Simultaneous Utilization of Both Commitment and Settlement Mechanisms

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The settlement and commitment procedures have been increasingly utilized within the decisions of the Turkish Competition Authority ("**TCA**"), but the adoption has been debated since 2014, when the mechanisms came to the agenda of the parliament but were refused after long discussions. However, on 24 June 2020, Law No. 4054 on the Protection of Competition ("**Competition Law**") was amended, incorporating both commitment and settlement mechanisms for the very first time into the Turkish competition legislation. Even prior to the adoption of the secondary legislation, the TCA had started implementing these mechanisms. After the adoption of *Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position* ("**Commitment Communiqué**") and *Regulation on the Settlement Procedure for Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position* ("**Settlement Regulation**"), the process that was previously vague gained clearance and perhaps incentivized more undertakings to resort to these mechanisms.

While there are many decisions that has utilized commitment and settlement procedures separately, the investigation initiated with the TCA's decision dated 04.03.2021 and numbered 21-11/147-M upon the claim that Singer Dikiş Makineleri Tic. A.Ş. ("**Singer**") had violated Articles 4 and 6 of the Competition Law in the market for supplying sewing machines is the only decision to be concluded by way of both commitments and settlements as stipulated under Article 43 of the Competition Law.

Within the scope of the secondary legislation, the TCA rendered two decisions regarding the investigation against Singer: (**i**) the TCA's decision dated 09.09.2021 and numbered 21-42/614-301 ("**Commitment Decision**"); and (**ii**) the TCA's decision dated 30.09.2021 and numbered 21-46/672-336 ("**Settlement Decision**") (collectively to be referred as "**Singer Decisions**"). The allegations investigated were resale price maintenance and online sales restriction, and unlawful non-compete clause within dealership agreements.

First and foremost, the TCA has differentiated between which mechanism will be applicable to which of the allegations. Resale price maintenance along with online sales restriction is categorized as a naked and hard-core infringement as per Article 3 of the Commitment Communiqué and therefore cannot benefit from the commitment mechanism. Accordingly, only the non-compete clause had been found to be eligible for a commitment application.

Commitment Decision

It has been found that the dealership agreement between Singer and its dealers is deemed to be implicitly renewed unless one party states otherwise, causing the non-compete clause to be indefinite in nature. This has been found to render the Block Exemption Communiqué No. 2002/2 on Vertical Agreements inapplicable as non-compete obligations imposed on the dealer for an indefinite period. However, it has also been found that Singer had incorporated the relevant competition legislation as an imperative provision with regard to the duration of the non-compete, and within the meetings held with dealers, they have stated that Singer has implemented the dealership agreement not to exceed five years.

With regard to the complaint that Singer has also implemented *de facto* exclusivity by way of coercing and sanctioning dealers, the TCA has held on-site inspections and meetings. The on-site inspections did not yield any finding to support the complaint, and the TCA found that Singer did not pressure independent dealers on the sale of competitor brands as a consequence of the meetings.

Upon the Case Team informing Singer that the wording of the relevant non-compete clause may raise uncertainties with regard to competition law, Singer has applied to the commitment mechanism with the offer to remove the relevant clause. As Singer was found to not implement either contractual or *de facto* exclusivity further than what is permitted by the competition legislation, Singer's commitment to remove the non-compete clause from their dealership agreements has been found sufficient by the TCA in eliminating any potential competitive concerns, terminating the investigation by accepting Singer's commitment.

Settlement Decision

As elaborated above, the claim of Singer's practice regarding resale price maintenance and online sales restriction is categorized as a naked and hard-core violation and thus, has been evaluated within the scope of the settlement mechanism. Although the TCA did not clarify whether Singer was in a dominant position in the market for supplying sewing machines, it was emphasized that Singer held significant market power and was a market leader.

