SETTLEMENT PROCEDURE IN TURKISH COMPETITION LAW

Mahmut Yavaşi[*]
Elif Banu Varlı[**]

Abstract

Settlement procedure, whose legal basis is to be found in the Law No. 4054 on the Protection of Competition, is conceptually discussed in this article by focusing on its legal nature and comparing it to other alternative dispute resolution methods. Our study in this article is limited to competition law, with settlement procedure being the most used procedure in the European Union (EU) and the United States of America (USA) in this area of law. The study, which was based on the Law No. 4054 on the Protection of Competition, was completed by making maximum use of the scholarly works on the subject.

In the study, comparisons have been made with EU competition law on how the settlement procedure can be conducted in Turkish Competition Law. The regulations in the Draft are also discussed while making a comparison. The settlement procedure, which did not have a legal basis before in Competition Law, has been evaluated in the light of the decisions in which leniency programs are implemented in current practice. In Turkish Competition Law, the problems that may be encountered in the implementation of the settlement procedure regulated by the Law No. 4054 on the Protection of Competition and suggestions on the solution of these problems are included.

Keywords

Competition Law · Settlement Procedure · Leniency Programs

[*] Mahmut Yavaşi is a Professor of Law at the University of Ankara Social Sciences Law School.
[**] Elif Banu Varlı is a Research Assistant and PhD Candidate at the University of Ankara Social Sciences Law School.

1. Introduction

The settlement procedure's basic aim is resolving the dispute resolution effectively and quickly, while optimal use of resources is ensured. This situation creates a view of the procedural savings. With the settlement procedure regulated in the article 43 in the Competition Law No.4054, it is possible to implement the procedure within the legal framework. Comparative explanations are given as to whether there is a need for settlement procedure in this context, with the leniency program and penalty regulation mechanisms that the regulation on settlement, which is a new procedure to Turkish competition legislation, is closely related.

In the study, the concept of settlement procedure is addressed within the framework of the procedure, the spread of the settlement procedure throughout the Turkish competition legislation, and the country's practices and the evaluations in the doctrine. In this context, in terms of which components will be included in the settlement setup, where the settlement envisaged in the draft is separated from the European Union (EU) and the United States (USA) practices, how the process will be operated and managed, whether it can find actual application areas in the presence of current and planned regulations. Explanations were made on the secondary regulations regarding the process. A comparative analysis of the EU draft law with the Law No. 4054 is included, and suggestions are given regarding the problems that may be encountered in practice and their solutions.

2. What is Settlement Procedure?

Settlement, in terms of word meaning, refers to the fact that more than one person may resolve the existing or future differences of thought and interest by making mutual compromises in order to resolve the dispute.[1] The definition and scope of settlement in the Competition Terms Dictionary is explained as follows: "Within the scope of the plea agreement/settlement, which is generally used in cartel investigations, discounts are determined within the framework of criteria such as application orders and maximum sanctions that can be applied. The settlement that the interested parties have agreed to avoid possibilities such as the emergence of their trade secrets, deterioration of their public image and exposure to more severe sanctions, especially the maximum punishment, at the end of a very costly investigation process has also benefits in terms of competition authorities.

With the benefits of cooperation, such as preventing unnecessary extension of files, enabling competition authorities to obtain precise evidence, provide effective use of public resources. However, despite these benefits, there are also criticisms of settlement. Some of these criticisms are the damage to the defense rights and the reduction of the deterrence."[2] The settlement procedure is designed to create an effective way to prevent cases of violation of the Competition Law as a result of cartelization. Cartel screening techniques are "structural, economic and statistical studies carried out in order to identify markets that might face

[1] Candan Turgut, *Taxation Methods and Settlement* (Istanbul: Finance and Law Publications, 2006), 260; "Candan Turgut, Settlement I," *Finance Post*, No:271(13) (1991): 61; E. Yılmaz,, "*Evaluation of the Settlement Procedure in Terms of Legal Nature and Basic Taxation Principles*," GÜHF Review, Vol.13(1-2) (2009): 322.
[2] *Competition Terms Dictionary*, Revised Sixth Ed. (Ankara: Competition Board, 2019), 151.

competition problems and undertakings that may have adopted practices restricting competition.[3] Basically in cartel scanning techniques; information such as price, cost, market share, tender offers are evaluated by statistical methods and it is investigated whether the data provide signs of the existence of an inter-competitive anti-competitive agreement. In this context, some features that affect the cartelization tendencies such as the number of producers, product homogeneity, and demand predictability are scanned. In addition to these data, the existence of factors such as parallels between enterprise behaviors, regional differences or significant breaks in the data are investigated. According to the results of screening techniques, it is decided whether the market examined is worth examining more closely."[4]

The competition authority stated that the settlement was not used as a platform to detect the existence of the violation or to negotiate it regarding the level of fines or sanctions.[5] The EU Commission's message on this issue is clear: "These meetings are not about negotiation or discussion. The Commission will not negotiate the evidence or objections."[6] Therefore, "*settlement*" in the settlement procedure does not imply bargaining in general. The measures committed to the Commission are subjected to market analysis to show that this procedure is not the result of hidden bargains behind closed doors. When talking about the "*meetings*" factor in the settlement procedure, only the interaction and negotiations between the competition authority and undertakings are meant.

