

The Turkish Competition Board Acknowledged that Reassessment of a Decision Must Not Harm the Appellant

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A. Introduction

The Competition Board (“**Board**”) has recently published its reasoned decision¹ in its reassessment of the Turkish Pharmacists Association (*Türk Eczacıları Birliği*) (“**TPA**”) case, following the annulment decision² rendered by the 13th Chamber of the High State Court (“**High State Court**”). The High State Court’s ruling was made as a result of the TPA’s appeal against the Board’s earlier decision³ concerning the TPA’s practices, which examined allegations that the TPA had fixed pharmacies’ purchasing terms and conditions in non-market circumstances. Pursuant to the investigation, the Board found that the TPA had violated Article 4 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”), and imposed an administrative monetary fine corresponding to 3% of the TPA’s revenues for the 2009 fiscal year.

B. Summary of the High State Court’s Review of the Board’s Previous Decision

1. Basis of the Request for Annulment

In its decision, the High State Court summarized the TPA’s legal basis for its appeal as follows: (i) the Board had failed to define any relevant product market in its decision, (ii) the Board was not authorized to review the TPA’s practices arising from its powers that were vested and conferred by its establishing documents (iii) the Board failed to justify the use of

¹ The Board’s decision dated April 5, 2018, and numbered 18-10/185-88.

² The 13th Chamber of the High State Court’s decision dated December 16, 2014, and numbered 2010/4769 E. and 2014/4294 K.

³ The Board’s decision dated July 8, 2010, and numbered 10-49/912-321.

its discretionary powers for the determination of the administrative monetary fine, and (iv) the practices subject to the investigation did not constitute a competition law violation.

2. The High State Court's Judgment

It should be noted at the outset that the High State Court did not assess all the grounds for appeal that were asserted by the TPA. Rather, its evaluation of the case revolved around the following questions: (i) whether the Board was authorized to review the TPA's practices, (ii) whether the TPA's practices violated Article 4 of the Law No. 4054 and whether they failed to comply with the conditions for receiving an individual exemption under Article 5 of the Law No. 4054 (and thus, whether the Board's decision to task the Presidency of the Competition Authority to send a written opinion under Article 9(3) of the Law No. 4054 was lawful), and (iii) whether the Board's determination of the administrative monetary fine was lawful.

The High State Court affirmed that, as a public professional association, the TPA qualified as an association of undertakings under the definition provided by Article 3 of the Law No. 4054. However, the High State Court also examined whether or not the Board had the authority to review the TPA's practices in light of the relevant precedents. According to the landmark decisions of the High State Court's Grand Chamber of Administrative Trials,⁴ which were referenced in the High State Court's decision, the Competition Authority does not possess the power to conduct judicial review pursuant to the Law No. 4054 with regard to practices that arise from the implementation of the applicable legal provisions regarding the duties of public associations or professional chambers that have been established in accordance with the laws. According to the High State Court, judicial review of such practices must be sought and conducted through annulment requests before administrative courts.

On the other hand, relying on the approach of the High State Court's Grand Chamber of Administrative Trials, the High State Court excluded practices whose execution had no legal basis in a statutory power from this analysis, and asserted that such practices should fall under

⁴ The High State Court's Grand Chamber of Administrative Trials decisions (i) dated March 11, 2004, and numbered (stay of execution objection number) 2004/93, (ii) dated February 11, 2010, and numbered 2008/1881, and (iii) dated March 27, 2008, and numbered (stay of execution objection number) 2007/774.

the scope of the Law No. 4054. The High State Court concluded that the Board possessed the power to initiate a full-fledged investigation against the practices of an association of undertakings that did not arise from the duties specified or assigned by the association's founding legal documents (*e.g.*, articles of association) and that were determined to be anti-competitive. More specifically, the High State Court analyzed whether the TPA's practices under scrutiny fell under the scope of the Turkish Pharmacists Law No. 6643 ("**Law No. 6643**"). Accordingly, the High State Court found that these practices did not fall under the scope of Article 39 of the Law No. 6643, which enumerates the duties of the TPA. Therefore, the High State Court ultimately concluded that the Board had not exceeded its authority and that the Board's exercise of its power with respect to the TPA's practices under scrutiny had been lawful.

