ACTECON

Memorandum on the Settlement Regulation

Introduction

This memorandum was prepared on the Regulation on the Settlement Procedure for Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position ("**Settlement Regulation**" or "**Regulation**"), which was published in the Official Gazette dated July 15, 2021 and numbered 31542 and entered into force on the same day. As is known, the settlement procedure also present in the European Union legislation was introduced to Turkish Competition Law with the amendments made to Article 43 of the Law no. 4054 on the Protection of Competition ("**Competition Law**") titled "*Investigation, Commitment and Settlement*" by the Law no. 7246 dated June 16, 2020. The five added sub-paragraphs to the relevant article are as follows:

> *"Article 43 - (5) After initiating an investigation the Board may, on the request of the parties concerned or on its own initiative, start the settlement procedure, taking into account the procedural benefits that may arise from a rapid resolution of the investigation process and the differences in opinion concerning the existence and scope of the infringement. Before the notification of the investigation report, the Board may come to a settlement with the undertakings and associations of undertakings under investigation which acknowledge the existence and scope of the infringement.*
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> *(6) In this framework, the Board shall grant a definite period of time to the parties under investigation to present a settlement text wherein they accept the existence and scope of the infringement. Notifications made after the expiry of the granted period will not be taken into account. The investigation is concluded with a final decision which includes an establishment of the infringement and the administrative fine imposed.*
>
> *(7) As a result of the settlement procedure, a discount of up to twenty five per cent may be applied to the administrative fine. Application of a discount in administrative fines*

under this article does not prevent the application of a discount under article 17.6 of the Law on Misdemeanor no 5326.

(8) In case the process is concluded with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court.

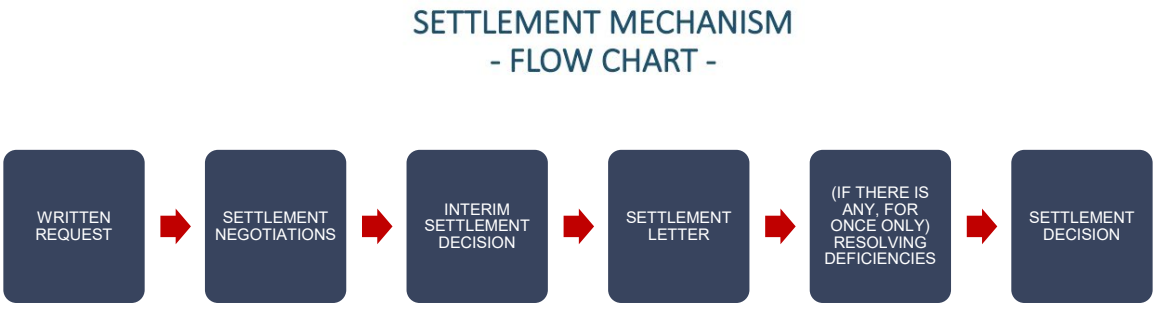
(9) Other rules and procedures concerning settlements shall be set out with a Regulation issued by the Board."

Following the amendments to the relevant article, the draft Settlement Regulation was opened to the public opinion on March 18, 2021. The final Settlement Regulation, which entered into force on July 15, 2021, has become a detailed and definitive source of the process for the undertakings and/or associations of undertakings that are subject to investigation and may want to resort to settlement. At this point, it is worth noting that the settlement procedure can also be initiated, *ex officio*, by the Turkish Competition Board ("**Board**").

Settlement Procedure

In case the undertakings investigated under Article 4 of the Competition Law, which regulates agreements, concerted practices and decisions limiting competition between competitors, or Article 6, which regulates the abuse of dominant position, declare to the Board during the investigation until the investigation report is served, that they have committed a violation, and waive their right to subsequent litigations, the administrative fine that is likely to be imposed following the investigation may be reduced by a rate determined by the Board with a range of 10% to 25%.

The stages of the process could be summarized as follows:



1. Written Request:

By conveying their settlement requests to the Turkish Competition Authority ("**TCA**") in writing (except for the processes initiated *ex officio*), the parties to the investigation will ensure the initiation of the settlement process.

2. Settlement Negotiations:

The Settlement Regulation indicates that if the settlement requests of the undertakings subject to the investigation are accepted or the Board initiates the settlement process ex officio, the settlement negotiations shall begin as soon as possible after they are accepted within fifteen days of the notification of the invitation for settlement. The parties to the settlement may always withdraw from the settlement process until the submission of the settlement letter to the Board.

3. Interim Settlement Decision:

Within a 15-day mandatory duration following the official date of registration of the settlement letter with the TCA, the Board shall render an interim decision on issues such as the maximum administrative fine rate and the discount rate to be applied to the relevant party.

4. Settlement Letter:

If the settlement party agrees to the terms included in the interim settlement decision, it shall submit a settlement letter to the TCA containing the following elements:

- The settlement party's explicit declaration of the acceptance of the existence and the scope of the violation,
- The maximum administrative monetary fine rate and amount of fine that the Board may impose to the settlement party due to the violation and the acceptance of this fine rate and amount by the party within the scope of the settlement procedure,
- That the settlement party has been sufficiently informed about the allegations directed and that they were adequately allowed to convey their opinions and explanations,
- That the administrative monetary fine and the contents of the settlement letter cannot be disputed.

If the settlement letter is not presented to the Board within the mandatory duration, the Board shall not be bound by the matters included in the interim decision.

5. Resolving Deficiencies:

In case deficiencies are to be found in the settlement letter submitted by the investigated parties, the Board shall give the parties seven days to resolve these deficiencies, only for once. If the deficiencies in the settlement letter are not resolved within this period, it is accepted that the settlement process has not resulted in a settlement and thus the ordinary investigation process will carry on.