The beginning of a successful settlement means that undertakings accept their responsibilities in joining the cartel and in violation. After the undertakings acknowledge that they have violated, they are expected to arrive at a common solution in which serious legal consequences are accepted. An undertaking applying for a settlement submission must waive some rights in the compromise, for example it cannot request an Oral Hearing. However, the right of appeals to the undertakings is kept separate due to the acceptance of the responsibilities of the undertakings in violation, and their appeal is not blocked. Within the context of the settlement procedure, the problem arises from the settlement procedure, as it is unthinkable that the compromising parties can waive their right to object to the main issue[7] and the resolution of cartel cases is also burdensome for the undertakings. Therefore, the appeal that is the final appeal rights are reserved. However, a problem will be raised here. An undertaking that has agreed to compromise is an undertaking that has also accepted the existence of a violation. The appeal of the decision to be made by the competition authorities at this point causes controversy.[8]

A major factor, without encouraging undertakings to participate in the settlement procedure, is for a 10% fine reduction in response to settlement and cartel violations. Meanwhile, up to 10% fine reduction is not as generous as in other legal remedies (click, the amount of

[3] Leniency Regulation, Article 3.
[4] Competition Terms Dictionary, 151.
[5] Greg Olsen and Mark Jephcott, "Sharing the Benefits of Procedural Economy: The European Commission's Settlement Procedure." *Antitrust* 25 (2010): 76.
[6] Neelie Kroes, Assessment of and Perspectives for Competition Policy in Europe - Celebration of 50th Anniversary of the Treaty of Rome (Speech, November 2007).
[7] A. Scordamaglia, "The New Commission Settlement Procedure for Cartels: A Critical Assessment," *Global Antitrust Review* No. 2 (2009): 78.
[8] R. Zheng, *Settlement Procedure in EU Commission's Competition Law Enforcement - A 'Negotiation Game' between the Commission and Cartelists* (Europa Kolleg Hamburg, 2017): 21.

compensation appreciated by concrete case) that can reduce the deterrence of the settlement procedure.[9] The settlement procedure works in three meeting rounds, with the undertakings communicating with the Commission on the definition and scope of the violation and an appropriate amount of punishment to achieve a common solution.[10] Theoretically, it is an indisputable fact that when the settlement procedure is initiated, the undertakings concerned are engaged in certain illegal activities. The appropriate amount of punishment is based on the extent and severity of the existing violations and, of course, on the calculation of fines executed by the competition authority. Unless a settlement application is filed, the undertaking has the freedom to give up, while the competition authority maintains its flexibility to end compromise throughout the entire process. For example, in the *Smart Cards Chips*[11] *case The Commission has announced that it has stopped meetings on the grounds that they have not been able to record a stage and returned to the standard procedure. Again, in the Animal Feed Phosphates case*[12] the undertaking that participated in the meeting decided to leave the settlement desk. However, upon the initiation of the settlement procedure in 2008, hesitations about its effectiveness arose. If the Commission will continue its stated position on the meeting, a 10% reduction in the penalty for them will not seem sufficient incentive for them to reach an agreement after the settlement decision has been made.

In summary, it can be thought that despite the uncertainty/gap in the meeting, the Competition Board may not be evaluated in terms of undertakings, despite the "authority" position of the compromise procedure, away from "bargaining". It is likely that there is an uncertain area for undertakings regarding the scope of violation and punishment. The settlement procedure is the “negotiation” game between the competition authority and the cartels. We think that this uncertainty can be prevented by mutual concessions in this game process.

2.1. What is The Legal Structure of Settlement Procedure in Turkey?

Settlement means that the disputes that exist as words end in peace. Settlement[13] expresses the agreement of the competition authority with the undertakings by reducing the penalties in return for the acceptance of the violation by the undertakings in the competition law and the cooperation with the Board. In cases where the agreement exists, the existence of a legal contract cannot be disputed. It is not clearly revealed on which basis the legal nature of this contract concluded. Achieving a compromise agreement between the competition authority and undertakings is in a sense similar to a settlement institution in Tax Law. In Turkish Tax Law; discussing and resolving the dispute between the taxpayer and the administration by offering peaceful solutions within the framework of administrative control principles between the parties, without going through a trial; Accordingly, the “*settlement institution*”, which can be defined as the settlement of tax original and penalty, is one of the best examples of settlement ways in

[9] S. P. Brankin, “The First Cases under the Commission’s Cartel Settlement Procedure: Problems Solved?” *E.C.L.R.* 32(4) (2011): 5.
[10] “Commission Statement on the Implementation of Decision Making Procedures for the Adoption of Decisions in cartel cases according to Articles 7 and 23 of Council Regulation (EC) No 1/2003,” 2008, para.5.
[11] *Smart Card Chips*, Case 39.574 965 (The decision is not publicly available); See the page that the commission published: IP/14/960.
[12] Commission Decision of 20 July 2010, Com. (2010) 5004.
[13] Ejder Yılmaz,, *Legal Dictionary* (Ankara, Yetkin Publishing: 2015), 327.