With respect to the substantial review of the Board's decision, the High State Court concluded that (i) the Board's assessments regarding the TPA's practices had been lawful and that the TPA's practices violated Article 4 of the Law No. 4054, and (ii) these practices did not fulfill the conditions that must be satisfied to receive an individual exemption under Article 5 of the Law No. 4054. Accordingly, the High State Court declared that the section of the Board's decision tasking the Presidency of the Competition Authority with sending a written opinion under Article 9(3) of the Law No. 4054 had also been lawful.

Finally, regarding the determination of the administrative monetary fine, the High State Court found that the Board's decision subject to appeal had failed to include any assessments regarding the specific aspects of the case that had been taken into account when determining the amount of the administrative monetary fine. In particular, the High State Court stated that the Board's decision had failed to set forth: (i) any justification for the Board's use of its discretionary powers when setting the exact ratio to be used in determining the administrative monetary fine amount (*i.e.*, as a percentage of the TPA's revenues), in accordance with the range interval stipulated by legislation, (ii) a clear and thorough evaluation regarding the potential existence of aggravating and/or mitigating factors, and (iii) a clear explanation with respect to the potential impact of the gravity of the TPA's prohibited conduct on the determination of the administrative monetary fine amount. Against this background, the High State Court concluded that the substance of the Board's assessments regarding the determination of the administrative monetary fine amount lacked the clarity required for a

judicial review of the administrative monetary fine decision, and therefore annulled the relevant section of the Board's decision.

C. The Board's Assessments Regarding the Administrative Monetary Fine and the Principle of *Reformatio in Peius*

Following the High State Court's decision, the Board reassessed the determination of the administrative monetary fine amount in light of the Law No. 4054 and the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("**Regulation on Fines**"). The Board acknowledged that the administrative monetary fine must be calculated on the basis of a three-step process: (i) the determination of a base fine amount according to Article 5 of the Regulation on Fines (which includes the incorporation of the duration multiplier, if applicable), (ii) the consideration and factoring in of aggravating circumstances under Article 6 of the Regulation on Fines, and (iii) the consideration and factoring in of mitigating factors under Article 7 of the Regulation on Fines. The Board subsequently determined that the violation in this case fell under the category of "Other Violations" as per Article 5 of the Regulation on Fines, and asserted that an administrative monetary fine corresponding to between 0.5 to 3 percent of the turnover generated in the fiscal year preceding the date of the administrative fine decision should be imposed. The Board then noted that a number of relevant factors, such as the market power of the undertakings/associations concerned and the seriousness of the damage which occurred or is likely to occur as a result of the violation, should also be taken into consideration in determining the level of the abovementioned base percentage. Finally, the Board ruled that there were no applicable aggravating and/or mitigating factors in the present case, and concluded that the duration of the infringement did not necessitate increasing the base fine amount either.

After establishing the base fine percentage, the Board turned its attention to determining the fiscal year that would be taken into account for calculating the base fine. In this regard, the Board turned its attention to the criminal procedure principle of avoiding *reformatio in peius* (Latin: "change for the worse," which occurs when, as the result of an appeal, the appellant is put in a worse position than if they had not appealed). In this context, the Board declared that

the principle of *reformatio in peius*, which is defined under Article 307(4) of the Law No. 5271 on Criminal Procedure in Turkey, would also be applicable to administrative monetary fines levied by the Board. To that end, in an effort to reach the most advantageous base fine amount for the TPA, the Board calculated three different turnover figures for 2011, 2014 and 2017, which respectively represented the years preceding (i) the High State Court's stay-of-execution decision, (ii) the High State Court's annulment decision, and (iii) the Board's previous monetary fine decision. Subsequently, the Board compared these turnover figures with the corresponding figures for 2009 and decided to use the TPA's turnover figures for 2014 when determining the amount of the base fine, as it was the lowest turnover figure among the three years under consideration. The Board thereby respected and incorporated the principle of *reformatio in peius* into its decision.

