

Competition Investigations in the Shadow of the Settlement Procedure

According to the Competition Authority's ("Authority") activity report for 2023, it is seen that 68 of the 117 investigation files were concluded with settlements and 28 files were concluded with commitments. Although the activity report for 2024 has not yet been published by the Authority, announcements of final decisions on its website indicate that the majority of investigations in 2024 have also been concluded through settlement.

Investigation of competition law infringements is a process that may take a considerable amount of time and resources for both competition authorities and undertakings. Therefore, many competition authorities around the world have adopted the settlement procedure in order to accelerate their investigations, increase their efficiency and ensure that infringements are remedied more quickly.

The settlement procedure is a process applied in competition law, particularly in the European Union and various countries, allowing undertakings under investigation for suspected competition law infringements to acknowledge the violation and waive certain rights, thereby reaching an agreement with the competition authority to conclude the process swiftly and effectively.

Within the scope of the settlement procedure introduced into our legislation and practice through the amendment to Article 43 of the Law No. 4054 on the Protection of Competition in 2020, the Competition Board ("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.

While the settlement procedure may start at certain stages of a competition investigation, the competition authorities of each country have adopted a different framework and process in this regard.

In Turkish competition law, settlement is possible until the notification of the investigation report. Upon submission of the settlement text, the Board may decide to conclude the investigation for the relevant undertakings and grant a reduction of 10% to 25% in administrative fines. If the process is concluded through settlement, the administrative fine and the matters included in the settlement text cannot be subject to litigation by the parties to the settlement.

The settlement procedure aims to shorten the investigation process, ensure a swift conclusion, and reduce the public costs associated with litigation. While it offers significant advantages such

as the efficient use of resources and incentives for companies, including fine reductions, to encourage the acknowledgment of violations, it is evident that for the system to function effectively, a more transparent enforcement policy must be established. Additionally, the competition authority's fundamental purpose must be upheld, the system should not be abused, and a proper balance must be maintained to preserve its deterrent effect.

The settlement process may prevent the competition authority from conducting an in-depth investigation, potentially obscuring the true extent of the violation. For example, in a cartel investigation, if undertakings conclude the process solely by acknowledging the infringement, it may become difficult to assess the actual harm to the market and the full scope of the violation, potentially allowing certain infringements to go unnoticed. Additionally, insufficient evidence may hinder the initiation of future investigations.

In the settlement process, undertakings are required to waive certain procedural rights during the investigation. This eliminates several stages compared to a standard investigation, allowing for a faster resolution. However, one of the most debated aspects of the settlement mechanism is that such waivers raise concerns regarding the principles of fair trial. While waiving rights contributes to expediting the process, it also exposes undertakings to the risk of potential misjudgments or procedural irregularities.

Compliance with competition law is not only about fulfilling legal obligations but also plays a crucial role in establishing a sustainable business model and maintaining a reputable presence in the market. Adhering to competition rules helps undertakings avoid severe administrative fines, reputational damage, and prolonged legal proceedings, ensuring operational continuity. Undertakings subject to an investigation or opting for settlement due to competition law violations risk losing the trust of customers and investors.

With the introduction of the settlement mechanism into Turkish competition law, there has been a significant increase in its use in recent years. It has become the first legal instrument that comes to mind for undertakings when an investigation is initiated against them. This trend suggests that the settlement mechanism is increasingly being perceived as an easy way out rather than a corrective legal tool.

If undertakings involved in serious competition infringements opt for settlement merely to obtain a fine reduction, this could lead to more violations in the future or the concealment of certain infringements. If the settlement process is perceived as a low-cost solution, the deterrent effect of the competition law regime may weaken.

For an effective competitive environment to be maintained, it is crucial for authorities to conduct thorough investigations and fully uncover all violations. However, despite the procedural benefits and cost advantages it offers, the settlement mechanism may indirectly harm effective competition in the market.

Decisions in competition law serve as precedents for similar violations in the future. However, the lack of a full investigation into the scope of the infringement during the settlement process, along with the exemption of administrative decisions from judicial review, increases the risk of limiting oversight and hindering the development of legal precedents. This may create uncertainty regarding how similar violations will be addressed in the future and could negatively impact the long-term evolution of competition law.

Another concern among professionals in the field of competition law is that settlement is increasingly becoming the primary option, leading undertakings to forgo internal assessments in response to an infringement allegation and instead opt for a quick resolution through settlement. This trend may reduce competition authorities' practice of conducting in-depth investigations, which could, in the long run, weaken institutional memory and expertise. To prevent settlement from undermining the investigative capacity of competition authorities, some countries impose restrictions by excluding certain types of infringements from the scope of settlement.

The role of judicial review mechanisms in settlement procedures is also limited. While the decision rendered as a result of a standard investigation process is open to judicial review by the administrative court, there is no effective judicial review of the process, as the matters contained in the settlement text cannot be subject to litigation by the parties to the settlement. This raises concerns that it may lead to a decrease in the objectivity of judgements and a lack of jurisprudence to ensure the consistent implementation of the law.

The fact that the settlement procedure is conducted behind closed doors also limits public scrutiny of competition law proceedings. Failure to disclose the decisions to the public or to explain their justifications in a sufficiently detailed manner may lead to a lack of transparency and accountability in the market. Although the competition authorities state that the settlement procedure is completely non-bargaining, a bargaining ground is created due to the co-operation provided by the undertakings and the nature of the procedure.

In light of the aforementioned discussion, it should not be forgotten that the settlement procedure is not only a tool that speeds up the investigation processes, but also may have consequences

that may directly affect the quality of competition law enforcement. While undertakings may have legitimate reasons for opting for settlement, it should always be considered as a last resort, applied in a balanced manner, and used appropriately to serve its intended purpose.