

Shuffle The Cards! The Decision Of Ankara 6th Administrative Court Might Be Calling For A New Hand In The Administrative Monetary Fines Regime Under Turkish Competition Law

7 Jul 2014

First published by [Mondaq](#).

The administrative monetary fines under the Turkish competition law regime are regulated by Article 16 of the Law No. 4054 on Protection of Competition ("**Law No. 4054**"). Accordingly, the undertakings that violated Articles 4, 6 or 7 of Law No. 4054 would be separately subject to administrative monetary fines of up to 10 per cent of their Turkish turnover, generated in the financial year, preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

Furthermore, by referring to Article 17 of the Law on Minor Offenses, the Article 16 of Law No. 4054 requires the Turkish Competition Board ("**Board**"), in determining the magnitude of the administrative monetary fine, to take into consideration certain factors such as recurrence and duration of the violation, the market power of the undertaking(s) within the relevant market, decisive influence of the undertaking(s) in the violation, compliance with the commitments, cooperation and the amount of actual or potential damage in the relevant market. Finally, Article 16 also stipulates that the factors that will be taken into account in deciding the magnitude of the administrative monetary fine, would be stipulated by the regulations that will be issued by the Board.

Administrative Monetary Fines under the Regulation

The Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("**Regulation on Fines**") is introduced in 2009 as a secondary legislation which would serve as a tool for predictability, in terms of discretionary powers of the Board in deciding administrative monetary fines. The Regulation on Fines sets forth detailed guidelines as to the calculation of monetary fines applicable in the case of violations of Articles 4 and 6. In other words, the Regulation on Fines applies to both anti-competitive agreements and abuses of dominance, but not anti-competitive concentrations. Under the Regulation on Fines, the base level of the administrative monetary fines for "cartels" is between 2 and 4 per cent and for "other violations" is between 0.5 and 3 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision). After the base of the administrative monetary fine is decided, aggravating and mitigating factors are then considered to calculate the final monetary fine.

With the enactment of the Regulation on Fines in 2009, in deciding the administrative monetary fines to be imposed, the Board has been consistently applying the principles set out by the Regulation on Fines. Since then, there has been a camp of academics and practitioners criticizing legal grounds of the fining decisions of the Board arguing that the Regulation on Fines contradicts with the principles of the Law No. 4054 and thus violates the "hierarchy of norms". In fact, one of the members of the Board, Mr. Resit Gurpinar, has been consistently writing concurring opinions for each and every fining decision of the Board, stating that although he agrees with the substantive conclusions reached by the Board, he objects to the legal grounds of the administrative monetary fines that were being imposed. His arguments were based on (i) the Regulation on Fines does not comply with the principles of the

Turkish Constitution (i.e. the hierarchy of norms requires the regulations to comply with the law and the laws to comply with the constitution. In this regard, the regulations can neither limit nor widen the scope of the provisions of the laws.) and (ii) Article 16 of the Law No. 4054 authorizes the Board only to issue regulations solely on the factors that will be taken into account in deciding magnitude of the administrative monetary fine (i.e. aggravating and mitigating factors) but not on the ranges that would be applicable to certain kinds of violations. Despite the concurring opinions, there has not been any case in which cancellation of the Regulation on Fines was requested from the administrative courts.

The Decision of Ankara 6th Administrative Court

Although it is not a cancellation decision issued by the administrative courts, the conclusions of a recent decision¹ of Ankara 6th Administrative Court ("Decision") reveal that the concurring opinions might in fact have been pointing the right direction.

The Decision is about a legal challenge against the decision of the Board dated 30.10.2012 and numbered 12-52/1479-508 which imposes administrative monetary fines on MPS Metal for violating Article 4 of the Law No. 4054 by collusive behavior in bids and agreeing with its competitors on the prices or sales terms to be applied.

The court concluded that MPS and its competitor BEKAP have violated Article 4 of the Law No. 4054 by collusive behavior in bids and agreeing with its competitors on the prices or sales terms to be applied. Thereafter the court proceeded to state;

"On the other hand, the Constitution is at the top of the hierarchy of norms; and laws, statutory decrees, statutes, regulations and other legal texts follow the Constitution respectively. As seen, these norms are in different levels, and there is a hierarchical structure between these norms, and accordingly the validity of each norm depends on the one in higher level. Therefore, the issued regulations shall not be in conflict with the high-level norms. On the other hand, as per Article 124 of the Constitution, Prime Ministry, Ministries and public legal entities are authorized to issue regulations in order to enable the enforcement of the laws and statutes within the scope of their duties, provided that these regulations are in compliance with such laws and statutes. The regulation is an administrative act which explains and supplements the law and provides the enforcement of the law. There is an organic link between the regulation and the law, and the regulation is bound by laws. Therefore, the law, as the higher level norm, shall be primarily enforced and the provisions of the regulation are to be enforceable in cases where they are not contrary to the law. In other words, if there is a conflict between the law and the regulation, the contradiction needs to be settled by giving priority to the law which is a norm in the higher level."

After providing the above given overall analysis which is built on almost the same grounds as the concurring opinions of Mr. Gurbinar, the court continued with the assessment of the dynamics of the case at hand; *"Accordingly, under the abovementioned Article, the upper limit of the monetary fine is determined as 10% and the administration is authorized to determine the administrative fine at a rate between 0% and 10% at its sole discretion. However according to Article 3 of the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance issued based on Article 14 of the Law No. 4054, provides two different violation types as "cartels" and "other violations". Article 5 of the same regulation indicates that the base fine should be calculated, on a rate between 2% and 4% for cartels over the determined annual gross revenues and on a rate between %0,5 and 3% for other violations over the determined annual gross revenues. Subparagraph 3 of the same article provides that the final fines will be determined by applying and considering aggravating and mitigating factors laid down in Article 6 and Article 7 of the regulation respectively. Thereby two violation types are introduced by the regulation despite the Law No. 4054 does not include such differentiation on violations and, although it falls within the 10% discretionary power of the Board, a lower limit for the fines is set by the regulation which goes beyond the principles set forth in the Law No. 4054 on the scope of the regulation. Thus, it is observed that the power to regulate granted by the Law to the regulation is exceeded and imposing a fine below the lower limit is blocked, and accordingly a provision in contradiction to the provisions of the Law No.4054 is brought by the regulation."*

Finally, the court has concluded that the fine imposed on the plaintiff is contrary to the law, since the fine is imposed based on the provisions of the Regulation on Fines which violates the provisions of the Law No. 4054. It also stated that the administrative monetary fine should have been determined under Article 16 of the Law No. 4054 and further adjusted by applying the aggravating and mitigating factors set forth in same article.

Conclusion

Although the Decision is open to appeal before the High State Council and thus cannot be deemed finalized yet, it might light the fuse of a debate on the legal grounds of the fining decisions of the Board. It should be kept in mind though that the Decision repeals only the decision of the Board on the specific case but not the Regulation on Fines itself. Therefore, whether we will see a separate legal challenge against the Regulation on Fines itself and whether the Board would continue to use the Regulation on Fines as a legal ground to its fining decisions remain to be seen. Furthermore, it should also be noted the Decision is expected to have an impact only on the files for which an appeal process has been going on but it is likely that, even if the Decision starts a period of repeals on this procedural ground, the ultimate outcome of the analysis of the Board and the consecutive administrative monetary fines would not be changed due to the discretionary power of the Board in determining the administrative monetary fine that will be imposed.

Finally, considering that the Amendment Proposal for the Law No. 4054 and the Amendment Proposal for the Regulation on Fines are still being negotiated in the parliament, the impact of the Decision on the legislative work needs also close attention.

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