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The Turkish Competition Authority introduces a settlement mechanism under national competition law

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Turkish Competition Authority, *Draft Regulation on Settlements*, Press release, 18 March 2021 (Turkish)

Turkish Competition Authority, *Draft Regulation on Settlements*, Regulation, 18 March 2021 (Turkish)

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Öznur İnanılır | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Berfu Akgun | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Buğrahan Köroğlu | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

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In an effort to take one step further in harmonizing the Turkish Competition Law with the EU legislation, the Turkish Competition Authority (“**Authority**”) has recently introduced the settlement mechanism under Article 43 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) and the relevant Draft Regulation on Settlements (“**Draft Regulation**”).

(i) A General Insight into the Settlement Mechanism Provisions under Law No. 4054

The main points of the new settlement mechanism have been set out in Article 43 of Law No. 4054 through the amendment in June 2020. Based on this, the Turkish Competition Board (“**Board**”) may initiate the settlement process, in view of the procedural efficiencies and any differences of opinion regarding the existence or scope of the violation.

As per Article 43, a settlement process can only be commenced after the initiation of the investigation and concluded before the official service of the investigation report, i.e., the statement of objections, which identifies the competition law concerns. Once the parties officially confirm their intentions for settlement by a written application to the Authority, the Board sets a definitive time period for the undertakings to submit a settlement letter. Since the time period is definitive, the Board would not consider the submissions made after the conclusion of the period. Following the submissions of the undertakings, if the Board finds them acceptable and decides to settle, then the investigation will be closed with a final decision, including the finding of a violation and

administrative monetary fine, which may be reduced by up to 25% as a result of the settlement procedure. The parties would also still be eligible for an additional reduction on the fine as per Article 17(6) of Law No. 5326 on Misdemeanors. However, the Board's decision on the administrative fine and the matters set out under the settlement decision are final, and therefore, cannot be appealed before a higher court. The Law No. 4054 authorizes the Board to issue secondary legislation, in the form of a regulation, to determine the other implementation procedures and fundamentals of the settlement process. As for the scope of applicability of the settlement mechanism, Law No. 4054 does not set any restriction in terms of the nature of the violation.

(ii) Application of the Settlement Mechanism under the Draft Regulation

The Competition Authority has recently announced the Draft Regulation and initiated a public consultation process that will be open to submissions until April 19, 2021. Although the current text is not final, it still provides an early guidance on what to expect with regard to the Competition Authority's implementation of the settlement mechanism.

Firstly, the Draft Regulation gives the Board the discretion to choose which cases to settle, based on procedural efficiencies and the following factors which may be taken into consideration. The factors set forth under Article 4 of the Draft Regulation are **(i)** the number of parties under investigation, **(ii)** whether a significant portion of the investigation parties applied for settlement, **(iii)** the scope of the violation and the nature of the evidence, and **(iv)** whether it is possible to come to a mutual agreement on the existence and scope of the violation. These factors seem to be loosely based on those listed under the European Union ("EU")'s Notice on Conduct of Settlement [7].

Following the submission of the settlement letter, the Board could terminate the settlement procedure for some or all of the investigation parties, at any time until the settlement decision, if **(i)** it is understood that the anticipated procedural efficiencies will not be achieved, or it is not possible to come to a mutual agreement with the parties to the investigation on the existence and the scope of the violation, **(ii)** there is a risk of concealment of evidence, or **(iii)** there are risks with respect to the confidentiality of certain processes.

The structure of the settlement process is mapped out in the Draft Regulation with the following steps:

1. Start of the Process

The parties to the investigation will convey their request for a settlement to the Board, in writing. At this point, the Board may accept or refuse the settlement request and/or invite other parties. Aside from the parties themselves, the Authority may *ex officio* initiate the process as well and invite the investigation parties to settlement negotiations. At this point, the written request needs only to include a simple of declaration of the investigation party's wish to initiate a settlement procedure, without an acknowledgment of guilt.

2. Settlement Talks (Negotiations)

Similar to the European practice, based on the Draft Regulation, the settlement parties will have a negotiation phase with the Authority. After receiving the written request, if the Board accepts the settlement request (and, the investigation parties duly accept the Board's invitation) the Authority will arrange the settlement negotiations as soon as possible. The fact that the negotiations have started does not denote any admission of guilt. Therefore, the parties may pull out of the negotiations until the settlement text is submitted. If there are multiple settlement talks being run with different investigation parties, it is essential that these are conducted separately. As per Article 6 (5) of the Draft Regulation, the case handlers will provide the following information to the settlement

parties, on the condition that the confidentiality of the investigation is not compromised.

