

# New commitment mechanism turns the tide in ongoing investigations

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## Introduction

On 24 June 2020 Law 7246 Amending the Law on the Protection of Competition entered into force and introduced significant changes to Turkish competition law, including with regard to the commitment mechanism. The commitment mechanism allows undertakings and trade associations to make commitments in the course of an ongoing preliminary investigation or a full-fledged investigation process to address competition concerns (except hardcore violations) arising from Articles 4 and 6 of Law 4054 on the Protection of Competition, which are equivalent to Articles 101 and 102 of the Treaty on the Functioning of the European Union prohibiting restrictive agreements and the abuse of dominance. The mechanism aims to address anti-competitive effects in a timely and effective manner and save time and red-tape costs incurred by both the Turkish Competition Authority (TCA) and undertakings subject to investigation, as stressed by the vice president of the Ministry of Trade.<sup>(1)</sup> Further, it is generally in the parties' best interest to avoid significant administrative fines and negative publicity as a result of possible violation decisions.

Although the secondary legislation with regard to the implementation process has not yet been published, on 27 November 2020 the TCA launched a public consultation for its draft Communique on Commitments Offered During Preliminary Investigations and Investigations on Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. The draft communique will enter into force in the near future. In the meantime, the Competition Board has already implemented the commitment mechanism in three cases so far, one of which resulted in failure due to the application's timing.

To shed light on the newly introduced commitment mechanism in Turkey, this article discusses the key points of the draft communique and the early signs of implementation by the Competition Board in light of its initial decisions involving commitment mechanism.

## Draft communique

Reviewing the draft communique, it is possible to observe that the TCA is sensitive to the timing of submissions as it aims to save red-tape costs with the commitment mechanism from a public policy perspective.

Accordingly, the draft communique requires undertakings to communicate their intention to engage in the commitment process within three months of the legal service of the investigation notice. Therefore, unlike the situation in the European Union, the draft communique provides a specific period for the submission of the commitment. Following the request for the commitment procedure, the TCA initiates the negotiation process, which may be conducted via written correspondence or verbally.

The draft communique sets out that commitments are expected to be proportional with the severity of violations and must address violations efficiently within a short period. It provides that both structural and behavioural commitments are acceptable.

In the assessment process, the Competition Board may consult third parties, including the complainant, with regard to the commitments proposed and take their opinions into consideration. If the board deems the commitments adequate to address anti-competitive concerns, they become binding for those that submitted them on the board's decision. Moreover, if the board finds the parties' proposed commitments inadequate in eliminating the violation, it can:

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- request the parties to amend the commitments (which can be made only once); or
- terminate the commitment process.

Accordingly, termination of the commitment process may occur where undertakings:

- fail to submit commitments within the period determined by the TCA or the Competition Board; or
- withdraw their commitments at a later stage.

Once the commitment process is terminated, parties cannot negotiate or offer new commitments to the TCA.

Over the implementation period, the TCA monitors undertakings' compliance with the commitments directly or indirectly through periodic notifications by the concerned undertakings or a trustee or by cooperating with professional associations or relevant public authorities. Following the performance of all commitments, the concerned undertakings notify the TCA of their full compliance with the commitments and the Competition Board renders a decision confirming their full compliance.

On the other hand, there are many points which are either not covered or left vague under the draft communique, such as the scope of application and the penalties for failing to comply with commitments. The draft communique also does not clarify the situations where the relevant undertakings offer commitments that are beyond the necessary extent.

The abovementioned points are a part of the initial draft; they are not yet in force and might be subject to changes after the public consultation. Therefore, to develop a better understanding as to the commitment mechanism under Turkish law, it is crucial to examine the Competition Board's initial approach in the recent decisions where the investigated undertakings offered commitments.

### **Competition Board's initial decisions**

To clarify the implementation of the commitment mechanism under Turkish competition law, the initial decisions rendered by the Competition Board are summarised below.

#### ***Arslan Nakliyat***

The Competition Board rendered the first commitment decision in *Arslan Nakliyat*,<sup>(2)</sup> where the company allegedly engaged in price fixing and a customer allocation agreement within a transport association (ie, Ege Konteyner Nakliyecileri Derneği Arslan Nakliyat San ve Tic AŞ (Arslan Nakliyat)) filed for commitments on 9 July 2020, five months after the completion of investigation process.

