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Competition Authority's Singer investigation marks first simultaneous application of settlement and commitment

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Introduction

The changes to Law 4054 on the Protection of Competition (Law 4054), which introduced new commitment and settlement mechanisms, entered into force on 24 June 2020 with the Amendment Law. Its aim has been to promote efficiency and allow competition investigations to close before the entire process has concluded. Specific regulations regarding commitment and settlement mechanisms are set out in:

- the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position (Regulation 2021/2); and
- the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations (Communiqué 2021/2).

In light of the opportunities that Regulation 2021/2 and Communiqué 2021/2 have brought in terms of the procedural rules on settlement and commitment mechanisms, an increasing number of undertakings that are being scrutinised by the Competition Authority are opting to apply for such mechanisms.

The Turkish Competition Board recently published two separate decisions (collectively the "*Singer* case") regarding the full-fledged investigation that had been launched against the company Singer Dikiş Makineleri Ticaret AŞ on the grounds that it violated article 4 of Law 4054. During the investigation, Singer applied to both settlement and commitment mechanisms. While Singer submitted its commitments addressing the deletion of the non-compete clause, it also applied before the Authority for conclusion of the investigation through settlement mechanism by accepting its resale price maintenance violation. The *Singer* case, in which the Authority conducted settlement and commitment procedures, highlights both of these newly introduced mechanisms in Turkish competition law.

Background

The Board launched a full-fledged investigation against Singer following a complaint made by a distributor of its competitor, which was active in the same market. The distributor claimed that Singer was in a dominant position in the market for household sewing machines and hindered the activities of the competitors by its practices, which caused de facto exclusivity. As the Authority found evidence indicating that Singer might have been involved in resale price maintenance, the investigation also focused on findings that supported those suspicions. In addition, the Board found that dealership agreements between Singer and its dealers, which were discovered during on-site investigations, included a non-compete clause effective for an indefinite period. Such a provision falls outside the safe harbour provided in the Block Exemption Communiqué on Vertical Agreements Communiqué 2002/2 (Communiqué 2002/2).

Singer's settlement and commitment applications

During the investigation, Singer made a settlement application on 18 May 2021. Following the settlement application, Singer liaised with the Authority, made another settlement application on 27 May 2021 and applied for commitment on 28 May 2021. The Board evaluated Singer's applications and accepted them on 3 June 2021. The commitment and settlement negotiations with the parties started on 23 June 2021.

Firstly, the Board stated that allegations made against Singer could be analysed under two main categories:

- resale price maintenance and interference of online sales to that effect; and
- non-compete clauses set out in Singer's distributorship agreements.

The Board stated that categorising these two actions was crucial in terms of evaluating the settlement and commitment applications, since naked and hard-core infringements might benefit from the settlement mechanism, while applications for commitment regarding such infringements were to be rejected under Communiqué 2021/2.

The Board continued its assessment with reference to the definition of the naked and hard-core infringements made under article 4 of Communiqué 2021/2. Despite the fact that Regulation 2021/2 did not provide a specific definition of "naked and hard-core infringement", Communiqué 2021/2 clearly regulated resale price maintenance as an infringement of this type. Therefore, the Board highlighted that resale price maintenance applications should be considered under the settlement mechanism. On the other hand, the non-compete clause included in Singer's dealership agreements was evaluated under commitment mechanisms, as such behaviour did not fall into the scope of behaviours constituting naked and hard-core infringements under relevant legislation.

Assessment on resale price maintenance and implementation of settlement mechanism

In the *Singer* settlement decision,[(1)] the Authority found certain email and WhatsApp correspondences between the Singer's employees,

including various online resale prices of Singer products, which signified close and constant monitoring of the prices of different product models of Singer's sales points, and reporting of such information to Singer executives. The Board evaluated the correspondence obtained within the investigation and found that Singer had been interfering with the resale prices through its general sales policy and the undertakings that did not comply with the resale prices that were imposed by Singer were punished by being offered the lowest possible discount rates and/or supply restrictions. In addition, the Board noted that dealers who insisted on not complying with the resale prices that Singer imposed were threatened with termination of dealership. The Board highlighted that such acts were pursued systematically to ensure deterrence, thus they were sufficient to restrict competition. Consequently, the Board stated that Singer had made a considerable effort to make its dealers comply with the resale prices with the purpose of restricting competition.

The Board evaluated the evidence by referring to many of its previous decisions and emphasised that one of the criteria sought while evaluating resale price maintenance was the existence of systematic application. The Board also stated that in, its previous decisions, it had also evaluated whether the non-compliance with the resale price maintenance of the supplier resulted in the implementation of certain penalties, and the results of such monitoring and penalty mechanisms. Despite there being specific examples to the contrary, the Board emphasised that its precedents since 2011 showed that resale price maintenance was considered as a "by object" restriction.

