 on Protection of Competition

The Law No. 7246 ("*Law No. 7246*") regarding an amendment to the Law No. 4054 on Protection of Competition ("*Competition Act*") has finally been approved by the Grand National Assembly of Turkey and entered into force within Official Gazette dated 24 June 2020. Competition Act has been in force without any significant amendments since 1994. Recent amendments bring changes, as well as introduce new instruments for competition enforcement.

Hereby, it is aimed to refer to the most prominent changes introduced by this proposal and make an assessment in this regard.

- **Amendments to the merger and acquisition transactions**

Within the amendments, the test applicable to review of the mergers and acquisitions is changed. Before the Law No. 7246, the Turkish Competition Board ("Board") evaluated whether mergers create or strengthen dominance of an entity with "dominant position test". Within aforementioned amendments, Board will use "significant impediment of effective competition" test in order to assess whether a transaction creates or strengthens a dominant position or not. Purpose of this change is to allow a more definite and reliable assessment for the situations emerged from such transactions and to prohibit transactions that may cause a significant impediment of competition along with the transactions creating or strengthening dominance.

- **De minimis principle**

Introduction of the "de minimis" principle *(insignificant restriction of competition)* is one of the most important changes in the Law No.7246. De minimis principle will be applied in preliminary investigation procedures and pursuant to amendments to the Article 41, Board will be able not to commence an investigation into contracts, concerted practices and decisions of association of undertakings which are below the certain market share and turnover thresholds determined by Board. Hard-core restrictions such as territory or customer sharing, control of supply and price fixing will be exempted from this principle.

- **Collection of data during on-site investigation process**

The Law No.7246 also includes a provision that the authority is empowered to analyze and make copies of books, any data kept within physical and electronic environment and information systems during on-site inspections.

- **Structural and behavioural remedies for anti-competitive conduct**

The Law No.7246 aims to entitle the Board to the power to apply structural remedies for anti-competitive conduct infringing Articles 4, 6 and 7 of the Competition Act, provided that behavioural remedies are first applied and failed. Accordingly, at least 6 months will be given to the related undertaking to comply with the structural remedies determined by the Board. It should be noted that, both behavioural and structural remedies should be proportionate to and necessary to end the infringement effectively.

At this point, as expressly mentioned in the preamble of the The Law No. 7246, structural remedies come into the view as an exceptional method and provides protection for the undertakings against the precautions that may be taken by the Board since it is the condition that the behavioural remedies shall be initially applied to and such remedy shall remain inconclusive.

- **Settlement and commitment mechanism**

According to the amendment that made within the scope of Article 43, in the investigations initiated by the Competition Authority, settlement and commitment methods are introduced and a time limit is set for entities to introduce their settlement submissions, including explicit acceptance of the violation. According to the Law No.7246, it is possible to settle with an undertaking or associations of undertakings which an investigation is initiated upon them and accepts the existence and scope of the violation until the investigation report is served. Board is entitled to reduce the administrative fine up to 25% for the violation, once the settlement submission is filed.

Within Law No.7246, commitment procedure will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns regarding Articles 4 and 6 of the Competition Act. If commitments will be deemed as sufficient to eliminate competitive concerns, the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to end an on-going investigation without completing the entire investigation procedure. However, commitments regarding explicit and gross violations such as territory or customer sharing, control of supply and price fixing will not be accepted. The Board will provide the details of these new procedures by secondary legislation.

Within the aforementioned amendment, the Board is allowed to reopen an investigation in the following cases:

a) substantial change in any aspect of the basis of the decision,
b) the relevant undertakings' or association of undertakings' non-compliance with the commitments,
c) realization that the decision was made on deficient, incorrect or fallacious information provided by the parties.

There are two issues that may be taken into consideration in this amendment. Firstly, behavioural and structural remedies are currently being applied to in practice for the merger & acquisition transactions even though the term “commitment” has already been included within the heading and the content of the investigation provision of the Competition Act and some amendments have been made accordingly. In other words, it is understood that the term “commitment” will have a broader application than the merger & acquisition transactions with this new amendment. Accordingly, it is possible to state that there is a need for new regulations on how these commitments shall be applied to, otherwise the lack of such regulation may cause some indefinite and broad implementations of this provision.

The second issue is to determine the exact meaning of the term of “settlement”. At this point, the Regulation on the Active Cooperation for the Exposure of the Cartels (“Regulation”) may be a guide in this regard. According to the Article 5 of the Regulation;

From the decision of the Board to conduct a preliminary investigation until the notification of the investigation report, the penalties to be given to undertakings that provide the information and documents and fulfill the conditions specified in the Article 6 of this Regulation separately from its competitors, but cannot benefit from the regulation regarding the non-punishment provision stated in the Article 4 will be reduced. In this case, the penalties to be imposed on the managers and employees of the undertakings that accept the violation and cooperate actively will also be reduced. In this context; a) The penalty for the first undertaking is reduced between one third and one half. In this case, the penalties to be given to managers and employees who accept violations of the undertaking and actively cooperate may be reduced not less than one third or may not be given. b) The penalty for the second undertaking is reduced between one fourth and one third. In this case, the penalties to be given to managers and employees who accept violations of the undertaking and actively cooperate may be reduced not less than a quarter or may not be given. c) Penalties for other undertakings are reduced between one sixth and one fourth. In this case, the penalties to be given to the managers and employees who accept violations of the undertaking and actively cooperate may be reduced not less than one sixth or may not be given.
As a result of the evidence presented, if the penalty should be increased due to the prolonged duration of the violation and similar reasons, undertaking that first submitted the relevant evidence, and the managers and employees of this undertaking who accepted the violation and actively cooperated will not be affected by increase of penalties.

It is probable to face with some difficulties in practice between the terms of “settlement” and “cooperation” particularly for the investigations made on the cartels and to cause some hesitations on the implementation of the discount rates for the penalties.

- **Self-assessment procedure**

Despite the fact that the purpose of the amendment regarding self-assessment principle is to provide legal certainty as to the individual exemption regime by clarifying that the "self-assessment" principle which applies to agreements (as well as concerted practices and decisions of associations of undertakings) that may potentially restrict competition, the relevant amendment also causes some uncertainty on the implementation of the exemption regime.

It is determined in the Law No.7246 that the agreements, concerted action and decisions made between the undertakings may be exempted from the application of the Article 4 of the Competition Act provided that “the determined conditions fully exist”. Accordingly, even though there is still an opportunity to apply for an individual exemption, the expression in the old regulation stating that “decision on the exemption may be taken” has been replaced with the expression of “such act is exempted”. This amendment proves that the legislator tries to strengthen the system in which there is not a need for an application for individual exemption and self-assessment procedure is sufficient in this regard. At this point, it is possible to state that this provision may cause uncertainty on how the assessment of the agreements included within the group exemption will be made and what the consequences of the lack of one of these conditions are for the group exemptions.

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Conclusion

The Law No.7246 contributes to an improvement of the essential principles of the Competition Law by providing a different perspective, however, it leaves some points open and brings issues into question regarding the meaning and the assessment of the relevant amendments in practice. Notwithstanding, in the light of these amendments, it is possible to state that the Law No.7246 essentially (i) clarifies certain mechanisms in the Competition Act which might have led to legal uncertainty in practice to a certain extent, and (ii) introduces new mechanisms as to the selection of more significant violations and cases for the Authority to focus on, and solutions such as a new substantive test for merger control, and underlines behavioural and structural remedies in order to prevent anti-competitive conducts, and brings Turkish competition law closer to the EU law.