Turkish law.[14] In this sense, it is necessary to examine the settlement agreement as arranged in the settlement agreement applied in Tax Law.

The settlement procedure offers an administrative solution system that is important for the non-dispute settlement of the dispute in our Competition Law. However, the legal nature of the compromise and its current position in the competition system, its importance in practice, and its impact on Competition Law have not been discussed. The settlement procedure has definitive results for the administration / competition authority and undertakings and directly affects the provision of a healthy competition environment and punishment processes in competition law.[15] For the reasons listed, the settlement procedure needs to be discussed as a whole both in terms of its legal quality and its effects on the application. It is an imperative to present the legal nature of a legal institution correctly, to make accurate evaluations related to settlement and to conclude.

The relationship between competition law and administrative law consists of tight and strong ties. The reason for this is "*Competition Law is a special application area of Administrative Law and in this context, a 'special administrative law' discipline.*"[16]It is not possible to accept that the settlement institution is an administrative process. The reason for this is that the administrative process, which is a public law regulation, occurs with a unilateral declaration of will, without the consent of the other party. However, mutual consent is sought in compromise.[17] While the settlement meetings are going on, there is an undertaking on the one hand, although there is a competition authority on behalf of the administration, and on the other hand, there is an undertaking, and the written report reflects the will of both the administration and the enterprise. For these reasons, it is not possible to accept the settlement institution, which does not have the characteristics of the administrative procedure. Even if it is possible to claim that the settlement occurs with a mutual declaration of will, the competition authority and undertakings overlap with the mutually declared wills, aiming to have the same legal result, the settlement procedure differs from this. This is because in order for a contract to qualify as an administrative contract, it is necessary to grant powers to perform the public service of the contract and exceed the powers of the administration-specific law.[18] Settlement has nothing to do with the execution of public service and it is not possible for the competition authority to grant superior rights that exceed private law powers.[19]

The undertaking with the competition authority, by revealing their will to end the violation, meetings on a common ground and make these wills applicable with a settlement submission. In our opinion, if we compare the establishment of settlement to a type of agreement, it can be said that it can be compared to the "*peace contract*" in Civil Jurisdiction Law, but it still remains weak to fully reflect the legal nature of the settlement procedure.

[14] Metin Pektas, *An Alternative Way in Competition Law: Settlement* (Ankara: Competition Authority Specialization Theses Series: 2008), 7.
[15] Yılmaz, *Legal Dictionary*, 327 (n. 13).
[16] M.Ates, "Relation of Competition Law with Administrative Law," in *Introduction to Competition Law* (Ankara: Adalet Publishing, 2013), 181.
[17] D.Şenyüz, *Tax Criminal Law* (Bursa: Ekin Publishing, 2005) 191.
[18] Kemal Gözler, *Introduction to Law* (Ekin Publishing, 2018), 385.
[19] Şenyüz, *Tax Criminal Law*, 191 (n. 17).

The compromise, which is the alternative solution of the Criminal Law, the pre-payment and the alternative dispute resolution way of the Competition Law, contains various similarities. However, it is not possible to match the settlement procedure with the prepayment system in terms of its legal nature. In the pre-payment, the perpetrator accepts or refuses to pay the amount of the penalty, which is determined unilaterally and in advance. On the other hand settlement procedure accepts that the undertaking has committed a violation and discusses the amount of the penalty to be imposed by sitting at the same table as the competition authority. Unlike pre-payment, there is no acceptance or rejection of unilaterally determined punishment in settlement. In the event that the will of the parties coincides, both parties endure sacrifices by giving up certain rights. As a result, some advantages are obtained. In this case, it is not possible for one side to force the other's will or be superior to the other. The parties are in an equal position in the settlement institution.[20] It is not possible to compare it to the prepayment institution in Criminal Law due to its legal nature due to the listed reasons.

Competition Law, with its own rules and practice, is important in our legal system. Competition Law is closely related to private law as well as other branches of public law. The connection of Competition Law with public law or private law does not limit its independence. Competition Law, which has its own rules, institutions, terminology and objectives, is an independent discipline, and the contract concluded between the undertaking and the competition authority as a result of settlement meetings is not an administrative contract in administrative law nor is it a civil contract in civil law. The settlement agreement is a contract with sui generis, which has its own characteristics and quality, which is suitable for evaluation in the category of anonymous contracts.[21] In our opinion, it is the most appropriate approach to accept that the settlement procedure is a unique institution of Competition Law.