The Competition Board refused to assess the merits of Arslan Nakliyat's submitted commitments because it had submitted the commitments after the investigation stage was finalised. The board emphasised that in order to assess the commitments, the investigation should be ongoing; in other words, the investigation should not have been finalised at the date of submission. Moreover, in the decision, case handlers opined that Arslan Nakliyat's application should be rejected as the violations reviewed by the board relate to hardcore restrictions, which fall outside the scope of the commitment mechanism. Therefore, the first commitment attempt in Turkey culminated in failure on the procedural grounds.

#### ***Havaş***

Another noteworthy decision by the Competition Board concerns a full-fledged investigation launched into the bonded temporary storage and warehouse services sector,<sup>(3)</sup> which may be considered as the first successful application of the commitment mechanism in Turkish competition law. Four service providers have allegedly abused their dominant position by restricting the transfer of imported goods to alternative warehouses through imposing a warehouse switch fee.

During the investigation process, one of the concerned parties (ie, Havaalanları Yer Hizmetleri AŞ (Havaş)) submitted certain commitments to end the ongoing investigation. Within six days after the commitment proposal, Havaş and the TCA held a meeting on 13 October 2020 and Havaş submitted its final commitment package to the TCA on 19 October 2020.

According to Havaş's commitment, it would put an end to charging warehouse switch fees and all other equivalent fees restricting customers' switch to alternative warehouses for a specific time period. Havaş further indicated that the proposed commitment did not require monitoring.

Despite the case team's assessment that the commitment proposal brought forward for a specific period should be revised in a way to be valid without any time limitation, to resolve the problem permanently, the Competition Board found Havaş's commitment proposal, as is, adequate to address the competition concerns arising out of the investigation. Therefore, the commitment process initiated by Havaş has been finalised within almost one month and thus, the investigation has been closed for Havaş as a result of its application.

However, the investigation is ongoing for the remaining three undertakings subject to the relevant investigation.

### **TSB/OSEM**

The Competition Board recently announced another decision in which it employed the commitment mechanism in an investigation initiated into the insurance sector on 29 August 2019.<sup>(4)</sup> The relevant decision relates to an investigation in which the board examined the allegations that:

- OSEM's practices on standardisation and certification services for damage repair centres and equivalent part suppliers and mass spare part purchases restrict competition; and
- OSEM's portal named 'Osem Portal', which is used within the damage management system, would render competitively sensitive information transparent in the market.

The commitments submitted by TSB and OSEM include:

- the submission of the transfer agreement to the TCA within one year following the legal service of the reasoned decision;
- the termination of the data processing services protocol between the parties; and
- obtaining the board members' undertakings to not use the information that they obtained within the scope of their duties at OSEM.

As the commitments were found sufficient to eliminate the competition law concerns, the Competition Board ended the ongoing investigation. It is remarkable under this ruling that the board has further tightened its assessment period to 15 calendar days after the submission of the final commitments within the scope of a commitment process. The board has also accepted the structural commitments together with the behavioural ones for the first time. The reasoned version of the board's decision will provide further details on the application of the commitment mechanism in this investigation.

### **Comment**

The commitment mechanism is expected to bring many advantages to the enforcement of competition law in Turkey, cutting red-tape costs and bringing effective and immediate solutions for anti-competitive effects. The Competition Board's approach towards commitment procedure in its decisions will further shape the application of this procedure. Early signs of implementation are quite promising so far; however, the commitment mechanism's effects in the long run are yet to be seen on a larger scale. The communicate expected to be finalised in the near future will shed light on the implementation process and address private actors' questions.

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### **Endnotes**

(1) Bilgi University, Competition Law and Policy Research Centre, Conference on Amendments in Law 4054: Motives, Scope, Potential Impacts, Rıza Tuna Turagay, available [here](#).

(2) *Arslan Nakliyat*, 28 July 2020 (20-36/485-212).

(3) *Havaş*, 5 November 2020 (20-48/655-287).

(4) See the 11 January 2021 press release available [here](#). The reasoned decision dated 7 January 2021 (21-01/8-6) is yet to be published.

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