

## Turkish Constitutional Court: Failure to take the Favorable Law into Account Violates the Principle of Legality of Crime and Punishment

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Turkish Constitutional Court ("**CC**") ruled that it is unconstitutional not to apply the favorable criminal provision within the scope of the law change that occurred during the judgement process.

An investigation was conducted against the applicant company with the allegation pertaining to violation of article 4 of the Law on the Protection of Competition numbered 4054 ("**Competition Law**") in 2007. As a result of the investigation, the Competition Board ("**Board**") decided that the applicant company had reached an agreement with other undertakings and caused the supply conditions of the products in the market to be determined outside the market and that this should be considered as a severe violation of competition. As a result, in accordance with article 16 of the Competition Law, the Board has decided to impose an administrative fine of TRY 616,285.96 to the applicant company, which corresponds to the 5% of its gross income for the year before the date of its last action.

Even though the applicant company applied to the Council of State for the annulment of the administrative fine against the decision, the application was rejected on the grounds that the penalty imposed was in accordance with the law as it was given due to price determination, market sharing, joint arrangement of tender offers, supply boycott and behavior aimed at making the activities of competing undertakings difficult. Since the Board detected that the actions were lastly carried out in 2002, the administrative fine was determined on the basis of 5% of the company's gross income at the end of 2001.

The applicant company had appealed the verdict on the grounds that it could not exercise its rights of defense sufficiently, the Board has not complied with its obligation of providing information regarding legal remedies, that they were acquitted from the criminal proceedings and an agreement limiting competition could not be presented. However, the Plenary Session of the Chambers for Administrative Cases ("**PSCAC**") had asserted the decision of the Council of State.

In addition to the claims at the appeal stage, through the petition of request of revision of decision, the applicant company had asserted that the Competition Law had been amended with article 472 of the Law dated 22 January 2008 and numbered 5278 and that the amending law had stipulated favorable provisions with regard to administrative fines and these amendments have not been taken into consideration. In this regard, Applicant Company had stated that the turnover to be calculated shall be the turnover of the year before the final decision or if that calculating is not possible, the turnover of the year which is the closest to the date of the final decision, and in this regard, as the turnover of the year before the final decision is lower, the administrative fine to be applied should be determined in consideration of that turnover. Upon PSCAC's rejection of request of revision of decision, applicant company applied to the Constitutional Court.

The Constitutional Court considered relevant provisions in the legislation and the legal precedents of the Council of State and the Supreme Court, and examined the application within the scope of the principle of legality of crime and punishment and the principle of retroactivity of the law which is in favor of the applicant. In this regard, while the lawsuit filed by the applicant company with the request of the annulment of administrative fine was pending, the criteria to be applied for the determination of the penalty amount had been changed as per the amendment made in article 16 of Competition Law, and although the change was in favor of the applicant, this objection had not been considered during the judgement process and the Court had not made an explanation in that regard. For these reasons, the Constitutional Court has decided that the principle of legality of the crime and punishment set forth in article 38 of the Constitution, was violated.

The Constitutional Court had decided on violation of right to property in the present case and ruled on sending the file back to Council of State for retrial.

Please see this [link](#) for the full text of the decision of the Turkish Constitutional Court's decision, dated 17 June 2020, numbered 2016/8342 published in the Official Gazette dated 30 September 2020 and numbered 31260 (only available in Turkish).

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