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The New Settlement Regulation Has Come Into Force

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Introduction

On July 15, 2021, the Turkish Competition Authority ("***Authority***") issued the Regulation on Settlement Procedure for Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position ("***Settlement Regulation***"), which was also published in the Official Gazette on the same day.[1]

The legal basis of the Settlement Regulation is Article 43 of the Law No. 4054 on the Protection of the Competition ("***Law No. 4054***") as amended by the Law No. 7246 on June 24, 2020.[2] As per Article 43 of the Law No. 4054, after initiating an investigation and before the investigation report is notified to the parties, the Board may, upon the request of the parties concerned or on its own initiative, commence the settlement procedure. The relevant article also provides that the rules and procedures of the settlement procedure will be established by a regulation to be issued by the Board.

In light of this authority on secondary legislation, the Board initially prepared a Draft Regulation on Settlements that was opened for public consultation in March-April 2021 ("***Draft Settlement Regulation***"); and the subsequent Settlement Regulation which has now been published is a result of the Authority's assessment of the opinions received within the scope of the public consultation.[3] Accordingly, this article aims to illustrate the main differences between the Draft Settlement Regulation and the Settlement Regulation.

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[1] The announcement can be accessed at the following link: https://www.rekabet.gov.tr/tr/Guncel/uzlasma-yonetmeligi-resmi-gazete-de-yayi-e0afe50e07e6eb118140005056b1ce21 (last accessed: July 26, 2021)

[2] *See* G. Gürkaynak, O. Onur Özgümüş, A. Göktuğ Selvitopu, Efe Oker, *Losing The Battle, Winning The War? – Ramifications Of The Newly Introduced Settlement Mechanism Under Turkish Competition Law*, Mondaq, August 11, 2020 for a more detailed assessment on the Law No. 7246 Amending the Law on the Protection of Competition, which introduced the settlement mechanism. (https://www.mondaq.com/turkey/cartels-monopolies/970552/losing-the-battle-winning-the-war-ramifications-of-the-newly-introduced-settlement-mechanism-under-turkish-competition-law) (last accessed: July 26, 2021)

[3] *See* G. Gürkaynak, Öznur İnanılır, Berfu Akgün, Buğrahan Köroğlu, *Newly Introduced Settlement Mechanism Under Turkish Competition Law*, Mondaq, April 8, 2021 for a more detailed assessment on the Draft Settlement

I. Initiating the Settlement Mechanism

The Settlement Regulation stipulates that the Board may delay rendering a decision under Article 5/1 regarding the parties` request to initiate settlement procedures, if a more detailed research is deemed necessary to reveal the nature and scope of the alleged violation.

In addition, Article 5/3 of the Settlement Regulation provides that if the Authority *ex officio* invites the investigation parties to settlement negotiations, the parties should declare whether they accept the invitation to initiate settlement negotiations with the Authority within 15 days, whereas the Draft Settlement Regulation had merely left it as "*within reasonable time.*" With this change, the relevant article has become more compatible with the principle of legal certainty and removed the ambiguity of the concept of "*reasonable time,*" which may have potentially resulted in the loss of rights on part of the investigated authorities, if they failed to pinpoint what the Board would consider to be "reasonable."

II. Settlement Negotiations

Article 6 of the Settlement Regulation concerning the negotiation phase, states that the settlement negotiations shall start *as soon as* the Board accepts the settlement request, or the investigation parties duly accept the Board`s invitation. As such, the Settlement Regulation has maintained the wording of the Draft Settlement Regulation. That said, had the Settlement Regulation set forth a specific time for the initiation of the negotiation phase, it would have served better in terms of legal certainty.

In a similar vein, Article 6/5 of the Settlement Regulation has removed the burden for the case handlers to inform the undertakings about the "*duration*" of the alleged violation. However, it would have been more accurate in terms of legal certainty, if the Settlement Regulation had kept the reference to the "*duration,*" as well as adding the requirement for undertakings to acknowledge the time interval in which the violation is evaluated. The Settlement Regulation has made the same change in the wording of Articles 7/1 and 9/2 pertaining to the interim and final settlement decisions, and removed the references to the duration of the infringement.

Regulation. (https://www.mondaq.com/turkey/cartels-monopolies/1055812/newly-introduced-settlement-mechanism-under-turkish-competition-law) (last accessed: July 26, 2021)

III. Settlement Letter

As per Article 8 of the Settlement Regulation, after the interim decision is issued, if the settlement parties agree on the matters set forth therein, they will submit a settlement letter which shall include *inter alia* an express declaration of admission as to the existence and scope of the violation. The extent of the admission requirement has been pared down from what was set out under the Draft Settlement Regulation, where the settlement parties had been obliged to admit the duration, consequences of the violation, and the liabilities arising from it.

One of the most significant changes in the Settlement Regulation is that if there are deficiencies in the submitted settlement letter, the Board will grant, for one time only, an additional period of seven days and notify the parties that the settlement procedure will be brought to an end if the parties fail to correct the deficiencies. This amendment in the Regulation will allow the parties an opportunity to correct a text that may have been inadvertently incomplete or mistranslated; and therefore prevent the intended procedural economy gains of the settlement procedure from being lost after the procedure was fully implemented.

IV. Finalizing the Settlement Procedure

The Settlement Regulation states that the Board must set out the reasons for its decisions (i) to terminate the procedure for the reasons stated under Article 4/6 or (ii) to reject the settlement request as per Article 5/1, in its final settlement decision. With the relevant change, the said Article became compatible with the duty of public authorities and administrations to give reasons and justify its decisions or actions.

Lastly, the Regulation has added a provision under Article 11, prohibiting the resubmission of a request for settlement in cases where (i) the process had not resulted in settlement, (ii) the invitation sent by the Board within the framework of Article 5 was not accepted, or (iii) the invitation was not answered within the time limit.

V. Reduction of Fines

Article 4/4 of the Settlement Regulation provides that the Board has the discretion to grant a settlement reduction between 10% and 25%, indicating that the actual reduction of fine due to settlement would not be less than 10%. With this minimum reduction rate, which was not present in the Draft Settlement Regulation, it is considered that resorting to the settlement mechanism has become more attractive to the undertakings under investigation.

Conclusion

Although the Settlement Regulation is quite similar to the Draft Settlement Regulation in essence, it still diverges from the Draft Settlement Regulation in certain aspects. The Settlement Regulation sets forth that the Board may delay its decision given under Article 5/1 if further detailed research is needed, and brings certain amendments in order to better observe the principles of legal certainty and reasoned decision-making. The Settlement Regulation also departs from the Draft Settlement Regulation by vesting the Board with the authority to grant an additional seven days` period if there are deficiencies in the submitted settlement letter. Therefore while it is noteworthy that the amendments to the Draft Settlement Regulation has made the settlement mechanism more attractive and bolstered the legal principles of the procedural efficiency, legal certainty, and administrative accountability, there may yet be a few issues that may need to be addressed in the future.

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