[20] A. Erol, *Turkish Tax System and Tax Law* (Ankara: Yaklaşım Publishing, 2008), 134.
[21] Yılmaz, *Legal Dictionary*, 335 (n. 13).

3. Examination of Turkish and EU Competition Law Settlement Procedure Within The Framework Of Comparative Analysis

	Judicial Review	**Discount in the amount of the penalty**	**Scope of the Settlement Procedure**	**Arrangement of the Settlement Procedure**
Settlement Procedure in EU Competition Law	It is possible to refer the decision made as a result of the settlement to the appeal.	10% penalty discount is provided.	The main purpose is to ensure faster and more efficient conclusion of cartel files.	It is regulated by the Statute and Regulations numbered 1/2003.
Settlement Procedure in Turkish Competition Law	It is stipulated in the text of the law that they waive their right to legal remedy.	25% penalty discount is provided.	It has been defined to include all types of violations (art. 4 and art. 6) defined in the Law No. 4054..	It is regulated in the Law No. 4054.

Table 1: Comparison of EU Material Law and the Settlement Procedure Regulated in Law No. 4054

In the justification of Article 4 of Law No. 4054 includes:

> *For the purpose of the article, the agreement has been used to mean any compromise or agreement on which the parties feel bound, even if it does not comply with the validity conditions of the Turkish Civil Law.*

In this sense, in the understanding of Turkish Competition Law, it has been defined as an alternative concept that is intended to be used to prevent agreements between competitors that restrict competition. Along with the 2020 amendment to the Act on the Protection of Competition, with the provision of Article 43, under the heading of "Starting an Investigation, Commitment and Settlement", the settlement procedure, which has not been applied before in Turkish competition law, has been ruled. According to this,

> *Article 43/5: After starting the investigation, the Board, upon the request of the concerned parties or ex officio, may initiate the settlement procedure, taking into account the procedural benefits that may arise from the rapid completion of the investigation process and the differences of opinion regarding the existence or scope of the violation. The Board may reconcile with the undertakings or associations of undertakings about whom an investigation has been initiated and*

> *which acknowledges the existence and scope of the violation until the notification of the investigation report.*
> *43/6: In this context, the Board gives a certain period of time to the parties investigated to submit a compromise text in which they acknowledge the existence and scope of the violation. Notifications made after the given time has elapsed will not be taken into account. The investigation is terminated with a final decision containing a violation determination and administrative fine.*
> *43/7:As a result of the settlement procedure, a reduction of up to twenty-five percent can be applied to administrative fines. The fact that a reduction in the amount of administrative fines is applied in accordance with this article does not prevent the reduction within the scope of the sixth paragraph of Article 17 of the Law No.5326.*
> *43/8: In the event that the process is concluded with settlement, the administrative fine and the matters included in the settlement paper cannot be subject to litigation by the parties of the settlement.*
> *43/9: Other procedures and principles regarding settlement procedure are determined by the regulation issued by the Board.*

3.1. Nature of the Violation-Just for Cartels?

In the Law No. 4054, it was regulated how the way of settlement would work with the amendment dated 24.06.2020. Article 43 of the Law is stipulated that,

> *The Board is conducting an investigation and the undertaking must accept the existence of the violation and make it a subject of discussion. Undertakings or associations of undertakings that acknowledge that they have committed a violation can mutually agree with the Competition Authority until the notification of the investigation report*.

Unlike the Draft, after the initiation of the investigation, it is regulated that the Board can initiate the settlement procedure, upon the request of the relevant persons or ex officio, by taking into account the procedural benefits arising from the rapid completion of the investigation process and the differences of opinion regarding the existence or scope of the violation.[22] Efficacy from the procedural benefits, which is the purpose of the settlement procedure, is stated under the provision in the Law No. 4054.

Settlement procedure is regulated in EU legislation with leniency programs and is only applied for cartel cases. The Regulation No. 622/2008 shows that the settlement procedure is a mechanism established to enable the Commission to terminate cartel cases in a shorter and more effective time period. It is noteworthy that while in the EU legislation, the settlement is regulated solely for cartel cases, in the Turkish Competition Law the settlement is designed to cover all types of violations regulated in the Law No. 4054. All investigations under article 4 and article 6 of the Law will be made possible to be concluded by settlement.[23] In the regulation of the Law, it is foreseen that the settlement will be appointed in the period from the decision to open an

[22] Regulation 622/2008, para.4.
[23] E., Ince and N. Unubol, "Settlement: Journey to Uncertainty," *Competition Journal* Vol. 16, No. 4 (2015): 53.

