Unchartered Territories: A Comparative Study of the Newly Introduced Commitment and Settlement Mechanisms of Turkish Competition Law with the European Union Competition Law

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As explained in depth within the previous June 2020 issue of Legal Insights Quarterly[1], the Law No. 4054 on the Protection of Competition has finally been amended by the Grand National Assembly of Turkey. The amendments, which were accepted by the parliament and entered into force on 24 June 2020 ("***Amendment Law***"), introduced numerous novelties to the established practice with the overall aim of bringing Turkish competition law closer to European Union practice. These practices include a different selection mechanism for Competition Authority's cases, introduction of the SIEC[2] test for merger control and numerous procedural tools to increase efficiency of the Competition Authority.

This article aims to shed light on the newly introduced commitment and settlement mechanisms during anti-competitive behavior investigations. It should, however, be noted that the commitment and settlement mechanisms under Turkish competition law is not yet drawn out by secondary legislation or established by practice. As these mechanisms are inspired by the European practice, this article will examine the EU practice, together with current Turkish legislative framework.

(i) Settlement and Commitment Mechanisms under the Amendment Law

The Amendment Law introduces two new mechanisms inspired by EU competition law which aim to enable the TCA to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is a commitment procedure. This will allow undertakings or an association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the TCA's competitive concerns under Articles 4 and 6 of Law 4054, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the TCA can decide against launching a full-fledged investigation following the preliminary investigation or to end an on-going investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing and the restriction of supply. The TCA will provide the details of these new procedures by secondary legislation and may reopen an investigation in the following cases:

- a substantial change in any aspect of the basis of the decision;
- the relevant undertakings' non-compliance with the commitments; or
- the decision was based on deficient, incorrect or fallacious information provided by the parties.

The new law will enable the TCA, *ex officio* or at the parties' request, to initiate a settlement procedure. Unlike the commitment procedure, settlement could only be offered in full-fledged

[1] Legal Insights Quarterly, June 2020 issue (*see* https://www.gurkaynak.av.tr/docs/liq/June2020/#PDF/1, last accessed on August 7,2020).
[2] Significant impediment to competition test ("***SIEC test***")

investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The TCA will set a deadline for the submission of the settlement letter and, if settled, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the TCA can reduce the administrative monetary fine by up to 25%. Other procedures and principles regarding settlement will be determined by the TCA's secondary legislation. That said, technically both commitments and settlement could be offered in the ongoing proceedings as the Amendment Law is effective as of June 24, 2020.

(ii) Main Differences between the Commitments and Settlement Mechanisms under Law No. 4054

In order to provide more insight on the distinction between the commitment and settlement mechanism under Turkish competition law, below is a comparison of the two mechanisms. However, it must be noted that the secondary legislation is expected upcoming days, in which the below outline is awaited to be made more concrete.

- The commitment mechanism can be reenacted during both the investigation and preliminary investigation phases whereas the settlement mechanism can only occur the initiation of the investigation.
- There is no time limitation for the utilization of the commitment mechanism whereas the settlement mechanism can be used until the official serving of the investigation report (statement of objections).
- The commitment mechanism does not require for the undertaking in question to admit to the existence of a violation whereas the settlement mechanism requires the admission of the existence and the scope of the violation.
- There is no concrete time limitation for the completion of the commitment mechanism whereas for the settlement mechanism, the Board will set a definitive time period for the undertaking(s) in question to submit a commitment text. Settlement submissions after this deadline will not be taken into account.
- The commitment mechanism is not applicable to hard-core violations (such as price fixing between competitors, territory or customer sharing and the restriction of supply) whereas the Law No. 4054 does not specify a restriction for the scope of application for the settlement mechanism.
- In scope of the settlement mechanism, the undertaking in question cannot appeal the administrative fine and the matters within the scope of the final settlement text. This is not applicable to the commitment mechanism.
- The settlement mechanism may result in a %25 decrease in the administrative monetary fine.

(iii) Commitment Mechanism within the European Competition Law Practice

In order to shed light on the European Union practice, below is a brief summary of how the commitment procedure is conducted vis-à-vis the Commission. At this stage, it is unknown whether the Turkish Competition Authority will follow the below procedure as the secondary legislation has not been enacted yet.

1. The investigated undertakings expresses interest in submitting commitments;

2. Commission and the undertaking convene in a meeting (State of Play) and the Commission informs the undertaking during this meeting the timeframe for when the commitments will be submitted and the conclusion of the process;

3. Later on, if the Commission agrees that the case can be concluded by way of commitments, the Commission prepares a pre-assessment report to convey its competition law concerns for the case and conveys it to the investigated party. If the commitment procedure is initiated following the servicing of the Statement of Objections, the Commission does not prepare a pre-assessment report as the Statement of Objections correlates to the same content;

4. Once the pre-assessment report is served, the investigated parties have one month to officially submit the commitments;

5. Once the investigated parties submit their commitments, the Commission conducts a market test and makes the short summary of the case and the redacted version of the commitments public in order to enable third parties to submit their opinions;

