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A Critical Approach to Standard of Proof Adopted by the TCA

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The Ankara Regional Administrative Court 8th Administrative Chamber (“**Regional Court**”)[1] recently ruled for the stay of execution of the Turkish Competition Authority’s (“**TCA**”) cartel decision[2] which has imposed on two undertakings active in the chemicals market an administrative monetary fine for violation of the Article 4 of the Law No. 4054 on the Protection of Competition (“**Competition Law**”).

This decision is of significance as it reveals the attitude of the Regional Administrative Courts toward the standard of proof adopted by the TCA. Indeed, as will be explained in detail below, when the Regional Court closely analyzed the case at hand, it ruled that the TCA’s decision did not meet the standards of proof and therefore did not comply with the law.

Background of the Case

Back in 2019, an investigation was initiated by the TCA against undertakings operating in the field of chemical products used for the chemical treatment and disinfection of water treatment plants to determine whether they violated Article 4 of the Competition Law (similar to Article 101 of the Treaty on the Functioning of the European Union).

During the investigation, a conclusion was reached mainly based on two following findings:

- The TCA, firstly, was based on an internal correspondence made between Akkim’s employees (one of the undertakings fined in the investigation), including explanations on the determination of approximate cost amounts about the tender, which does not include even the slightest statement showing that Akkim and Hicri Ercili (the other undertaking fined) are in concerted practices.
- Secondly, based on another finding which was again put forward as a basis for the violation, the TCA also alleged that Akkim had held meetings with Hicri Ercili on various dates and that the situation indicated the existence of meetings held in the past years and that Akkim was in anti-competitive collusion with Hicri Ercili.

Accordingly, the TCA found that Akkim and Hicri Ercili violated Article 4 of the Competition Law via bid-rigging and accordingly, the TCA imposed an administrative monetary fine of TRY 9,539,865.00 (approx. EUR 1,502,340.94) on Akkim, an amount corresponding to 1% of Akkim’s

turnover achieved in 2019, which is the preceding financial year and TRY 20,753,916.26 in total (approx. EUR 3,268,333.21).

Following the undertakings appeal against the TCA's decision, the Regional Administrative Court has determined that the decision was not in accordance with the law and thus has annulled it.

The TCA Shall Prove a Cartel Allegation Beyond a Reasonable Doubt

When we look more closely at the reasons behind the Regional Court's decision, it is seen that (i) the undertakings' pricing movements in the related period are based on reasonable economic justifications and (ii) the findings shown as a basis for the claims is far from revealing any collusion. Indeed, in its assessment, the Regional Court revealed that:

- The e-mail shown as a basis for violation, which was an internal correspondence made between employees of Akkim, does not belong to the term when the tender, which is the matter in dispute, has been realized.
- Furthermore, there is no statement in this e-mail that a price in the tender was determined together with Hicri Ercili.
- The meetings shown as a basis for violation were held due to the commercial relationship (raw materials sales) between Akkim and Hicri Ercili.
- There was a demonstrable increase in costs during the periods when the relevant tender was made, and at this point, Akkim's behaviours (pricing) in the relevant period could be explained with reasonable economic justifications.

Accordingly, the Regional Court concluded that it could not be said that the undertakings concerned violated Article 4 of the Competition Law by acting in anti-competitive collusion on the foregoing grounds. At this point, to what extent the burden of proof standard adopted by the TCA is appropriate has been a matter of debate. Indeed, reaching a cartel violation by the TCA without proving beyond reasonable doubt was criticized by the administrative jurisdiction.

Although reasonable economic reasons explained behaviours of the undertakings concerned during the relevant period, this situation was not taken into account by the TCA, and it is another point which has been criticized by the administrative jurisdiction.

The administrative courts had previously established various evaluations of the standards of proof, and several decisions of the TCA were overturned since they did not meet the standards of proof beyond a reasonable doubt. This decision is of importance in that it has reinforced the approach of the administrative courts on the TCA's decisions taken without demonstrating any proof beyond a reasonable doubt.

[1] The Ankara Regional Administrative Court 8th Administrative Chamber's Decision dated 16.02.2022 and numbered 2022/76.

[2] The TCA's decision dated 19.11.2020 and numbered 20-50/693-304.

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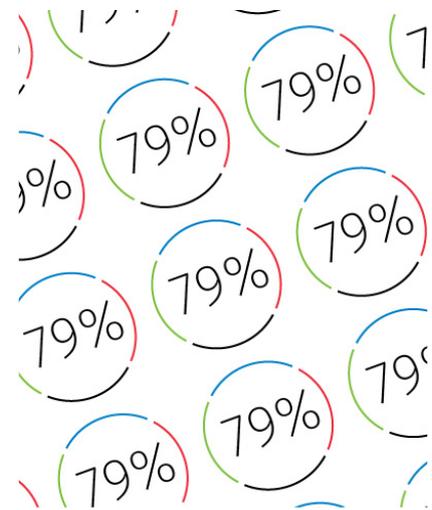
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