

COMMITMENTS:

Pros, Cons and Challenges along with Turkey's Snapshot

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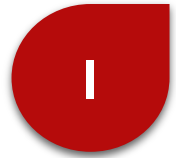
OUTLINE*

- I Commitment Mechanism in a nutshell
- II Pros, Cons, Challenges
- III Turkey's Snapshot: the situation in Turkey



* The views expressed in this presentation are personal, **do not** necessarily reflect those of the Turkish Competition Authority.

OUTLINE



Commitment Mechanism in a nutshell



Pros, Cons, Challenges



Turkey's Snapshot: the situation in Turkey



Commitment as a new case resolution tool

A tendency towards introduction of resolution tools to facilitate the work of competition authorities by...

- Shortening the case duration
- Creating right incentives for the firms to cooperate (termination of the case, immunity/reduction in fines, etc.)
- New tools: Leniency, Settlements, Commitments
- Commitments: commitments, consent decrees/orders, undertakings



OECD (2016)

- 29/34 member countries + EU Commission have commitment procedures.
- Has become very popular (esp. for abuse of dominance and vertical anti-competitive agreements cases):
- consent decrees concerns 70-80% of the US DOJ cases.
- between May 2004- December 2013 over 150 commitments decisions in EU states → %26
- between May 2004- May 2014 34/54 of antitrust cases of EU Commission are commitment decisions → %63

Commitment Mechanism in a Nutshell

Major elements of Commitments

- Legally binding commitments/remedies voluntarily submitted to the CA, which eliminate the grounds for further enforcement action.
- Termination of the antitrust investigation.



The Bottomline...

- Quicker end: procedural economy
- No fines (#1 incentive for the firm)
- No infringement decision (#2 incentive for the firm)
- Elimination of anticompetitive concerns of the CA.

DETERRENCE?



Implications...

- Not appropriate in cases where CA intends to impose fine, e.g cartel cases
- Legally binding commitments → Fines for the infringement of commitments
- Commitments → as either behavioral and/or structural (behavioral dominates structural in practice) which could be negotiated with the CA.
- Quicker end → Procedural rights are limited
- No infringement decision → limited private enforcement



OUTLINE



Commitment Mechanism in a nutshell



Pros, Cons, Challenges



Turkey's Snapshot: the situation in Turkey



What are the pros and cons?

PROS

- Procedural economy
- Quicker resolution of cases (both in CA and courts) ← no infringement decision)
- Market test → Crafted remedies/commitments that can overreach the ones allowed by infringement decisions → improved quality for remedies
- Avoidance of fines



CONS

- Type 1 error risk → what if the conduct is not anticompetitive?
- Less legal certainty → loose legal review → CA being the main decision-maker instead of courts
- no infringement decision → little room for private enforcement → pro for the undertaking concerned!!!



What are the challenges?

DETERRENCE

- The incentives for firms to cooperate:
 - No fines
 - No infringement decision
 - No lengthy antitrust litigations ← risk management

VERSUS

- Deterrence of antitrust enforcement
 - The absence of full-fledged investigations
 - Limitation of case-law?
 - Firms get away with the anticompetitive harm they created?



DISCRETIONARY POWER OF CA

- CA being the main decision-maker instead of courts → abuse of discretionary power?



OUTLINE



Commitment Mechanism in a nutshell



Pros, Cons, Challenges



Turkey's Snapshot: the situation in Turkey



Turkey's Snapshot

To date, Turkey does not have a formal commitment mechanism

- No law provision concerning formal commitments for antitrust cases
- Remedies/commitment mechanism is available for merger cases
- A special provision in draft law to introduce a formal commitment mechanism much like the one in EU Commission
 - Early termination of proceedings
 - Crafted commitments



Commitment like mechanism: Article 9/3

- Art. 9/3 of the Competition Act: *«The Board, prior to taking a decision pursuant to the first paragraph, shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement.»*
- Termination of proceedings
- Board's opinion ~recommendation → Not binding



THANK YOU...

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