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The Turkish Competition Board rejects a major fertiliser producer's reversal request over a cartel settlement despite concluding its investigation into other alleged cartelists and declining to impose sanctions (*IGSAS*)

ANTICOMPETITIVE PRACTICES, CARTEL, EXCHANGE OF INFORMATION, INVESTIGATIONS / INQUIRIES, AGRICULTURE / FOOD PRODUCTS, SETTLEMENT, SANCTIONS / FINES / PENALTIES, TURKEY, CHEMICAL INDUSTRY, PRINCIPLE OF EQUAL TREATMENT

Turkish Competition Authority, *IGSAS*, Case No. 23-40/763-267, Decision, 31 August 2024

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This case summary aims to offer insight into the Turkish Competition Board's ("**Board**") *IGSAS* decision, where the Board assessed whether Istanbul Gübre Sanayi A.S.' ("**IGSAS**") request to reverse the settlement decision regarding the investigation initiated to determine whether fertilizer manufacturing undertakings violated Article 4 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). As a result of its evaluation, the Board concluded that *IGSAS* accepted that it violated the Article 4 of Law No. 4054, and the fining decision should not be reversed considering that Article 43 of Law No. 4054 prohibited to subject an issue included in the settlement text before administrative courts.

Procedural Background

The Board decided to launch a full-fledged investigation on seven undertakings, namely Bandirma Gübre Fabrikalari A.S. ("**BAGFAS**"), Ege Gübre San. A.S. ("**Ege Gübre**"), Eti Bakir A.S. ("**Eti Bakır**"), Gemlik Gübre San. A.S. ("**Gemlik**"), Gübre Fabrikalari T.A.S. ("**GUBRETAS**"), İstanbul Gübre San. A.S. and Toros Tarım San. ve Tic. A.S. ("**Toros**").

During the investigation phase, *IGSAS* requested to submit a commitment application which would include remedies to address the competition law concerns related to the allegations raised in the investigation. However, as the competition law issues under the investigation were considered as clear and severe (i.e. per se) violations, the Board rejected *IGSAS*' request to close the investigation with commitments.

Furthermore, *IGSAS* requested the Board to initiate a settlement procedure which was accepted by the Board. Upon

the completion of the settlement negotiations, the Board rendered its final settlement decision, concluding that IGSAS had violated Article 4 of the Law No.4054 by way of exchanging competitively sensitive information with its competitors in the fertilizer market. Accordingly, the Board imposed an administrative monetary fine and closed the investigation with respect to IGSAS, while the investigation continued for the other six undertakings.

After its assessment on the practices of other six investigated undertakings, the Board determined that they did not engage in anticompetitive practices by exchanging their competitively sensitive information and decided that these undertakings did not violate Article 4 of Law No. 4054. Consequently, no administrative fines were imposed on these undertakings. Following this decision, IGSAS has requested the reversal of this decision in accordance with the provisions of the Administrative Procedure Law.

Evaluation on IGSAS' Reversal Request

In its reversal request to the Board, IGSAS reiterated that the investigation had concluded that none of the investigated undertakings violated Article 4 of Law No. 4054 and no violation had been found with regard to the other undertakings for the exchange of competitively sensitive information, which could only be carried out reciprocally. In this respect, IGSAS argued that this outcome would violate its right to a fair trial, the principle of equality, the principle of legal certainty and ultimately the right of property.

Moreover, IGSAS indicated that the Board has discretionary power to accept or reject an undertaking's settlement request and the Board might postpone its decision if the case required more detailed examination. IGSAS further argued that while the Board accepted IGSAS' request for settlement without any necessity to examine the case in detail, the Board did not find any violation and consequently did not impose an administrative fine on any of the investigated undertakings which resulted in a contradiction between the Board's decision on the investigation and the final settlement decision concerning IGSAS.

As a result, IGSAS explained that it was not possible for a single undertaking to violate Article 4 of Law No. 4054 on its own, as it addressed horizontal agreements and concerted practices that restrict competition between competitors. In detail, IGSAS argued that, as described in the Board's decisional practice and paragraph 46 of Guidelines on Horizontal Cooperation Agreements, the act of exchanging competitively sensitive information could only be performed by multiple undertakings mutually and even in the case of a unilateral declaration of information, the violation would only occur if receiving party's practices would show restrictive effect on the competition among players.

In addition to these explanations, IGSAS asserted that as per Article 10 of Turkish Constitution, the administrative bodies were under obligation to act within the scope of the principle of equality, and therefore the administrative bodies are obliged to apply the general, abstract and objective legal norms equally to all who are in the same or similar legal conditions. Against this foregoing, IGSAS argued that the contradiction between the final settlement decision and the decision closing the investigation led to the unequal and different treatments to undertakings which were in same legal conditions, consequently, imposition of monetary fines based on contradictory decisions ultimately caused a reduction within IGSAS's assets which would constitute a violation of its right of property. In light of these arguments, IGSAS requested the Board to reverse its decision regarding the settlement and to issue a new administrative act in favor of IGSAS.

While evaluating IGSAS' request for reversal, the Board considered the terms contained in IGSAS' settlement document and referred to Article 11 of Administrative Procedure Law and indicated that as per the interested party (i.e. IGSAS) may request the annulment, reversal and amendment of the administrative action or issuance of a new

administrative action from the higher administrative authority or the administrative authority which issued the action, in case that there is no higher administrative authority prior to the filing an administrative lawsuit within the stipulated time period.

The Board evaluated that, contrary to the provisions stipulated under Article 11 of Administrative Procedure Law, paragraph 8 of Article 43 of Law No. 4054, stating that if the investigation stage is concluded by settlement, the administrative fine and the matters included in the settlement document shall not be appealed by the parties to the settlement, serves as the superior legal norm.

Conclusion

The Board stated that IGDAS applied for the settlement procedure which ultimately concluded with IGDAS acknowledging that it violated Article 4 of Law No. 4054 by exchanging the competitively sensitive information with its competitors in fertilizer market, although IGDAS had no intention or purpose to do so, and the Board decided to impose an administrative monetary fine accordingly. While the Board emphasised that IGDAS had agreed not to appeal the terms included in the settlement document, it decided that the fines imposed as a result of the settlement procedure were not subject to appeal pursuant to Article 43 of Law No. 4054, and that IGDAS's request to annul the fining decision pursuant to Article 11 of the Administrative Procedure Law could not be accepted. The Board's decision provides an invaluable insight into the appealability and revocability of fining decisions issued as a result of the settlement procedure.