D. The Principle of *Reformatio in Peius* in Turkish Competition Law

The prohibition on *reformatio in peius* is a statutory restriction on judicial authorities that obliges them not to resolve an appeal (or objection) with a decision that puts the appellant in a worse position than if it had never appealed. *Reformatio in peius* is an important procedural rule that is observed by Turkish courts as an established legal principle. It can be reasonably argued that the Turkish Competition Board should respect and abide by the principle of *reformatio in peius* and thereby avoid rendering decisions that put an appellant undertaking in a worse position than it would have been under the initial Board decision.

In fact, the High State Court has previously affirmed this approach in the *Aktif-İriyıl Otomotiv İnşaat Turizm Ticaret ve Sanayi Limited Şirketi* (“*Aktif İriyıl*”) case.⁵ In that lawsuit, the High State Court reviewed a Board decision⁶ that was a reassessment made upon an annulment order⁷ rendered by the Ankara 9th Administrative Court. Previously, the Ankara 9th Administrative Court had delivered its annulment decision upon Aktif İriyıl's appeal against the Board decision imposing an administrative monetary fine on the undertaking in the amount of TL 109,418.33 (approximately EUR 46,363 at the prevailing exchange rate).⁸ In

⁵ The 13th Chamber of the High State Court's decision dated November 11, 2015, and numbered 2015/5483 E. and 2015/3835 K.

⁶ The Board's decision dated April 16, 2014, and numbered 14-15/277-119.

⁷ The Ankara 9th Administrative Court decision dated December 24, 2013, and numbered 2013/752 E. and 2013/2064 K.

⁸ The Board's decision dated April 12, 2012, and numbered 12-20/557-141.

light of its reassessment, the Board decided to impose a larger administrative monetary fine on Aktif İriyil (TL 156,473.67, approx. EUR 66,302 at the time). Aktif İriyil subsequently challenged the Board's reassessment decision. With respect to Aktif İriyil's appeal, the Ankara 9th Administrative Court (which was the court of first instance that had rendered the previous annulment decision) concluded that the reassessment decision should also be annulled, to the extent that the newly imposed administrative monetary fine exceeded the previous fine's amount (TL 109,418.33). The Ankara 9th Administrative Court reasoned as follows: "*In a state governed by the rule of law, exercising one's legal rights should not result in detriments being incurred.*" Subsequently, the High State Court upheld the Ankara 9th Administrative Court's decision and, accordingly, decided that the administrative monetary fine imposed by the Board should be reduced to TL 109,418.33.⁹ This decision was final and unappealable, since the High State Court rejected the Competition Authority's final appeal (*i.e.*, the request for a revision of the decision).¹⁰

Although there aren't a high number of precedents demonstrating the implementation of the principle of *reformatio in peius* in the context of competition law, the High State Court's *Aktif İriyil* decision provides a powerful and clear-cut example for the Board and administrative courts to follow.

E. Conclusion

We believe that the decision discussed above is highly significant, as it (i) provides comprehensive and instructive explanations on the method to be used for lawfully determining the administrative monetary fine amount, and (ii) sheds light on the correct and proper implementation of the principle of *reformatio in peius* by the Board when reassessing the administrative monetary fine amount subsequent to an annulment order by an administrative court. To that end, this decision may serve as a powerful reference for future cases in which the Board will be required to reassess its decisions, particularly in cases where it will have already imposed an administrative monetary fine.

⁹ See Footnote 5.

¹⁰ The 13th Chamber of the High State Court's decision dated May 25, 2016, and numbered 2016/750 E. and 2016/1955 K.

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