- The content of the allegations against the settlement party, The nature, scope, and duration of the alleged violation,
- violation, in order to inform the settlement party of the content and scope allegations,
- The redacted version of primary evidence which forms the basis of the alleged
- The reduction rate from the monetary fine that could be applied if the process were to be concluded with a settlement,
- The range of the administrative monetary fine that can be rendered against the settlement party.

The settlement party will have the chance to express its views with regard to the foregoing, during the settlement talks. In order to put the parties' statements on record, the negotiation discussions will be documented in writing, under an official affidavit, to be agreed upon by the negotiation attendees.

3. Interim Settlement Decision

Upon the completion of the settlement negotiations with the Authority, the Board will render an interim decision. According to Article 7 of the Draft Regulation, the Board's interim decision would include **(i)** the nature, scope, and duration of the alleged violation, **(ii)** the maximum and the minimum administrative monetary fine ratio calculated as per the Regulation on Fines, **(iii)** the reduction rate to be applied on the fine as a result of the settlement, **(iv)** if applicable, the maximum and minimum reduction rate due to leniency, **(v)** the maximum and minimum administrative monetary fine ratio and amount to be rendered, **(vi)** a definitive time limit of no longer than 15 days for the submission of the settlement text, **(vii)** a declaration stating that the Board will not be bound by these facts if a settlement proposal is not submitted during the time period granted.

With respect to the calculation of fines and the reductions to be applied, Article 7 makes clear that if the maximum fine calculated under the Regulation on Fines exceeds %10 of the annual turnover of the undertaking in question, then this will be reduced to %10 of the turnover, and the settlement reduction will be applied on top of this reduced amount, and if there is also a pending leniency application, this would mean that the two fine reductions (due to settlement and leniency) will be combined and applied together.

Once the interim settlement decision is issued, the matters therein cannot be subject to further negotiation.

4. Settlement Letter Submission

After the interim decision is issued, if the settlement parties agree with the matters set forth therein, they will submit a settlement letter which would include **(i)** express declaration of admission as to the existence, scope, duration and consequences of the violation, and acceptance of the liabilities arising from the violation, **(ii)** the acceptance of the maximum monetary fine ratio and amount, as expressed in the interim settlement decision, **(iii)** a declaration that the settlement party was sufficiently informed and had the opportunity to express its own views and explanations with respect to the allegations, and **(iv)** *[Acceptance of]* the fact that the administrative monetary fine and the issues under the settlement text cannot be appealed by the settlement party.

The settlement submission is required to be signed by the authorized representative of the settlement party. This text is kept as internal Authority correspondence. The Draft Regulation is unclear on what happens if the settlement letter does not cover the criteria set by the interim decision, i.e., whether the Board could reject the settlement application as a whole, or allow a second submission amended in order to mitigate the deficiencies of the first letter.

It is noteworthy that **once the investigation party submits the settlement letter, this letter cannot be withdrawn**. This process also shows resemblance to the EU settlement practices, although not completely alike. According to paragraph 20 of the Notice on Conduct of Settlement, the formal settlement request is to include **(i)** acknowledgment of the infringement, **(ii)** the maximum amount of fine the parties expect and would accept, **(iii)** confirmation regarding sufficient knowledge on the Commission's approach and that they have had a chance to be heard, **(iv)** confirmation on that they do not expect further investigation (i.e., oral hearing) provided that the Commission accurately reflects the settlement submissions in the statement of objections and the decision, and **(v)** the parties agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003.

5. Settlement Decision

The investigation is finalized (with respect to the relevant settlement party) within 15 days after the settlement submission is entered into the Authority records. That means, the investigation will not continue if a final settlement decision is rendered. Therefore, similar to the EU practice, once the settlement decision is rendered, the settlement party will not be in a position to utilize its remaining defense rights.

The Authority will publish a reasoned decision regarding the settlement. As the Draft Regulation states, the settlement decision will comprise the usual elements of a Board decision as provided in Law No. 4054, most important of which are: the claims of the parties, the summary of legal and economic topics discussed, the opinion of the case handlers, the assessment of all evidence and defences, legal reasoning, conclusion, and dissenting opinions. It will also include the claims regarding the settling party, the nature, scope, and duration of the alleged violation; the evidence the violation was based on; and the settlement party's admission to the violation and acceptance of the monetary fine.

