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Curated Content **Turkey:** Losing The Battle, Winning The War? – Ramifications Of The Newly Introduced Settlement Mechanism Under Turkish Competition Law

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(1) Introduction

Law No. 4054 on the Protection of Competition ("Competition Law") has recently gone through the most comprehensive set of amendments since its initial adoption back in 1994. Law No. 7246 on Amendments to the Law on Protection of Competition ("Amendment Law"),1 which entered into force on June 24, 2020, introduced several new mechanisms for the Turkish Competition Authority (the "Authority") to focus on and streamline certain of its processes, such as the de minimis principle in its selection of cases, a new substantive test for merger control, behavioural and structural remedies for anti-competitive conduct, and procedural tools including commitments and settlement.

Among these newly introduced mechanisms, the settlement procedure is a salient topic in terms of its actual implementation and potential consequences. Article 43 of the Competition Law, as amended, sets out the primary rules governing the settlement mechanism and provides that the Turkish Competition Board (the "Board"), ex officio or upon the investigated parties' request, can initiate the settlement procedure during full-fledged investigations. Accordingly, the Board is capable of settling with the parties that concede the existence and scope of an infringement, until the date the investigation report (which, similar to the statement of objections, is the main document setting forth the competition law concerns identified by the Authority) is officially served on the parties. In order for the parties to benefit from the settlement procedure, they must submit a settlement letter to the Authority within the peremptory time period determined by the Board. Subsequently, the investigation will be ended with a final decision, which will comprise the finding of a violation and the imposing of an administrative monetary fine. Should the investigation end with a settlement, the Board can reduce the administrative monetary fine amount by up to 25%. Finally, the administrative monetary fine and the matters under the settlement letter cannot be made subject to an appeal before the court. Other procedures and principles regarding the settlement procedure will be determined in due course through secondary legislation.2

(2) Notable differences with the settlement procedure before the European Commission

The Turkish competition law regime is closely modelled on and akin to the relevant legislation under European Union competition law in general, and the adoption of Amendment Law, in particular, is an attempt for further alignment in this respect. Having said that, at this stage there are certain crucial differences in terms of the settlement procedures.3,4

The first notable difference is that while the settlement before the European Commission (the "Commission") is only applicable to cartel cases, the process described under the amended Article 43 of Competition Law can be applied to all infringement types. Therefore, the investigated undertakings may ask the Authority for settlement, irrespective of the nature and type of the alleged infringement.

The wording of the relevant provision also gives the Authority the discretion to initiate the settlement proceedings, taking into account judicial economies and efficiencies, as well as any consensus (or lack thereof) regarding the existence and scope of the infringement.

Secondly, the applicable reduction on the monetary fine amount in case of settlement differs significantly. The Commission offers a reduction of 10% of the fine for settling a case, for each settling party. Meanwhile, the Board is equipped with a broad margin of discretion to determine the rate of reduction on the administrative monetary fine: the rate can be null or as high as 25%, as Article 43 of Competition Law does not foresee a scale or minimum rate on this front.

The third substantial distinction relates to the right to bring administrative proceedings against the settlement decisions issued, before the relevant courts. The settlement procedure before the Commission does not prejudice the parties' right to appeal after the settlement. To that end, even after a settlement is reached with the Commission, the relevant undertakings could still appeal the Commission's decision to the General Court.5 On the other hand, Article 43(8) of Competition Law explicitly stipulates that the settling parties cannot appeal the Board's decisions in the aftermath of the settlement.

(3) Potential positive and negative aspects/consequences of the settlement procedure

The settlement mechanism promises significant benefits for undertakings as well as the Authority, in both substantive and procedural aspects. First of all, the ordinary investigation procedure may be costly, time-consuming and burdensome in many cases for both the investigated undertakings and the Authority. The settlement mechanism allows for a streamlined procedural organization and enables the Authority to speed up the investigation process and the adoption of a decision. As such, the Authority would be able to reduce its workload and free its resources to deal with other cases, augmenting its deterrence effect. On the other hand, the investigated undertakings would get an opportunity to avoid a burdensome investigation process and save significant time, as well as legal fees. This would also allow the undertakings to keep their focus on their businesses, instead of dealing with the Authority throughout an investigation which usually takes more than a year to conclude.

The settlement mechanism has further advantages for undertakings. The most evident benefit is that a successful settlement procedure will result in a reduction of up to 25% on the amount of the monetary fines that the undertakings would normally have to pay. In order to create further incentive to choose the path of settlement, Article 43(7) of Competition Law stipulates that the fine reduction under the settlement procedure would not prejudice a further 25% reduction as per Article 17 of the Misdemeanours Law No. 5326, which is granted to the undertakings for early payment of the fine in accordance with the General Communiqué No. 442 on Collection.

Moreover, the investigated undertakings might be more inclined to choose the settlement option, given that it allows for extensive communication with the Authority throughout the process compared to the standard procedure. By engaging in a dialogue with the Authority, the undertakings may have the chance to further grasp the case handlers' views regarding the facts of the case, as well as any aggravating and mitigating factors they are focusing on. The ability to engage in an open and immediate dialogue with the Authority would also let the undertakings make an informed choice with respect to the settlement procedure. However, this would depend on to what extent the Authority would be willing to engage in open communication, as well as the availability of information and flexibility of the Authority on a given case.

While a reasoned decision as a result of a standard investigation process would inevitably delve into a thorough analysis of the merits of the case, settlement decisions might reveal relatively limited information as to the facts of the case and the Board's detailed assessments on this front.

This might be in favour of the settling undertakings to a certain extent, by way of limiting the level of ammunition that would be available to the potential damage claimants.