6. Settlement Decision:

Within fifteen days of the settlement letter entering into the register of the TCA, the investigation will be terminated by the Board in respect of the party with a final decision including the determined infringement and administrative fine.

The provisions of the Settlement Regulation will also be applicable for investigations initiated before the date of publication of the Regulation which the investigation reports have not been notified.

Highlights of the Settlement Procedure

The Board, following the initiation of the investigation, will be able to initiate the settlement procedure at the request of the investigative parties or *ex officio*. In this context, the highlights of the Settlement Regulation are presented to your attention below.

1. Admission of Violation

In line with the Competition Law, the first thing which stands out in the Settlement Regulation is the requirement that undertakings and associations of undertakings which request to engage in a settlement must admit that they have committed the violation attributed to them. In addition to the direct reference in Article 43(5) of the Competition Law, Article 1 of the Settlement Regulation titled ''*Purpose and Scope*'' also includes the phrase ''*…those who admit the presence and scope of the violation*''.

Depending on the status of the investigation for which settlement is requested, it is understood that additional work may be conducted in order to determine the nature and scope of the violation attributed in accordance with Article 5(2) of the Settlement Regulation in terms of the presence and scope of the violation: "*At the stage where parties request settlement, the Board may postpone its decision under the first paragraph, in case a more detailed research is needed to set forth the nature and scope of the attributed violation.*"

With regard to the determination of the presence and the scope of the violation, Article 4(2) Subparagraph (ç) states that the Board may consider ''*whether it is possible to reach a common opinion with the parties of the investigation about the presence and scope of the*

violation'' and this can be interpreted as the scope of the violation may be the subject of discussion as part of the settlement negotiations and it is important to reach an agreement.

Perhaps one of the most important regulations for undertakings is the provision mentioning that the start of settlement negotiations by undertakings in accordance with Article 6(2) does not denote that the parties have admitted the violation attributed to them and that the parties may withdraw from the settlement process until the submission of the settlement letter. This practice demonstrates that an approach similar to the source European Union practice has been adopted by preventing the fact that the parties have started negotiations as a matter that can be used against them within the scope of the investigation.

Pursuant to paragraph 5 of the same Article, the information foreseen to be obtained by the parties applying for settlement is also important in terms of the admission of the scope of the violation.

> *"(5) In settlement negotiations, on the condition that the confidentiality of the investigation is not compromised, the settlement party will be provided with information on the following matters:*
>
> *a) The content of the allegations against the settlement party,*
>
> *b) The nature, scope and duration of the attributed violation,*
>
> *c) The primary evidence which forms the basis of the attributed violation, on the condition that it is limited to informing the settlement party about the nature and the scope of the attributed violation and that it is redacted from trade secrets and confidential information,*
>
> *ç) The reduction rate from the administrative fine that could be applied if the process were to be concluded with a settlement,*
>
> *d) The range of administrative fine that can be imposed on the settlement party."*

In the settlement negotiations, the settlement party will be able to express its views on the subjects mentioned above in accordance with paragraph 6.

2. Reduction Rate and Administrative Fine

After the evaluation of the Board following the settlement procedure, the undertaking for which it will be decided to end the investigation with a settlement decision will be able to benefit from a reduction in administrative fine. In line with Article 4(4) of the Settlement Regulation, this rate can be applied as a minimum of 10% and a maximum of 25%. Unlike the draft Settlement Regulation, the fact that a minimum amount of 10% is stipulated can be regarded as an encouraging factor for undertakings which may consider applying for settlement. In our opinion, by determining the lower limit in the Settlement Regulation and eliminating the possibility of an application of a low reduction rate, the uncertainty of the reduction rate is prevented from being a negative factor in the risk analysis that the

undertakings will conduct before engaging in this procedure.

In addition, it would be appropriate to ensure that the parties are informed about the "*reduction rate that can be applied if the process results in a settlement*" and "*the range of administrative fines that can be imposed on the settlement party*" in accordance with Article 6(5) of the Settlement Regulation. Accordingly, a more predictable and secure process will be conducted for the parties engaging in the settlement procedure.

3. Waiver of Claim

The fact that the imposed administrative fine and the matters in the settlement letter cannot be disputed by way of a lawsuit by the parties to the settlement in case a settlement decision is rendered within the scope of Article 43 of the Competition Law is also seen within the Settlement Regulation. As explained in detail above, the settlement negotiations, the interim decision and the settlement letter are carried out with an intense information exchange and consensus between the TCA and the parties.

In the draft Settlement Regulation, the parties are prevented from resorting to litigation concerning the administrative fine and the matters included in the settlement letter, and no exception has been made regarding this. No additional or different provisions have been made in this regard within the scope of the Settlement Regulation that has entered into force. In this respect, there is no clarification on whether the parties can resort to litigation regarding the subjects that they have not previously agreed on or subjects that have been spun out of context, and in general, the scope of the waived right to action is rather wide. Despite the fact that the settlement negotiations are carried out with an intense exchange of information and consensus between the TCA and the parties, even though it may be assumed that a matter that was not previously made part of the negotiations and the settlement letter may be remedied by way of a lawsuit, it is seen that no relevant statement is incorporated within the scope of the Settlement Regulation.

Conclusion

With the introduction of the settlement procedure into Turkish Competition Law, another step has been taken towards adaptation the Competition Law with the European Union legislation. It is also possible to say that with the settlement procedure, investigations conducted by the TCA can benefit more from procedural economy. Following the amendments made to the Competition Law, the enactment of a secondary legislation in order to guide undertakings and associations of undertakings in a more detailed and precise manner may undoubtedly lead more undertakings to resort to this path.