If the investigation continues for other undertakings who did not settle, the reasoned settlement decision will not be served before the final decision of the investigation. In any case, this settlement decision would not be subject to appeal. The Draft Regulation does not provide any information whether the Authority would publish a short-form decision regarding the settlement so long as the investigation is ongoing for the parties that did not settle.

6. A Non-Settlement Decision

If the settlement party withdraws from the settlement process during negotiations, or the Authority decides to end the settlement process for any reason, the usual investigation process will continue. It is noteworthy that in such a case, the statements made by the parties during the negotiation phase are removed from the file and cannot be used as legal grounds for the final decision. Therefore, the explanations and declarations submitted by the settlement party during the negotiations, are excluded from the case file and cannot be used against the said party in the investigation decision. This is similar to the EU practice under the Notice of Conduct of Settlement, where, in the event that the Commission decides to opt out of the settlement procedure "*(...) acknowledgments provided by the parties in the settlement submission will be disregarded by the Commission and could not be used in evidence against any of the parties to the proceedings.*"

7. Confidentiality

The settlement party cannot disclose the contents of the settlement talks nor information it accessed to during the settlement process, until a final decision is rendered with regards to the other investigation parties. If confidentiality is breached, the settlement decision may be withdrawn, and a new investigation initiated. This breach of confidentiality may be deemed as an aggravating factor in determination of the fine in the upcoming investigation.

(iii) Reduction Rate on the Administrative Monetary Fine Following a Settlement Decision

The Draft Regulation sheds light on a number of elements in terms of the administrative monetary fine that were unclear in Article 43 of Law No. 4054.

Firstly, Article 4 of the Draft Regulation provides that the Board has discretion to grant a settlement reduction of maximum 25%, meaning that the actual reduction of fine due to settlement may turn out to be less than 25%.

Prior to the settlement submission, the Board's interim decision will have informed the settlement party of (i) the maximum and the minimum administrative monetary fine ratios, calculated in accordance with the Regulation on Fines; (ii) the reduction rate as a result of the settlement; and (iii) the maximum and minimum administrative monetary fine ratio and amount to be rendered. Therefore, prior to submitting the irrevocable settlement letter, the settlement party will have an approximate idea of what the monetary fine would be, in terms of the maximum and minimum amounts to be indicated.

While there is no direct reference to the inclusion of aggravating and mitigating factors, since the fines are said to be calculated in accordance with the Regulation on Fines, this may also mean that the aggravating and mitigating factors therein will be taken into account during the calculation. Therefore, there is a hypothetical risk that, as a result of the admission of guilt, the minimum fine would be set at the highest percentage. According to the Regulation on Fines, fines are calculated by first determining the base fine, which ranges between 2% to 4% for cartels, and between 0.5% to 3% for other violations. This is a risk as the maximum amount of monetary fine specified by the interim decision may turn out to be equal to the worst case scenario, including the highest base fine and the inclusion of all the aggravating factors. In such scenario, the settlement party has the choice to withdraw from the settlement process, and let the investigation process continue as usual, in which case the explanations made by the settlement party during the negotiation process will be excluded from the investigation. It is noteworthy that the Draft Regulation sets a limit to the ratio of the maximum administrative monetary fine that could be taken into account in terms of the interim decision, which is 10% of the annual turnover. Thus, if it turns out the maximum ratio would exceed this, it would be capped at 10% in any case, and this capped maximum amount would be taken into account for the possible settlement reduction. Therefore, this theoretical risk would not be more than 10%, minus the settlement reduction. According to Article 7 of the Draft Regulation, the amount of the reduction in the fine will also be notified to the settlement party with the interim decision.

(iv) Conclusion

Aside from some notable differences as to scope (limited to cartels for the EU as aside to "no scope restriction"), reduction ratio and appealability of the settlement decision, the Draft Regulation does correspond with the settlement mechanism in the EU, in general. In terms of timing, considering that the public consultation will

conclude on April 19, 2021, it may be a while before the Draft Regulation text is finalized and enacted. Accordingly, changes may be made on the Draft Regulation that may substantially alter the proposed settlement process once it is enacted.

[1] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. (“**Notice on Conduct of Settlement**”) (Consolidated text available at: <https://eur-lex.europa.eu/legal-con...> ↗)