Be that as it may, it would not be realistic to turn a blind eye to what are reasonable concerns on the potential negative outcomes. While the settlement mechanism could lead to considerable efficiencies for both counterparts, it also raises serious questions as to its effectiveness and how its actual implementation will take shape. First of all, the underlying uncertainty with respect to the implementation of the fine reduction rate by the Board might constitute a drawback, particularly in the absence of a settled case law on this point. Although the Board may apply a reduction rate up to 25% of the monetary fine, Competition Law does not foresee a minimum rate and thus allows the Board a very wide margin of discretion. Besides, it is not clear how the Board would take into account and implement the principles set forth under the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("Regulation on Fines") when determining the initial fine which would be subject to a reduction under the settlement procedure. Without this knowledge, certain undertakings may prefer not to be the pioneers to test the waters, which could cause the settlement mechanism to be ineffective off the bat for quite some time.6

The fact that the Authority may settle with the undertakings until the official service of the investigation report could also further complicate the decision to pursue a settlement in the absence of certain assurances and leeway. In most cases, the undertakings get the chance to fully understand the precise scope of the allegations they are faced with, only with the service of the investigation report. Therefore, many undertakings would be in a position to try pursuing settlement negotiations, which requires them to acknowledge the existence and scope of an infringement, when in fact they do not have a proper comprehension of the alleged infringement. This might lead the undertakings to remain relatively sceptical about the allegations and settling and thus, continuing with the standard procedure might appear to them as the preferable choice, strategically. Such potential concerns might be alleviated via rules to be set forth under the secondary legislation.7 To that end, one of the essential points would be whether the Authority will issue an investigation report within the scope of settlement procedure as well, and whether the parties will be allowed to respond to the investigation report by confirming their commitment to settle. It also remains to be seen whether the Authority will retain the sole discretion to discontinue the settlement process once the process has been formally initiated.

Furthermore, the undertakings may not find it entirely beneficial to acknowledge the existence of an infringement without pursuing a full legal battle, taking into account the loss of reputation they could face. It is also almost impossible to know whether the settling undertakings would get a better deal than the non-settling undertakings within the scope of the same case. Many undertakings would weigh whether they would be better off if they went to all lengths and contested the Authority's allegations, which could be costly; or concede the infringement and avoid a burdensome proceeding, which could potentially hurt their commercial reputation as a result. It would indeed be a tough choice and there is no guarantee that the pros of the settlement option would overall outweigh its cons. This is of great importance when it comes to multinational undertakings, whose similar behaviour could be simultaneously investigated in multiple jurisdictions. In that case, it could be strategically unreasonable and out of question to settle in one or even more jurisdictions, given that this could damage an undertaking's position in the remaining jurisdictions. Another issue with multinational undertakings is that these undertakings may consider that settling in one jurisdiction would not compensate for the loss of reputation which could potentially have global consequences. In this respect, the accessibility/discoverability and publicity of the settlement submissions will be of utmost importance.

Given that it will not be possible to appeal the Board's decision rendered after the settlement, the investigated undertakings may be reluctant to prefer the settlement procedure. One cannot exclude the possibility that the Board's decision may not completely reflect the expectations of the undertakings with respect to the determination of the original fine, the reduction rate or the scope of the infringement.

Accordingly, the undertakings might prefer fighting their way through, instead of taking a leap of faith. Such decision making process would be heavily affected by the level of transparency that the Authority will allow during the settlement processes, as well as the consistency in its approach.

In any event, settlement decisions might inescapably turn into shackles for the settling undertakings within the scope of potential private lawsuits for compensation of damages. The acknowledgement of an infringement could be used as evidence in the potential damages actions against the settling undertakings and weaken their defences in those legal battles. This is particularly important as claimants of such cases, if successful, are allowed to recover three times their losses as compensation pursuant to Article 58 of Competition Law. It is vital to see how the courts in these cases will view the settlement decisions, and whether they will consistently render decisions to the detriment of settling undertakings in the future.

(4) Conclusion

Some of the unknowns of the settlement mechanism, including the application of principles in the Regulation on Fines or the determination of the fine reduction rate could be eliminated by way of secondary legislation. That being said, the undertakings may still have different assessments on whether the benefits of settlement outweigh its adverse aspects under various scenarios and remain hesitant to opt to settle. Accordingly, the question of whether settling and surrendering in the legal battle before the Authority would actually result in winning the war for the investigated undertakings remains to be answered for now, especially until a settled decisional practice by the Board. In order to render the settlement option more acceptable and attractive for undertakings, as well as to encourage their reliance on the settlement procedure, the Authority may decide to be as transparent and instructive as possible when reaching out to the undertakings. As the Authority's approach towards the undertakings and the Board's decisional practice unfold in the upcoming years, it will further shed light on whether the downsides of settlement overshadow its benefits.

Footnotes

1. Amendment Law was published on the Official Gazette dated June 24, 2020 and numbered 31165.

2. As of the publication date of this article, there are not any concrete insights on the potential scope of the relevant regulation or its targeted promulgation date.

3. Commission Regulation (EC) No 773/2004 of 7 April 2003 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ L 171, 1.7.2008, p. 3) ("Commission Regulation 773/2004")

4. Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases, Official Journal C 167, 2.7.2008, pp.1–6. (the "Settlement Notice")

5. For instance, in Case T-95/15, the General Court annulled the fine for the first time on an appeal against a settlement decision of the Commission, finding that the Commission failed to explain why Bong AB, Groupe Hamelin SA and Printeos SA received different reductions to their penalties while their involvement was analogous (Case T-95/15, Judgment of the General Court of 13 December 2016, Printeos and Others v Commission).

6. By way of analogy, after the announcement of the Settlement Notice in June 2008, the first settlement decision was adopted by the Commission only in May 2010 (Case COMP/38511 DRAMs).

7. E.g. Paragraphs 20-27 of the Settlement Notice.