

## **Disputes on Health-Related Commercial Advertisements under Consumer Law**

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### ***Introduction***

The Law on Protection of Consumers No. 6502 (the “Law”) is published in the Official Gazette on November 28, 2013 and entered into force on May 28, 2014. Article 1 of the Law specifies the purpose of the Law as “*to take measures that protect the health, safety and the economic interests of the consumer ... in order to inform and educate the consumers in accordance with public interest*”. Regulation and supervision of advertisements are considered as necessary tools to protect consumers. Therefore the Law includes detailed provisions on advertisements, which are supported by the secondary legislation, i.e. the Regulation on Commercial Advertisement and Unfair Commercial Practices (the “Regulation”).

Under Turkish law certain sectors, such as health sector, are subject to additional restrictions on advertising due to their unique nature and purpose. As a general rule, health-related commercial advertisements are prohibited under Turkish law through various pieces of legislation. Administrative sanctions are set to be imposed by the Advertisement Board on the advertisers, advertising agencies and establishments broadcasting these advertisements in cases where the health-related commercial advertisements are considered to be contrary these restrictions. Since the Advertisement Board’s decisions are deemed as administrative actions under Turkish administrative law, these decisions are subject to judicial review before administrative courts. The Council of State rendered many decisions in cases where sanctions on health-related commercial advertisements are challenged and requested to be annulled, and these decisions provide further guidance on how the restrictions must be interpreted and viewed, specifically what makes a health-related commercial advertisement illegal under Turkish law.

### ***Commercial Advertisement under Turkish Law***

Article 61 of the Law defines “*commercial advertisement*” as “*announcements that are marketing communications made through written, visual, audio and similar methods in any medium by the advertisers, in order to provide sale or lease of a good or service, inform or convince target audience in connection with a trade, work, craft or profession*”. Scholars argue that there are different definitive elements in commercial advertisements, such as existence of promotion, commercial aim, intention to promote, purpose of increasing popularity of a product or service, use of a medium, and addressing the public, i.e. more than one individual.

Commercial advertisements are subject to regulations as they are considered to be inextricably linked to protection of consumers. Article 61 of the Law provides the main rules regulating commercial advertisements, which are elaborated and supported by the provisions of the Regulation. Article 77(12) of the Law specifies the administrative sanctions that may be imposed

on advertisers, advertising agencies and establishments broadcasting the advertisements by the Advertisement Board in case of non-compliance to the regulations.

### ***Prohibited and Restricted Advertisements in the Context of Health Sector***

Article 61(2) of the Law provides that commercial advertisements must be in conformity with the principles adopted by the Advertisement Board, public morality, public order and personal rights; they also must be honest and true. Commercial advertisements that deceive or mislead the consumer, or abuse the consumer's lack of experience or knowledge, threatening the life of the consumer and safety of consumer's property, encouraging the acts of violence or inciting to commit crime, endangering public health, abusing the sick, elderly, children or disabled people are prohibited by Article 61(3) of the Law. In addition to these general rules, the Regulation provides more specific rules that need to be observed.

Article 26(1) of the Regulation titled "*goods and services subject to special rules on advertisement*" provides that "*advertisements of goods and services that which are subject to special rules on advertisement, such as ... health services ..., must be in conformity with all the other rules on advertisement and promotion provided in the relevant legislation.*" Therefore, while examining the health-related commercial advertisements, specific legislations must be taken into consideration.

First of all, medical institutions and medical staff are not allowed to be involved in health-related commercial advertisements in order to prevent commercialization of human health and to observe public interest (common good) during the provision of healthcare services. Article 24 of the Law on Execution of Medicine and Medical Sciences No. 1219 provides an exception to the prohibition on medical staff being involved in commercial advertisement. This article stipulates that medical doctors are allowed to make announcements regarding the location of their clinic, working hours and their specialization; but they still cannot make advertisements regarding any other issue.

Article 60(2) of the Regulation on Private Hospitals allows private hospitals to make promotions and inform public only with the purpose of preservation and enhancement of health. That being said, Article 60(1) prohibits actions and promotions made by private hospitals that are considered to be contrary to medical deontology and ethical rules, which could deceive or mislead individuals or aim to increase demand of individuals or constitute unfair competition *vis a vis* other private hospitals. In the same vein, Article 29(1) of the Regulation on Private Medical Centers for Ambulatory Diagnosis and Treatment explicitly provides that "*medical institutions cannot be involved in advertisement*". The Ministry of Health's Circular on Private Medical Institutions' Informatory and Promotional Activities No. 2013/15 provides that "*Explicit and implicit advertisements going beyond being informative and promotional shall be prohibited.*"

### ***Supervision of Commercial Advertisements and Sanctions in the Context of Health Sector***

The Advertisement Board has the authority to supervise commercial advertisements and to impose sanctions of suspension, correction, monetary fine, or precautionary suspension up to three (3) months in case of non-compliance pursuant to Article 63 of the Law. There are numerous decisions rendered by the Advertisement Board wherein the Board imposed sanctions on the commercial advertisements made by medical institutions and/or medical staff that (i) exceed the informatory purposes, (ii) render the activities of the medical institutions and/or medical staff as commercial activities, (iii) aim to create demand, and (iv) constitute unfair competition *vis a vis* other medical institutions and/or medical staff. These are the general restrictions that a health-related advertisement is bound by.