The Board also evaluated the vigorous efforts of Singer to maintain resale prices on the online markets and stated that such behaviour fell within the scope of paragraphs 21, 24 and 28 of the Guidelines on Vertical Agreements. The Board ultimately concluded that Singer's attempts to maintain the resale prices on online markets should be considered together with its resale price maintenance practices, which constituted a single infringement. The Board highlighted that in email correspondences obtained during on-site investigations, Singer requested its dealers not to make sales through Amazon (an online marketplace), and stated that no product would be supplied to those who continued to sell through Amazon. However, the Board stated that aimed sales restrictions were only directed to Amazon and the reason behind it was to control online sale prices. In inter-company correspondences between different offices of Singer, it had been stated that undertaking sales through Amazon was lowering the prices, and such a situation resulted in reduced sales numbers .

The Board also noted that sales made via the Internet prevented Singer from monitoring compliance with the prices it had determined. Eventually, the Board found the aim of the restriction of online sales was to control resale prices. In addition, the Board concluded that, in certain instances, resale price maintenance might be complementary to securing the deterrence and effectiveness of resale price maintenance. As a similar situation was seen in the *Singer* case, the Board evaluated the restriction of online sales and resale maintenance to be a single action within the scope of the settlement mechanism.

In light of the above, the Board concluded that Singer had violated article 4 of Law 4054 by way of resale price maintenance. The Board further evaluated whether the behaviour at hand satisfied the criteria of individual exemption under article 5 of Law 4054. The Board stated that, considering the relevant product market (ie, household sewing machines), "price" was the primary factor among the factors that came into play regarding the customers' purchasing decisions. Accordingly, given that the most important competitive parameter in the relevant product market was "price", the Board noted that any interference in the pricing mechanism would be more influential than other factors.

The Board highlighted that Singer's systematic attempts to maintain resale prices had had an impact at the dealer level and Singer's resale price maintenance applications had been aimed at eliminating intra-brand competition. The Board considered that Singer's actions covered both traditional and online sales channels. In addition, considering the dominant position of Singer in the household sewing machine market and that the relevant actions of Singer had continued for a considerable period of time (ie, one-and-a-half years), the Board stated that it was not plausible to expect such behaviour not to have any anti-competitive effects. The Board ultimately decided that Singer's resale price maintenance applications did not meet the criteria of individual exemption provided under article 5 of Law 4054.

Eventually, the Board acknowledged that Singer had violated article 4 of Law 4054, and such violation constituted a naked and hard-core infringement under Communique 2021/2. Accordingly, Singer's application before the Authority to conclude the investigation process through the settlement mechanism by accepting its resale price maintenance practices was also accepted by the Board.

As the investigation continued, Singer applied for settlement on 18 May 2021 and a meeting was held with Singer's representatives on 25 May 2021. Singer later made a new settlement application along with a commitment application. On 23 June 2021, settlement and commitment negotiations were concluded with Singer's representatives and, upon Singer's manifestation on the continuation of settlement phase, the Board rendered its interim settlement decision. In its interim decision, the Board ruled that Singer had violated article 4 of Law 4054 by maintaining resale prices and, therefore, imposed an administrative monetary fine on Singer with a 25% discount (the maximum rate). Singer subsequently submitted its settlement letter and requested the final settlement decision to be rendered by the Board. Further to the acceptance of the commitments, the Board evaluated Singer's settlement application and accepted it. It thus rendered its decision to decrease the administrative monetary fine by 25% for the resale price maintenance violation.

Previous decisions

In terms of the settlement process, the Board's first implementation of the settlement mechanism was the *Philips* decision of 5 August 2021. The Board launched an investigation into the following companies in order to determine whether they, like Singer, had violated article 4 of Law 4054 by way of restricting online sales of its authorised dealers and maintenance of resale price:

- Türk Philips Ticaret AŞ;
- Dünya Dış Ticaret Ltd Şti;
- Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg Don İnş San Tic AŞ;
- Nit-Set Ev Aletleri Paz San ve Tic Ltd Şti; and
- GİPA Dayanıklı Tüketim Mamülleri Tic AŞ.

The Board announced on its official website that its investigation against these undertakings had concluded with a settlement decision for each investigated party through the Board's decision. However, the Board has not yet published its reasoned decision; the Board's assessment on the case, the monetary fine to be imposed and the details of the settlement mechanism will come to light when the reasoned decision is published.

In another decision, the Turkish Competition Board launched an investigation against Coca-Cola Satış ve Dağıtım AŞ and found that it had abused its dominance by way of using its rebate system and refrigerator policies to restrict its competitor's activities in the relevant market. Coca-Cola proposed its commitments, including the amendment of the general agreements entered with sales points and the

execution separate agreements for carbonated drinks and non-carbonated drinks, in addition to the termination of transitional terms and conditions across different product categories, to increase the refrigerator space accessible for competitors by 25%. The commitments that were offered and subsequently agreed by Coca-Cola were deemed to address the concerns raised by the Authority.[2]

Assessment on non-compete clause and implementation of commitment mechanism

In the *Singer* commitment decision,[3] the Board stated that resale price maintenance was deemed as a "naked and hard-core infringement" under Communique 2021/2 and could only be a candidate for the settlement mechanism. However, due to the fact that a non-compete clause was not considered as a "naked and hard-core infringement" under Communique 2021/2, the Board evaluated the non-compete clause set out in Singer's dealership agreements in light of Singer's commitment application.

