

## Constitutional Court Decision Regarding Administrative Fine Imposed by the Competition Board

5 October 2020

### Introduction

The Constitutional Court, with its decision dated 17 June 2020 and numbered 2016/8342 (the **Decision**), found a decision of the Council of State regarding an administrative fine imposed by the Competition Board against the constitution. The decision was published in the Official Gazette on 30 September 2020. Although the Decision did not cancel the administrative fine imposed by the Competition Board, the Constitutional Court ordered the retrial of the Council of State decision regarding the administrative fine, on the grounds that the Council of State failed to take into consideration the more favourable basis of fine calculation which was in effect at the time of the proceeding.

### Background

On 16 March 2007, the Competition Board imposed administrative fines against 22 undertakings operating in medical consumables market for violation of Article 4 of the Law No. 4054 on the Protection of Competition (the **Competition Law**) through price maintaining and market sharing practices. In accordance with article 16 of the Competition Law, which was in force at the time of the Board's decision, fines were calculated based on the gross income of the undertakings in the financial year prior to the year in which the anti-competitive activities had taken place. However, around a year later after the Board's decision, Article 16 of the Competition Law was amended with the Law No. 5728 (the **Law No. 5728**). Amended article requires administrative fines to be calculated based on the gross income of the financial year prior to the Competition Authority decision. Previously, there was no clarity as to which financial year should be taken as a basis of the monetary fine and the TCA usually took into account the financial year prior to the conduct itself.

Following the amendment, one of the 22 undertakings, Onmed Tıbbi Ürünler Paz. ve Dış Tic. Ltd. Şti. (**Onmed**), raised this issue during the appeal proceedings before the Council of State. However, the Council of State did not take this appeal ground into account and rejected Onmed's request to annul the Competition Board's decision. The matter was then brought before the Council of State's General Assembly of Chambers. In this appeal proceeding, Onmed argued that the Council of State failed to observe the revised provision of the Competition Law and thus the said decision should be reversed. However, the General Assembly upheld the Council of State's decision and rejected Onmed's claims. Appeal proceedings were then completed on 14 December 2015.

### The more favourable rule

The retrospective application of the more favourable rule is a principle set forth under Article 7 of the Turkish Criminal Code No. 5237, and is applied to misdemeanours as well due to the reference in Article 5 of the Misdemeanours Law No. 5326 (the **Misdemeanours Law**). Administrative fines imposed by regulatory authorities such as the Competition Authority are subject to the Misdemeanours Law. The Council of State has an established case-law which states that the law in favour at the time of the proceeding must be applied to administrative fines. Although this was the case, in its decision regarding Onmed's annulment action, the Council of State adopted a completely different approach. Therefore, after exhausting all legal avenues, Onmed brought this issue before the Constitutional Court with its individual application dated 27 April 2016. In line with the Council of State's established practice, the Constitutional Court ruled that the principle of legality in crime and

punishment also ensures the retrospective application of amendment in law that is in favour of sanctions. Thus, Constitutional Court concluded that not observing the revised provision of the Competition Law, which was in favour of the applicant, was against the constitution. Accordingly, the Constitution Court ruled a retrial by the Council of State to observe the revised provision of the Competition Law.

### What is new?

The Constitutional Court accepts misdemeanours as criminal offenses and therefore allows individual applications to be made against decisions regarding misdemeanours. There have been individual applications before the Constitutional Court against decisions by regulatory authorities before, such as the Capital Markets Board and the Energy Market Regulatory Authority. However, before the Decision there has only been one individual application to the Constitutional Court in relation to a decision of the Competition Board. In this decision, numbered 2015/16697, the Constitutional Court found a very similar claim regarding an administrative fine imposed by the Competition Authority inadmissible, where the applicant had stated that the more favourable rule on statute of limitations introduced by the Law No. 5728 was not taken into consideration by the Council of State. The Decision, therefore, is the first decision rendered by the Constitutional Court where an application regarding a Competition Board decision is found admissible. It is also the first decision ordering a retrial of a Council of State decision regarding an administrative fine imposed by the Competition Authority.

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