investigation to the notification of the investigation report, but there is no provision for the waiver of the Oral Hearing and written defense right or the right to enter the file, which the Law allows for undertakings during the investigation phase.[24] It can be stated that the files based on the effects of the settlement in the Turkish Competition Law in a stage before the notification of the investigation report may leave the boundaries of the actual implementation of the files. This thought has two pillars: First, the settlement decisions that adopt a different procedure than the standard investigation in stages consist of violation decisions. The fact that the competition authority expresses its opinions regarding the violation clearly removes hesitations in terms of the acceptance of the violation. In terms of the files based on their effects, the detection of the violation often becomes clear in the investigation report, which requires considerable time. It can be said that the cases of abuse of the dominant position will be more appropriate for the settlement procedure, as the situation in question is taken into consideration at a stage after the notification of the investigation report. Although there is no legal basis for the settlement, which is described as "*early decision agreement*" in England; the settlement scenario develops over the cases faced by the Commission in practice. In the UK, settlement is implemented in a way to include violations other than cartel formations, depending on the nature of the concrete event, and can be initiated at a stage before or after the reporting of the investigation report.[25] In this context, it is noteworthy that if the settlement procedure is foreseen to operate before the investigation report, the primary scope of application is cartel cases associated with the leniency program.[26] Considering the regulation of the law, it is predicted that the scope of application will be limited to a high rate of cartel cases, and will not be able to find a field of application, especially in cases requiring impact-based assessment, by foreseeing the settlement procedure in a period before the notification of the investigation report. Considering that the settlement procedure can be applied in cartel cases (also in cases with a high rate of leniency in this context), the period given for the preparation of the investigation report is limited to a period of 6 months as regulated in the Law No. 4054. It was believed that the Competition Board would become stronger. With the new regulation in Article 43, no changes were made within a period of 6 months.

3.2. Discount from the Fines

In Article 43/9 of the Law, it is regulated that the administrative fine and the issues existing in the settlement agreement will not be subject to litigation if the process is concluded with compromise. While the legislation regulates the provision of 10% reduction on the agreed fine for the undertaking that has come to a settlement table; Unlike the Draft, it was decided that a 25% discount would be applied. The Draft does not include any discount rates, only it is stated that an administrative fine will be agreed with the undertaking. Acknowledgment of the violation and the provision of a penalty reduction, which is a reward as a result of acceptance, are among the basic elements of the settlement procedure. Providing sufficient benefits and incentives for undertakings to choose the settlement procedure is a requirement for an effective settlement. In addition, undertakings that reached a compromise with the Board in accordance with the Draft did not know what kind of advantages they would gain, in other words, there were uncertainties

[24] Ibid., 55.
[25] Ibid., 63.
[26] Ibid.

as to whether the penalty amount to be provided for the undertakings would be reduced or not. The fact that the penalty reduction, which is one of the most fundamental principles of the settlement procedure, was not handled as a provision of law in the Law No. 4054 suggested that it could create problems for implementation. As a result of settlement with Law No. 4054, a reduction of up to 25% in administrative fines may be applied. In the Draft, there was the expression "agreed administrative fine". Contrary to the practice of EU competition law, it was concluded that the amount foreseen for the administrative fine could be negotiated. However, with the amendment, the rate determined as a result of the settlement has been clarified. In the regulation of the commission, it was clearly stated at the settlement table that no meetings were made with the undertakings in terms of the amount of the penalty. In accordance with the provisions of EU law regarding penalties on the nature of the violation, the minimum and maximum amount of the penalty was calculated and imposed on the attempt and the undertaking's statement stating that they accepted the maximum amount of penalty determined by the Commission in the settlement submission was required to be submitted at the time of settlement meetings.[27] As can be seen in the recent decisions made by the Commission[28] a reduction of more than the determined rate of 10%, which was limited in the EU settlement system, was achieved. In the confession bargain held in the USA, the reduction rate provided in the penalty amount over a fixed rate of 10%, which is the measure regulated in the EU competition law, was not foreseen, it was decided that a discount would be provided according to the severity of the violation, the impact of the violation attempts and the bargaining power. Therefore, the rates in the last three decisions will be possible to change within the implemented leniency programs, as well as the weight, effect of concrete violation, etc. as in the confession bargaining procedure in the USA. The discount rate is also regulated for reasons.[29]

Although it is thought that one of the parties that will sit at the settlement table with the undertaking is the Board, in practice, it is not thought that the interlocutors and the Board sit at a table and participate in the settlement. It is expected to reach a decision by taking into account the issues agreed with the Board in the process of making the final decision through the execution of the relevant units of the Board or the appointment of conciliators to the investigation, taking the practice of the EU Commission as an example. Therefore, it is considered that the agreement on the amount of administrative fines determined by the undertaking will restrict the discretionary power of the Board. It is important for a third person to achieve compromise at the point of ensuring impartiality and independence. The conciliator to be appointed bears the responsibility of always being neutral towards the parties to the dispute. The fact that these are third parties by the Competition Board will ensure that independent decisions are made at the point of resolution of the dispute, while leaving the Competition Board to third parties to reach a result quickly and effectively with the settlement procedure will be beneficial in terms of both the workload and the use of resources. As in mediation, these people should be resolved by experts who are well-versed and knowledgeable in Law No. 4054, as well as graduates of law faculties.[30]