The Board emphasised that agreements which did not include competition restrictions laid out under article 4 of Communique 2002/2 were exempt from article 4 of Law 4054. However, as per article 5(a) of Communique 2002/2, such an exemption did not apply to "the non-compete obligation imposed on purchaser for an indefinite period or whose duration exceeds five years". Accordingly, the Board noted that exclusive supply clauses imposed on dealers were non-compete clauses as per the definition provided in article 2 of Communique 2002/2.

In this respect, the Board indicated that the dealership agreement set out an automatic renewal clause, which resulted in the renewal of the agreement with the same terms and conditions, provided that none of the parties expressed their aim to the contrary. To that end, the Board noted that, in practical terms, the non-compete clause in the dealership was effective for an indefinite period. However, the Board also noted that as the agreement was predicated upon the mandatory rules of the Turkish law, it would be possible to draw a conclusion that the non-compete obligation within the agreement would be applied in line with Communique 2002/2 and would not exceed the five-year limit. Additionally, the Board expressed that the dealers had also submitted that the dealership agreements were applied in a way that would not exceed five years.

However, the complainant alleged that Singer applied de facto exclusivity by way of oppressing and punishing the sales points to exclusively sell Singer brand household sewing machines. The Board initiated on-site investigations based on this allegation; however, it found no evidence in support of it. Instead, the evidence revealed that the independent dealers were not facing any oppression by Singer regarding selling competitor brands. Accordingly, the Board indicated that no evidence had been found in support of the allegation that Singer's behaviours caused de facto exclusivity.

In light of the above findings, the Authority stated that the wording of the dealership agreements could cause uncertainty in terms of the competition law rules. Accordingly, Singer offered to remove the non-compete clause from its dealership agreements to address all competitive concerns raised by the Authority within the scope of the commitment negotiations. To that end, the Board ultimately accepted Singer's commitments as it was deemed that the commitments were adequate to restore competition, thereby terminating the investigation.

Previous decisions

The first published decision with regards to the commitment mechanism was in *Arslan Nakliyat*.[4] In that decision, the Board rejected the commitments offered on the grounds that such commitment submittal had been made after the completion of the investigation period.

The main purpose of the commitment mechanism is to reduce the possible anti-competitive effects of a competition law violation and, at the same time, save time and costs for both the Authority and the investigated parties during the examination processes required for the determination of a violation, which was the case for:

- Havaalanları Yer Hizmetleri AŞ (Havaş);[5]
- the Turkish Insurance, Reinsurance and Pension Companies Association; and
- OSEM Sertifikasyon AŞ.[6]

Havaş was the first successful example of the application of the commitment mechanism in Turkish competition law enforcement. Havaş proposed commitments to the Board after it was the subject of a full-fledged investigation, in addition to:

- MNG Havayolları ve Taşımacılık AŞ;
- S Sistem Lojistik Hizmetler AŞ; and
- Türk Hava Yolları AO.

After the commitment negotiations, Havaş submitted its commitment package immediately. After only eight days, the Board decided that the commitments offered were suitable to resolve the competition concerns and the investigation was terminated.

Moreover, the Board's *OSEM* decision was important because, aside from constituting the second example of the application of the commitment mechanism, it was also the first decision in which the Board accepted jointly structural and behavioural commitments. Further, the Board decided on the commitments in a short period – 15 days after the final submission of the commitments.

More recently, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları AŞ (Şişecam) and Sisecam Çevre Sistemleri.[7] Şişecam applied for the commitment mechanism during the pre-investigation phase and, after the negotiations, the Board ultimately concluded that the commitments offered by Şişecam were sufficient to address the competitive concerns. The *Şişecam* decision marks the first time that the Board has approved the commitments submitted by the undertaking in the preliminary investigation stage.

Comment

Both commitment and settlement mechanisms are new to Turkish competition law and there are limited instances of commitment and settlement mechanism applications. In this regard, the *Singer* case could be seen as a milestone as it provides the Board with an approach towards the simultaneous application of settlement and commitment mechanisms within the scope of one investigation and an insight into the application of commitment and settlement procedures based on the characteristics of the behaviour constituting infringement. The Board welcomed the fact that the commitment and settlement mechanisms could be carried out together in this case to terminate the investigation rapidly and effectively.

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Endnotes

(1) 21-46/672-336, dated 30 September 2021.

(2) 21-41/610-297, dated 2 September 2021.

(3) 21-42/614-301, dated 09 September 2021.

(4) 20-36/485-212, dated 28 June 2020.

(5) 20-48/655-287 dated 5 November 2020.

(6) 21-01/8-6, dated 7 January 2021.

(7) 21-51/712-354, dated 21 October 2021.