

The Decision of Turkish Constitutional Court Regarding the Amendments to the Law No. 4054 on the Protection of Competition

29 May 2023

Introduction

The decision of the Turkish Constitutional Court ("**TCC**") dated 09.11.2022 and numbered 2022/139^[1] which examines the annulment lawsuit filed by 137 deputies of the Turkish Grand National Assembly regarding the amendments introduced to the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") through the Law No. 7246 Amending the Law on the Protection of Competition ("**Law No. 7246**") is of importance as it provides insight on the TCC's assessment regarding the balance between the constitutional inalienable rights granted to undertakings such as the right to property, data protection, protection of trade secrets and the assignment imposed on the Turkish Competition Authority ("**Authority**") to ensure competitive market structure, consumer welfare and protection of public interest.

Accordingly, this article will discuss the annulment request of deputies and the assessment of the TCC under three categories; (I) Amendment of Article 9 which stipulates the termination of violation through remedies, (II) Amendment of Article 15 which regulates on-site inspections and (III) Amendments Regarding Article 34(3) and Temporary Article 6(1) that specify the status and appointment of the personnel of the Authority.

I. Amendment of Article 9 Introducing Structural Remedies

With the Law No. 7246, the first paragraph of Article 9 of the Law No. 4054 was amended as follows:

*"...and any structural remedies in the form of **undertakings transferring certain businesses, partnership shares or assets.**"*

for the purposes of granting the Authority with the right to impose structural remedies to terminate the infringement and assert competition in the relevant markets by way of transferring certain businesses, shares or assets.

The annulment request was based on the grounds that the amendment may result in undertakings' structural change without a judicial decision, and lead to the restriction of Articles 2, 13, 35, 48, 90 and 167 of the Constitution of Türkiye ("**Constitution**") stipulating the lack of proportionality for restricting fundamental rights and freedoms, the right to property as well as freedom of contract. Additionally, it was indicated that even if the Turkish Competition Board's ("**Board**") decision -granted to reinstitute competitive landscape through structural remedies- is cancelled through judicial appeal proceedings, the investigated undertakings may still suffer severe and irreparable damages.

Further to the assessment of the Deputies' claims, the TCC evaluated:

- *the Principle of Legality*: The TCC indicated that the competition was a mandatory aspect for the democratic functioning of the markets regulated under Article 167 of the Constitution and in the event of its restriction, the Authority was granted with the right to reinstitute it through limiting the undertakings' right to property which was enable under Article 35 of the Constitution and the structural remedies were also structured under competition law in clear manner which leave no room for hesitation on its application. Accordingly, the TCC determined that the relevant amendment was in line with the principle of legality.

- *The Principle of Legitimate Purpose*: the TCC noted that structural remedies were only imposed in cases where the competitive structure of the market could not be established through behavioural remedies or other enforcement tools and therefore, indicated that there was public interest in imposition of structural remedies and legitimate purpose.
- *The Principle of Proportionality*: As indicated above, the TCC once more noted that structural remedies were only imposed in cases where other enforcement tools remained ineffective and thus, the TCC indicated that the Authority considered structural remedies as a last resort (= *ultima ratio*) and thus, its introduction to the Law No. 4054 was proportionate.

In line with the above, TCC ruled that the amendment of Article 9 of the Law No. 4054 did not cause legitimately disproportionate interference with constitutional rights and thus, decided to unanimously rejected the request for the annulment of the rule.

II. Amendment of Article 15 Concerning On-site Inspections

Through the implementation of the amendment to the subparagraph (a) of the first paragraph of Article 15 of Law No. 4054 regulating onsite inspections, the Authority was granted with the right to take copies and physical samples of books, all types of data and documents of undertakings and associations of undertakings which are kept on physical or electronic media and in information systems during the on-site inspections and the following was requested to be annulled:

"...and take copies and physical samples thereof,"

The annulment request was based on the grounds that the amendment (i) enabled copying and sampling of all kinds of documents of the undertakings without any limitation by the Authority, (ii) authorized access to all kinds of data without assessing the protection of trade secrets and customer circle and (iii) did not provide any assurance regarding the acquisition and processing of personal data. Thus, the deputies alleged that the amendment brought to Article 15 of the Law No.4054 was incompatible with the principles of legal certainty and proportionality, and therefore contrary to Articles 2, 13, 20, 35 and 90 of the Constitution.