### ***Precedents concerning Advertisements in Health Sector***

Under Turkish law, the Advertisement Board's decisions are deemed as administrative actions and it is possible to initiate an annulment lawsuit against the Advertisement Board's decisions before the administrative courts. Various decisions of the Administrative Board related to health-related commercial advertisements were challenged through annulment lawsuits and the Council of State, the highest administrative court in Turkey, rendered many decisions in these cases, which provide further guidance on the restrictive rules on health-related commercial advertisements. Below are just a few of these decisions that could be an example to what makes a health-related advertisement being contrary to the allowed framework of such advertisements.

15th Administrative Chamber of the Council of State, with its decision dated December 15, 2015 and numbered 2015/8726 E., 2015/8764 K., confirmed an administrative court's decision wherein it was concluded that mentioning the contact details of the medical doctors working at a hospital in an advertisement published in a newspaper makes the hospital's activities seem like commercial activities.

15th Administrative Chamber of the Council of State, in its decision dated October 1, 2015 and numbered 2015/4050 E., 2015/5574 K., stated that advertisement published in a magazine containing statements such as "... *the new technology is available at [the name of the hospital]*" and the "before and after" photos of the patients aims to create demand for the relevant hospital, which renders the relevant hospital's activities as commercial activities and constitutes unfair competition *vis a vis* other medical institutions.

15th Administrative Chamber of the Council of State in its decision dated September 18, 2015 and numbered 2015/6917 E., 2015/5437 K. ruled that provision of detailed description of the treatments provided at a dental clinic by mentioning that all those treatments are successfully applied by the dentists working at that clinic and presentation of photos of the clinic was again considered as aiming to create demand, rendering the clinic's activities as commercial activities, and constituting unfair competition.

15th Administrative Chamber of the Council of State in its decision dated December 19, 2011 and numbered 2011/11279 E., 2011/5725 K. ruled that an advertisement that is published in a newspaper regarding a discount in vitro fertilization procedure limited with 500 families and gives contact details of the relevant hospital is contrary to law, as the advertisement aims to increase the demand for the relevant hospital and commercialize its activities.

15th Administrative Chamber of the Council of State in its decision dated November 21, 2011 and numbered 2011/1472 E., 2011/4167 K. ruled that the articles published in a magazine, which states that an hospital receives patients transferred from another hospital abroad and gives out contact details and opinions of the medical doctors working at that hospital abroad, is a commercial advertisement aiming to direct more patients to the hospital and medical doctors receiving transferred patients.

15th Administrative Chamber of the Council of State in its decisions dated December 21, 2011 and numbered 2011/12449 E., 2011/5843 K. and dated November 28, 2011 and numbered 2011/12437 E., 2011/4435 K. ruled that an advertisement on prostate treatment titled “*Stay always young, just like me*”, which also has the internet address of the relevant hospital, creates commercial appearance for the relevant hospital and aims to increase the demand for the relevant hospital.

9th Administrative Chamber of Ankara Regional Administrative Court in its very recent decision dated February 9, 2017 and numbered 2017/55 E., 2017/60 K. ruled that an advertisement suggesting that a public dental clinic to be a better clinic due to its high quality treatment facilities compared to private dental clinics directly incentivizes the patients to choose that public dental clinic, which is contrary to law in terms of restrictions in health-related advertisements.

In light of all these decisions, it is possible to say that health-related advertisements are considered to be illegal if these advertisements promote the health institution to attract patients, praise a medical procedure by implying that the procedure brings a positive effect despite that specific effect being irrelevant to that procedure, create attraction for the health institution by suggesting the institution is highly preferred, announce discounts on a medical procedure to steer patients into choosing the institution making that discount, suggest all the medical procedures are completed successfully in order to create a sense of confidence and thus patient demand. Surely these circumstances are mere examples of what constitutes an illegal health-related advertisement and any circumstance that exceeds the allowed framework of restrictive rules on health-related commercial advertisements would make the advertisement illegal.

### ***Conclusion***

The Law regulates commercial advertisement through the Regulation. Since the health sector is subject to special restrictions on advertisement due to special place in terms of public benefit, specific pieces of legislation become applicable when a health-related commercial advertisement is in question. As a general rule, health-related commercial advertisements are prohibited under Turkish law except for those aiming to inform the individuals. The Advertisement Board

rendered many decisions in cases where health-related commercial advertisements are found (i) exceeding the inforatory purposes, (ii) rendering the activities of the medical institutions and/or medical staff as commercial activities, (iii) aiming to create demand, and (iv) constituting unfair competition *vis a vis* other medical institutions and/or medical staff. The local administrative courts and the Council of State have adopted the same criteria while examining the legality of a health-related commercial advertisement by considering unique dynamics and specifics of each case.

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