



Law Bulletin

Competition Law | Turkey | March 2021

NEW COMMITMENT PROCEDURE UNDER TURKISH COMPETITION LAW: A BRIEF COMPARISON WITH THE EU

The commitment procedure was incorporated into Law No. 4054 on Protection of Competition (the “**Competition Law**”) with the amendments of June 2020. Accordingly, the Turkish Competition Board (the “**Board**”) can decide to end an investigation without an infringement decision, if the undertaking under investigation voluntarily submits commitments to eliminate the competition concerns. Both the Turkish Competition Authority (the “**TCA**”) and the investigated undertakings quickly adapted to this new but long-awaited procedure. Even before the adoption of the secondary legislation, the TCA adopted five commitment decisions. In three of these cases, the submitted commitments were considered appropriate and the investigations were ceased without an infringement decision.¹

On 16 March 2021, Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position (the “**Communiqué**”) which clarifies the rules and procedure to be followed in commitment decisions, came into force. Although one of the goals of amendments to the Competition Law is to increase the level of alignment with the European Union (the “**EU**”) legislation, the Communiqué involves major dissimilarities with the European Commission’s (the “**Commission**”) commitment procedure. In this article, we compare the commitment procedure in Turkey with the Commission’s practices and highlight the significant differences between the two jurisdictions.

¹ Board Decision dated 5 November 2020 and numbered 20-48/655-287; Board Decision dated 10 December 2020 and numbered 20-53/746-334; Board Decision dated 7 January 2021 and numbered 21-01/18-6

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Main Differences between the Two Jurisdictions

Timing to Start the Commitment Procedure

Although the Competition Law's relevant article states that undertakings can submit commitments until the end of the investigation (*i.e.*, submission of the third written defense), the Communiqué shortens this period. According to the Communiqué, investigated undertakings can submit their willingness to propose commitments within three months following their receipt of the investigation notice. The investigation notice is to inform the undertakings of the Board's decision to initiate an investigation and it includes the preliminary findings leading to the investigation. However, receipt of the investigation report (which may be considered as the equivalent of Statement of Objections in the EU and involves details of alleged competition violation) takes up to 12 months after receipt of the investigation notice. Undertakings may not be able to fully understand the competitive concerns and formulate appropriate commitments to remedy the competition problem, in the very early stages of the investigation.

The Commission is more flexible in its approach regarding the timing of the undertakings to express their willingness to follow the commitment procedure. According to the Commission's notice on best practices for conduct of proceedings concerning Articles 101 and 102 TFEU (the "**Best Practice Notice**"), undertakings may express their willingness to propose commitments at any time during the investigation. Moreover, in appropriate cases, commitments may still be accepted even after the receipt of the Statement of Objections.

Excluded Infringement Types

According to the Communiqué, the commitment procedure is not applicable for hardcore competition law restrictions. The Communiqué specifies that anticompetitive information exchange and resale price maintenance are considered as hardcore restrictions alongside price fixing, territory/customer sharing and supply restriction agreements between competitors. Exclusion of information exchange agreements and resale price maintenance from the commitment procedure's scope may narrow down the suitable cases to a great extent. On the other hand, cartels are the only infringement type excluded from the Commission's commitment procedure.

Market Test

The Communiqué states that the Board may ask complainants and third parties' opinions on submitted commitments' suitability to address the competition problems. The Board is not obliged to receive feedback from interested parties. If the Board decides to market test the submitted commitments, a non-confidential summary of the identified competition concerns and the submitted commitments may either be sent directly to the related third parties or announced on the TCA's website. The Communiqué gives broad discretion to the Board on the level of third party involvement and transparency of the commitment procedure.

In contrast, the market test is a mandatory step of the Commission's commitment procedure according to Article 27/4 of Council Regulation (EC) No. 1/2003 of 16 December 2002. The

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Commission is obliged to publish a concise summary of the case and the submitted commitments' main content in the Official Journal of the EU and to publish the commitments' full text in the authentic language on the Commission's Directorate-General for Competition's website. To enhance transparency, the Commission will also publish a press release setting out the key issues of the case and the commitments and invite interested third parties to submit their observations on the commitments' suitability. In addition, unlike the commitment procedure under the Competition Law, according to the Best Practice Notice, the Commission invites complainants to comment on the submitted commitments

Possibility to Amend Proposed Commitments

According to the Communiqué, the Board will analyze the proposed commitments and decide whether the commitments are appropriate to remedy the identified competition problems. If the Board decides that the proposed commitments are not suitable, it may grant the undertaking the right to amend the proposed commitments for once. Alternatively, the Board may cease the commitment procedure by rejecting the proposed commitments and continue the regular investigation proceedings.

In the Commission's practice, a state of play meeting is organized with the undertakings after receipt of replies to the market test. If the Commission is of the view that the proposed commitments are not suitable to effectively remedy the identified competition problems, it will inform the undertaking accordingly. The undertaking may submit an amended version of the commitments. If the amended version changes the nature or scope of the commitments, the Commission will conduct a new market test. Therefore, in the Commission's commitment procedure, the undertakings always have the right to amend the commitments after the market test phase.

SUMMARY OF MAIN DIFFERENCES		
Matter	EU	Turkey
Timing to Start the Commitment Procedure	Commitments could be submitted throughout the investigation proceedings, even after the receipt of Statement of Objections.	Willingness to propose commitments must be submitted within three months following the receipt of the investigation notice.
Excluded Infringement Types	Cartels are excluded.	Cartels, anticompetitive information exchange, resale price maintenance are excluded.
Market Test	Market test is mandatory. Concise summary of the case and submitted commitments are open to public to enhance transparency. Complainants can submit views on commitments.	Market test is not mandatory. The Board may decide to invite third parties to submit their views, if deemed necessary. Complainants may submit views on commitments if the Board invites.

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Possibility to Amend Submitted Commitments	After the market test, the undertaking has the right to amend the commitments.	The Board may give the right to amend commitments if it considers the commitments inappropriate.
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Conclusion

The commitment procedure is expected to provide opportunities to the TCA and undertakings under investigation to effectively remedy alleged infringements of the Competition Law at an early stage, without the need to allocate resources for lengthy investigations. Although the main structure of the Turkish commitment procedure is very similar to the Commission's procedure, there are major differences between the two jurisdictions.

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