[27] Ibid., 55.
[28] Press Release of the EU Commission, http://europa.eu/rapid/press-release_IP-18-6844_en.htm; Press release of the EU Commission, http://europa.eu/rapid/press-release_IP-19-1828_en.htm; AB Komisyonu basın bildirisi http://europa.eu/rapid/press-release_IP-18-4601_en.htm.
[29] Ince and Unubol, "Settlement: Journey to Uncertainty," 56 (n. 23).
[30] Regulation on Mediation Law in Legal Disputes, art. 42.

3.3. Waiver of Appeal is Possible?

In EU law, the Commission uses the settlement to eliminate some procedural steps included in the standard procedure. The aim is to resolve the violation quickly and effectively. With the help of the settlement procedure of cartel investigations, cases that are terminated faster and the resource savings achieved will be used to detect other cartel cases and deterrence will be increased.[31] Unlike the US competition law, the right to judicial remedy is a right that can be exercised after the final decision is made, rather than the investigation stage, in which the only right to waive the undertakings is a judicial remedy against the final decision. In terms of settlement scenarios, the regulated Oral Hearing, entry to the file etc. while procedural rights pertain to the processes currently underway in terms of authority; The waiver of the right to apply for a judicial remedy is related to the process in which the courts decide, and envisages a waiver of the right in this context.[32] The semi-judicial system, which exists in competition law systems carried out by administrative institutions, is the main argument often defended against the criticism of the undertaking that it harms the right to a fair trial; In the US practice, where cartel cases are criminalized and the criminal dimensions go up to prison sentences, the system called "plea-bargain", where the final decision is made by the competent courts at the end of the settlement and the waiver of the right to legal remedy takes place before the court, the system is less than the systems where the settlement is dealt with under administrative proceedings.[33] The renunciation of the right to appeal to a judicial remedy needs to be evaluated carefully, taking into account the constitutional rules under the current judicial regime in the country, within the framework of the protection of the appeal.[34] It is believed that the regulation of the condition of giving up the decision within the settlement to the appeal as one of the basic building blocks will create efficiency in terms of using and directing the resources with the disappearance of the litigation phase in terms of violation decisions.[35] It is considered that the process at the court stage is an important step in terms of both resource and time regarding the finalization of the aforementioned violation decision, and a significant amount of resource savings can be achieved by eliminating this step.[36] In a contrary scenario, even if the waiver of the right to litigation is not required, the rate of actually filing a lawsuit will decrease with the settlement, and therefore, whether a limitation is required to abolish judicial review will become clear with the implementation of the settlement.

In the last paragraph of the Law, it is stipulated that the procedures and principles regarding settlement will be determined by the regulation to be issued by the Competition Authority. As can be seen, in the Law, as in the Draft, the compromise clause is a short and framework arrangement, and it is foreseen that its content will be shaped in practice.

[31] Ince and Unubol, "Settlement: Journey to Uncertainty," 55 (n. 23).
[32] Ince and Unubol, "Settlement: Journey to Uncertainty," 57 (n. 23).
[33] D. Slather, S. Thomas, and D. Waelbroeck, "Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?" *College of Europe European Legal Studies*, Research Papers in Law 5 (2008): http://aei.pitt.edu/44310/1/researchpaper5_2008.pdf.
[34] OECD, "Competition Law and Policy in Turkey," 2005, 44. https://www.oecd.org/daf/competition/prosecutionandlawenforcement/34645128.pdf.
[35] Ibid.
[36] Ince and Unubol, "Settlement: Journey to Uncertainty," 57 (n. 23).

4. Evaluation of the Settlement Procedure in Terms of the Relation of Leniency and Penalty Regulation

As many competition authorities in the world, Turkey Competition Authority (TRC) is fighting against cartels and cartel to be regarded as the most serious violation of competition law. The Competition Authority tries to adopt different mechanisms to make its implementation more efficient.