6. If there is a complainant in the case, the Commission will specifically inform the complainant for its views;

7. A duration no less than one month is provided for third parties to submit their views;

8. The views of third parties are conveyed to the investigated parties and the State of Play meeting is held; additional time is allowed to the investigated party to revise its commitments;

9. The investigated parties revise their commitments; if the content of the commitments are substantially changed, the Commission may repeat the market tests;

10. Once the commitments are finalized, the Commission may decide to render a decision, making the commitments binding and concluding its assessment of the case;

11. If the investigated party does not wish to revise its commitments, the Commission would continue with its investigation of the case;

12. The Commission or the investigated party may at any point retract the commitments.

On an additional note, under European competition law, the investigations that were concluded with commitments, just as normal Commission decisions, is subject to judiciary review, if the annulment of the decision is requested. The relevant case grounds are cited in various sources as (i) the Commission's wrongdoing in strong arming the investigation parties to submit commitments, (ii) the rendering of a different set of commitments in the decision than those proposed by the Parties, (iii) non-abidance to procedural rules and (iv) the Commission strong-arming the undertakings to submit proportional commitments.

However, the appeals are very rare in practice as the commitments are voluntarily submitted and the commitment decisions do not contain a finding of guilt; therefore those undertakings subject of these decisions do not feel the need to appeal in general.

There is no clear indication in scope of Law No. 4054 that there will be no judiciary review after a commitment decision, like there is in the settlement procedure. Therefore, at this stage, it may be assumed that the commitment decisions can be taken to administrative courts.

Furthermore, in course of the commitment process and in scope of the analyses titled "*market test*", the commitments proposed by the Parties are submitted to opinions of third persons. If indeed the Commission is of the view that the commitments will mitigate the competition law concerns provided in the pre-assessment report, in accordance with Council Regulation (EC) No 1/2003, Article 27/4, analyses for the market test will be initiated. During the market test, which could be described as the most significant stage, essential elements of the commitments provided by the parties and subject to the analyses, will be published on the EU Official Journal under redaction and the redacted text of the commitments will be published on the Commission's internet page. A time period no less than one month is provided for third parties to submit their views during the market test stage. A press release is also published. As a result, upon the submission of the commitments, the commitment procedure does not remain confidential and is announced to the public.

(iv) Settlement Mechanism within the European Competition Law Practice

It is important to note that the main difference is that while the settlement before 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.

Below is a brief summary of how the settlement procedure is conducted in the European Union practice. It is still unknown whether the Turkish Competition Authority will follow the below procedure as the secondary legislation has not been enacted yet.

Initiation of proceedings

1. Parties are identified and recognized as parties to the proceedings (legal persons that a penalty may be imposed on for an infringement)

2. The initiation of proceedings can take place at any point until the date the Commission issues a statement of objections against the parties or parties express their interest for a settlement in writing. Initiating a formal proceeding against parties in view of settlement is a precondition. The Commission invites each party to confirm its interest in the process.

3. At this point, the Commission becomes the only competition authority that is competent.

4. Parties confirm their interest in writing in two weeks (this two weeks is also the final opportunity for the parties to apply for leniency). This confirmation does not mean that parties participated in an infringement. No liability can be attached to the parties by this confirmation.

5. It is in the Commission's discretion to disregard any immunity application that is submitted after the two weeks of time that is given to the parties.

Commencing the settlement procedure

6. Usually, the Commission's established practice is to set three formal bilateral meetings for the settlement discussions with each of the parties.

7. Information on essential elements will be disclosed in a timely manner. With this, parties will be able to assess whether they have a potential objection or they would settle.

8. Process of settlement discussion does not imply the existence of an infringement, the content of it cannot be used as evidence and this process is confidential. In this direction, liability and infringement can only be admitted once the settlement discussion is concluded.

9. The Commission may set a final time-limit of at least 15 working days for the party to introduce a final settlement submission.

10. Parties may call upon Hearing Officers during this procedure for effective exercise of the rights of defence.

Settlement submissions

11. If parties are willing to settle, they must make a formal request.

12. Parties cannot unilaterally revoke the settlement requests that have provided them unless the Commission does not meet the settlement requests.

13. Final decision should impose a fine which does not exceed the maximum amount indicated in settlement submission.

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. Under the current Turkish framework, -the settlement mechanism may result in a %25 decrease in the administrative monetary fine.

Another 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.[3] On the other hand, Article 43(8) of Law No. 4054 explicitly stipulates that the settling parties cannot appeal the Board's decisions in the aftermath of the settlement as explained above.

(v) Conclusion

This article contains a brief summary of the developments in Turkish jurisdiction as well as the practices of European Commission.. It is well known that the Law No. 4054 was amended to bring the

[3] 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).

Turkish competition law practice closer to the European practice. However, as of August 2020[4], the secondary legislation which will define how these amendments will be applied in practice. All in all, it is an exciting time to be a competition law practitioner in Turkey.

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[4] At the time of writing.