Within the scope of the investigation, several correspondences have been obtained by the TCA indicating that Singer's dealers conduct sales via various online platforms. Among the documents, it has been found that an online sales restriction has been implemented towards Amazon, giving the impression that the dealers selling products at a lower price have been determined and their sales on the respective online platform have been attempted to be prevented. Aside from this, the TCA has not found any additional information that could be evaluated within the scope of online sales restriction. In that regard, the TCA determined that while Singer did not implement a general restriction and the dealers could sell online in practice, they did put in ample effort to determine and monitor the online sales prices. One document in particular has led the TCA to find that Singer regularly sent price lists to its dealers and the agreements did not bear any indication that these prices were maximum or recommended. As mentioned above, since Singer was determined to be a

market leader, it would have been difficult for dealers to deviate from the price lists of Singer, amounting to the resale price maintenance. The conclusion was that Singer determined resale prices and by extension restricted online sales for the purpose of determining the sales prices, which was done so systematically and in the event that the dealers did not comply, Singer imposed sanctions onto them. The dealers who sold at a price lower than the recommended price was determined to be subjected to pressure and sanctions like removing discounts, not supplying products, or terminating dealership.

The TCA has also made an in-depth analysis on its precedent evaluations with regard to the resale price maintenance. Within the course of the last ten years, the main trend in this evaluation was said to be that the resale price maintenance is a *by-object* violation. Moreover, the TCA stated that it cannot be argued that Singer's practices did not have an effect on the market (due to Singer's leading market position and the duration of the infringement). Indeed, Singer had actively informed the dealers that retail prices would be applicable to online sales, attempting to equalize the prices.

Consequently, the TCA has concluded the investigation with a settlement and as per the Settlement Regulation, a final verdict of violation of Article 4 of the Competition Law was rendered, along with an administrative fine of TRY 603,858.28 (EUR 57,675[1]) reflecting a 25% reduction. The reduction that has been implemented is the maximum that has been stipulated within the Settlement Regulation.

A Similar Approach – European Commission's ARA Decision

On September 20, 2016, the European Commission ("**EC**") rendered its decision on the investigation launched against Altstoff Recycling Austria Aktiengesellschaft ("**ARA**") which operates in the market for the management of household packaging waste. Within its decision numbered Case AT.39759, the EC has imposed a fine of EUR 6 million onto ARA for preventing competitors from entering the Austrian market for the management of household packaging waste from 2008 to 2012.

In Austria where ARA is active, producers have an obligation to take back packaging waste that results from the use of their products. Producers also have the ability to transfer this task to a company in exchange for a license fee. The EC has determined that ARA has been the dominant provider of these services in Austria since at least 2008.

The EC held that ARA's collection system can be considered as an essential facility as it is not duplicable due to technical, legal and economic reasons and thus, this system had to be opened to competition by the incumbent. At the end of the investigation, it has been found that between March 2008 and April 2012, ARA refused to give access to this infrastructure and this behavior has caused the exclusion of the competitors and elimination of competition. This exclusionary behavior of ARA is a breach of Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") through abuse of its dominant position.

In addition to the imposition of the abovementioned fine, the EC also has imposed a structural remedy which was suggested by ARA to address the issue of foreclosure of the market. The ARA has offered to divest its part of the household collection infrastructure and as a result of the divestiture, the ARA would no longer be in a position to exclude competitors from access to that infrastructure. In the EC's decision, the fine was substantially reduced (30%) due to ARA's comprehensive cooperation. The elements of a settlement procedure can be seen in the decision however, it is not under the settlement notice which does not cover abuse cases. All in all, it can be seen that the EC conducted a commitment-like procedure to obtain remedies from ARA, as well as a reduced fine due to though not exactly, a settlement-like process.

Conclusion

Within three years of the introduction of the commitment and settlement mechanisms, there is an increasing number of implementation examples in Turkey where future potential applicants may refer to. In terms of the case at hand, the Singer Decisions constitute particular importance in demonstrating that when appropriate in terms of the specifics of the case, the TCA is willing to and does separate the investigation in a way that the implementation of these mechanisms is streamlined, benefitting not only the undertakings concerned, but also procedural economy. In this sense, the undertakings operating in Turkey may benefit from settlement and commitment mechanisms simultaneously dependent on the nature of the alleged conduct.

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[1] TRY has been converted at the exchange rate EUR 1 = TRY 10,3 in accordance with the average of buying and selling rate of the Turkish Central Bank for the date of the decision.