The settlement procedure has not been clearly implemented in Competition Law. However, there are cases where the Competition Authority reduced fines on the grounds that cartel participants accepted their responsibilities and cooperated with the TCA.For example, the Competition Authority, Siemens Sanayi ve Ticaret A.Ş. (Siemens) and its 14 dealers to determine whether the cartelization will be realized in the tenders after the dealership system and whether the system in question has anti-competitive effects and consequences in the traffic signaling market. In the *Siemens*[37] decision, one of the parties was fined a minimum fine for helping to reveal the violation, while other participants were fined up to 6% of their turnover. The defense of the cooperating undertakings supports the investigation's findings. *Yonga Levha I*[38] and *Yonga Levha II*[39] cases have taken into account the cooperation with the Competition Board and the fine has been calculated accordingly. Collaborating firms were fined 0.5%, while other cartel undertakings received fines corresponding to 1% of their turnover. One of the mitigating factors in the *Ytong* case[40] was the firm's denial of the alleged cartel's existence. Collaborating parties were fined up to 2% of their turnover, while other parties received fines corresponding to 3% of their turnover.

The decision implementation of the Competition Authority regarding the rewarding of accepting the violation and cooperation has been criticized in the past. It has been claimed that the practices of the Competition Board are not as successful as in the USA or the EU, because the general fines are not high enough to guarantee the cooperation of the undertakings. In addition, it is emphasized that there should be clear rules regarding the awards brought by cooperation. The need for transparent, objective and consistent policies on leniency and settlement institutions for an effective fight against cartels is also expressed.[41] Similar criticisms were expressed in one of the OECD reports. Turkey made some evaluation results "Review Report" has been proposed in the following considerations: “To improve the implementation capacity of the Competition Authority and the Competition Act, the law must be changed.” In this regard, the adoption of the settlement mechanism and leniency programs becomes more important. The settlement mechanism makes it possible to terminate the process in a short time if the undertaking changes its behavior according to the Competition Board's suggestion. Therefore, it will ensure that investigations are resolved effectively.[42]Undertakings that provide some basic information about the cartel may receive a reduction in fines when they accept their

[37] No. 05-13/156-54 and dated 10.03.2005, p. 84, 98-103. See also Annual Report On Competition Policy Developments In Turkey (2006), DAF/COMP(2006)7/20.
[38] No. 02-53/685-278 and dated 06.09.2002.
[39] No. 03-12/135-63 and dated 25.02.2002.
[40] No. 06-37/477-129 and dated 30.05.2006, p. 86, 88.
[41] H. Arı, G. Kekevi, and E. Aygun, “The Evaluation of Turkish Competition Authority’s Fining Policy for Cartel Cases.” *Annual Symposium on Recent Developments in Competition Law* 4 (2008): 158.
[42] OECD “Competition Law and Policy in Turkey” (n. 34).

responsibilities. The Guideline Draft Regarding the Disclosure of the Regulation on Active Cooperation for the Purpose of Revealing Cartel, without seeking the significant amount of value of the violation by the Competition Authority, only evaluates whether the undertakings meet the conditions specified in the 6th and 9th articles of the Leniency Programs. In this sense, fine reductions are assumed to be automatic when information about cartels is provided, and that the penalty reductions are linked to the acceptance of liability for the breach. In this sense, it can be accepted that these provisions mean that compromise has a place in Turkish competition law. However, it has different features than those of the Commission. The main difference from the EU settlement procedure is that there is no provision on procedural savings. Although there is a fixed reduction in EU law for all parties, the Leniency Program has different levels of reduction depending on the nature and timing of the cooperation. Apart from this, since the Competition Law makes it possible to punish individuals, there are provisions regarding the imposition of fines on the directors and employees of undertakings.

The reason for the lack of provisions on procedural savings is explained by the fact that in Turkish Competition Law, compromise is not seen as a resource saving mechanism. It aims to reward the admission of liability for the violation and thus facilitate the identification of cartels. Providing clear rules for leniency program and settlement is considered important for a strong sanction. These provisions also aim to address the criticism brought by international reports. In other words, the Commission aims to obtain procedural savings and direct them to the detection of other violations that would increase deterrence. In this sense, according to the views in the doctrine, the general purpose of the two systems is to provide deterrence, but they differ in terms of the way they are implemented. Another difference between the two systems is that the cooperating undertakings do not accept the possible amount of fines in the Turkish "settlement" option.

It has been understood that 17 leniency applications have been received so far within the scope of the Competition Board's leniency program. Nine of these applications were made to obtain a discount for an investigation that had already started. In three of these applications, it is observed that the Competition Board applied reductions in the amount of penalties to cooperating undertakings. We believe that it is beneficial to analyze these decisions, since a reduction in the amount of penalty will be foreseen in return for accepting the responsibility of the violation as “settlements”. In two cases, cartel participants initially cooperated but resorted to the leniency program after the investigation decision. During the application, the Competition Authority is of the opinion that sufficient evidence has been provided that the 4th article of the Competition Law has been violated. However, the Competition Authority did not look at whether there was a significant amount of evidence submitted by the parties and whether it provided reductions in the amount of fines. Therefore, these three applications have similar features to the settlement procedure, as a penalty reduction is provided for the liability of the violation. Here are some cases that the Competition Board has been reduced fines:

- *21 Driving Courses Operating in Kahramanmaraş*[43]

The investigation was initiated as a result of the preliminary investigation carried out upon the application, which alleged that the said driving courses agreed and raised the prices.