TCC evaluated the relevant amendment in terms of:

- *the Principle of Legality*: the TCC indicated that the Authority was commissioned to review and protect competitive functioning of the markets under Article 167 of the Constitution and as the procedures concerning on-site inspection was clearly stipulated leaving no room for hesitation, the TCC determined that the amendment complied with the principle of legality.
- *The Principle of Legitimate Purpose*: The TCC noted that the resurfacing of competitively restrictive behaviours may primarily be achieved through the collection of evidence during on-site inspections. Accordingly, the TCC evaluated that there was legitimate purpose in collecting copies and physical samples during on-site inspections and thus, indicated that the amendment was lawful.
- *The Principle of Proportionality*: Finally, the TCC stated that the amendment was sufficient and necessary for the detection and prohibition competitively restrictive behaviours and market conditions. Additionally, since the processing and collection of personal data was regulated under the Law No. 6698 on the Protection of Personal Data and the personnel of the Authority were bound with the obligation non-disclosure obligation towards trade secrets and personal data, the amendment complied with the principle of proportionality.

Consequently, the TCC ruled that the amendment of Article 15 of the Law No. 4054 did not cause a disproportionate interference, did not impose an unreasonable limitation on the right to request protection of personal data, was not contrary to Articles of the Constitution and therefore rejected the request for the annulment of the rule by majority vote.

As for the dissenting opinions, the views consisted of the claims that the rule was contrary to the right to request the protection of personal data and inviolability of the domicile since the copied and sampled documents contained all kinds of data, including trade secrets and personal information, on-site inspections carried out at workplaces without court order. In the dissenting opinions, it was noted that to limit these fundamental constitutional rights, there must

clear laws in which rules are specific and foreseeable and leaving no room to arbitrary applications, and thus, the amendment was opined to not meet the requirement of legality.

III. Amendment of Provisions Concerning the Status and Appointment of the Personnel of the Authority.

As for the annulment request concerning the amendment of Article 34(3) of the Law No. 4054 submitted for the TCC's consideration, the relevant amendment granted the Authority the right to change the financial rights, service classes, positions, titles and degrees of the Authority's personnel. The TCC upon its assessment noted that (i) the personnel of the Authority were initially public officials whom appointment is regulated under Article 128 of the Constitution and (ii) the amendment expanded the Authority's powers in a way that it resulted in the delegation of legislative power to the Authority which was considered contrary to Articles 7,123 and 128 of the Constitution and thus, the amendment was unanimously annulled.

As for the amendment of the first sentence of the Temporary Article 6/1 which enabled the Authority to appoint its personnels from different positions to researcher positions as follows: *"...those in the Authority advisor, advisor to the President, administrative coordinator, director, research expert, press consultant, system analyst, data communications expert, programmer, administrative services officer and administrative services expert positions shall be appointed to researcher positions."* was annulled by the TCC on the grounds that it was incompatible with the principle of legal security regulated under Article 2 of the Constitution.

The TCC based its assessment on the grounds that:

- public officials shall not be dismissed from their positions unless there is a justifiable reason for their dismissal from their positions obliged under the principle of legal security,
- the appointment of the Authority's personnel working in different positions to researcher position at the end of their service periods could not be considered as a legal and *de facto* obligation for appointment and
- it was not deemed necessary to carry out the constitutionality review of the fourth sentence of the Temporary Article 6(1) on the grounds that the annulment of the first sentence left no possibility to apply the fourth sentence.

Taking into consideration the above factors, the TCC decided for the annulment of Temporary Article 6(1).

Conclusion

The decision of TCC is a significant decision as it establishes a delicate balance between the increasing regulatory powers of the Authority and the fundamental rights as well as freedoms guaranteed to the undertakings by the Constitution and evaluates each rule that is requested to be annulled in terms of principal of legality, legitimate purpose, and proportionality. With the increasing investigative powers of the Authority, the decision of the TCC leaves room to consider whether new laws and/or amendments introduced to the Law No. 4054 will be under the TCC's scrutiny.

[1] The decision of the Turkish Constitutional Court dated 09.11.2022 and numbered 2022/139 is published in the Official Gazette dated 30.03.2023. You can access the full Turkish text of the decision through this link: <https://www.resmigazete.gov.tr/eskiler/2023/03/20230330-5.pdf>

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