[43] 20 August 2014, dated and numbered 14-29/610-264.

During the investigation phase, it was determined that the driving courses examined came together to determine the price and payment conditions, and that they envisaged inspection and punishment mechanisms to ensure price unity.

The Private Gençbilir Motor Vehicle Driving Course, one of the undertakings under investigation during the investigation phase, applied to benefit from the Regulation on Active Cooperation for the Purpose of Revealing Cartels (Leniency Program) on 08.01.2014 and 15.01.2014 and accepted the existence of the agreement.

As a result of the discussion of the file by the Competition Board on 20.08.2014; Administrative fines were imposed on the driving courses that were determined to violate Article 4 of the Law No. 4054 by agreeing to determine the fees for the driving license training.

While the administrative fines were assessed within the framework of the Agreement Restricting Competition, Concerted Actions and Decisions and the Regulation on Fines for Abuse of the Dominant Position (Penal Regulation), it was taken into consideration that no determination was made regarding the implementation of the agreement. In addition, the discount regulated in the Leniency Program was applied in terms of Private Gençbilir Motor Vehicle Driving Course. It is decided to be given 0.75% administrative penalty of 2.138.42 TL.

- *Investigation Against 45 Bakeries Operating in Aksaray*[44]

The investigation in question was initiated on 16.09.2013 as a result of the information and documents obtained from the preliminary investigation process, which was initiated ex officio following the application of denunciation that the bakeries operating in Aksaray. They had agreed to determine the price of bread and many news on the local internet news sites.

In addition, 45 undertakings on which an investigation were under investigation accepted the existence of the cartel by making an application on 21.11.2013 in order to benefit from the Regulation on Active Cooperation for the purpose of Revealing Cartels (Leniency Program).

On April 16, 2014, as a result of the meetings, an administrative fine was imposed for violating Article 4 of the Law No. 4054 by determining together the sale price of bread in 2013. In the determination of the administrative fines, taking into account the applications of the undertakings under the Leniency Program, the Agreements Restricting Competition, Concerted Actions and Decisions and the Regulation on Fines to be Imposed in the Case of Abuse of the Dominant Position (Penal Regulation) and the Penalty Regulation were applied.

Considering the general principles for the settlement procedure, an arrangement similar to the leniency program and penalties may be adopted. In these arrangements, possible procedural elements of the settlement procedure can be designed. In the regulation, the initiation of settlement meetings, confidentiality problems, withdrawal from settlement meetings or violation of the process can be explained by taking EU law. Waiver of appeal can have clear benefits in terms of reduced legal costs and the Competition Authority should use these benefits in resolving

[44] 6 April 2014, dated and numbered 14-15/287-120.

other cases.[45]It should also be remembered that transparency should be ensured for the settlement process as much as possible.

5. Concluding Remarks

The settlement procedure in competition law allows for the detection and analysis of violations of competition as quickly as possible and to provide a healthy competitive environment in the market as soon as possible. In this context, the continuation of the violation is prevented and the damage to be caused is prevented. On the other hand, the limited public resources of the competition authority are saved and these resources are redirected to other violations and resolved. Ending legal uncertainty in the settlement procedure, protecting commercial reputation, reduction in penalty amount and optimal use of resources, etc. undertakings that gain advantages also take advantage of the settlement process.

In the competition legislation in other legal systems, there are settlement procedures regulated in different ways. In most of these methods, undertakings accept their obligations arising from the breach, waive some procedural rights granted to them, obtain a reduction in fines as a result of their cooperation with the competition authority and ensure that the violation is terminated at an early stage. While the settlement implemented by the EU Commission and the plea bargain implemented by the USA are similar in shape, they differ from each other in terms of the way of implementation and penal dimensions.

The success of the settlement depends on the fact that undertakings decide which party's benefits outweigh the benefits after choosing to compromise with the judgment in the normal procedure. Like an effective leniency program, an effective cartel settlement requires a sufficient amount of benefits and incentives for both the Commission and undertakings joining the cartel.
When the competition authority invites the parties to negotiate the settlement, a time limit is set, stating whether the parties want to participate in the settlement with a written notice, "this written statement does not mean that the parties agree to participate in a violation or be responsible for it" and the settlement procedure is started. In this way, undertakings can participate in the settlement procedure in their innocent status. Therefore, the competition authority is obliged to ensure that the responsibility of each party is examined on the basis of its own infringement. In this context, an undertaking will not be limited by pressure from other undertakings forming a cartel and will therefore be free to make the best decision for itself.

[45]ICN, “Cartel Settlement.”, 2008, p.26. https://centrocedec.files.wordpress.com/2015/07/cartel-settlements-2008.pdf.

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