The Information You Have Requested Cannot Be Reached at the Moment: The Regional Administrative Court Upheld the Board's Decision Imposing Fines on Five International Banks for Not Providing the Requested Information

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Introduction

On 26 October 2022, the Ankara Regional Administrative Court's 8th Administrative Chamber revoked[1] an earlier decision[2] of the Ankara 3rd Administrative Court that had annulled the Turkish Competition Board's (the "**Board**") decision concerning the imposition of administrative monetary fines on five international banks for failure to provide the requested information/data.[3]

Legal Background of the Board's Decision

The Board initiated a preliminary investigation to determine whether international banks and financial institutions and their representatives/subsidiaries that are active in Turkey had violated Law No. 4054 on the Protection of Competition ("**Law No. 4054**") through their activities related to deposits, loans, foreign exchange, bonds, bills, stocks, and brokerage services.[4] Within the scope of the preliminary investigation, the Turkish Competition Authority (the "**TCA**") requested information from the 20 undertakings under investigation, including Citibank A.Ş. ("**Citibank"**), Goldman Sachs TK Danışmanlık A.Ş. ("**Goldman Sachs**"), ING Bank A.Ş. ("**ING**"), JPMorgan Chase Bank National Association Merkezi Colombus Ohio İstanbul Türkiye Şubesi ("**JPMorgan**"), and Türkiye Garanti Bankası A.Ş. ("**Garanti**").

More specifically, the TCA requested all chat-room correspondences made through Bloomberg and Reuters platforms between 01 January 2018 and 17 January 2020 by each undertaking and also those of their main groups' top 10 traders with the highest quoted transaction volume in Turkish Lira employed in the USA and the UK (separately for each country).

However, Goldman Sachs, JPMorgan, Citibank, ING, and Garanti argued that (i) the requested data

of the traders who were employed by the parent undertakings located in foreign countries were not in their possession and they lacked the ability to access or control them, and (ii) the request of information should have been served to the parent undertakings located in the foreign countries in accordance with Notification Law No. 7201 and relevant provisions of the bilateral and international treaties, including the Hague Conventions.[5]

Due to the aforementioned arguments, the relevant undertakings did not provide the requested information/data. The TCA, however, rejected their arguments and pointed to the single economic entity principle as well as to the relevant EU practices, reflecting the view that a notification made to the subsidiary to be delivered to the parent undertaking is sufficient to be deemed as directed to the parent undertaking since they form a single economic entity and are indeed the same "undertaking."

Therefore, the TCA rejected the claims raised by the parties (i) about "not possessing or having access to the requested data", (ii) that parent undertakings in possession of the relevant data are bound by the laws and regulations of other countries, and (iii) that the notification had not been made properly. Accordingly, the Board imposed administrative monetary fines on Goldman Sachs, JPMorgan, Citibank, ING and Garanti, as per Article 16(c) of Law No. 4054 for the failure to comply with the obligation to provide the requested information.

Judicial Review

Subsequently, Citibank, JPMorgan, Goldman Sachs, ING, and Garanti appealed for the annulment of the Board's decision. The appellants argued that (i) they did not have direct access to the requested information, (ii) it was not possible for them to obtain and submit the information belonging to the parent undertakings established in other countries, (iii) separate notifications should have been made to the parent undertakings as per the relevant laws and bilateral or international treaties, and (iv) single economic entity principle and effect theory could be applied to the notification procedure as it was a procedural issue.

Accordingly, the Ankara 3rd Administrative Court annulled the Board's decision mainly on the grounds that, in addition to the separate assessments specific to each bank, the procedure of notifications within the scope of Law No. 4054 need to be made in accordance with Notification Law No. 7201, which regulates the notification to the parties located abroad in the absence of applicable bilateral or international treaties. The Court added that the single economic entity principle serves for the purposes specific to competition law, such as holding the parent company liable for the conduct of its subsidiaries and it is not applicable to the notification process, which is a procedural matter and is regulated in detail by its own separate legislation.

In conclusion, the Court found that the Board's decision was unlawful and thus, annulled the decision. The first instance court's decision would have been a significant milestone for multinational companies which have parent undertakings abroad since the decision looked to set the rules for international notification procedures.

Judgment of the Regional Administrative Court

As expected, the decision of the Ankara 3rd Administrative Court was appealed further by the TCA. The Ankara Regional Administrative Court's 8th Administrative Chamber concluded that the TCA's reasoning had been justified and revoked the decision of the first instance court.

Contrary to the judgment of the first instance court, the Regional Administrative Court indicated that the single economic entity principle was applicable to all issues arising from Law No. 4054. It further stated that the TCA's jurisdiction would be determined on the basis of whether the conduct may have effect within the borders of the Republic of Turkey. After referring to the general principle stipulated in Article 2 of Law No. 4054, the Regional Administrative Court stated that notification with regard to the request for information made to the subsidiary, which belonged to the same economic entity as the parties from which the information would be obtained and therefore, constituted a part of that undertaking, was lawful. The Court also acknowledged that EU practice supported this view. According to EU practice, when an entity does not have a commercial presence in the common market, the European Commission may serve the notification to the wholly owned subsidiary of that entity in the EU. Therefore, contrary to the judgment of the first instance court, the Regional Administrative Court did not take into account Notification Law No. 7201.

Consequently, it was concluded that the undertakings were required to provide the data requested by the TCA to the extent possible. Thus, the Regional Administrative Court held that the decision to impose monetary fines for failure to fulfil the requests for information was lawful and revoked the Ankara 3rd Administrative Court's annulment decision and upheld the Board's decision.

Conclusion

Considering the number of multinational companies with branches, subsidiaries, and other entities in Turkey, the Board's decision and the following administrative process are significant in terms of the legality of the notifications within the scope of Law No. 4054 in regard to foreign-based undertakings through their affiliates established in Turkey. As the Regional Administrative Court's decision is not final and parties have the right to appeal its decisions, it is not possible to foresee how the Council of State will interpret the single economic entity principle in terms of procedures with regard to the competition law. Until then, it is safe to accept the Regional Administrative Court's decision as a benchmark for notification procedures to be made to the multinational companies in Turkey since this decision approved the position taken by the TCA.

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[1] Ankara Regional Administrative Court's 8th Administrative Chamber's decision dated 26 October 2022 and numbered 2022/396 E., 2022/1261 K.

[2] Ankara 3rd Administrative Court's decisions dated 16 February 2022 and numbered 2021/435 E., K: 2022/270; 2021/756 E., 2022/271 K; 2021/428 E., 2022/267 K.; 2021/432 E., 2022/268 K.; 2021/435 E., 2022/270 K.; 2021/554 E., 2022/269 K.

[3] The Board's decision dated 02 July 2020 and numbered 20-32/397-179.

[4] The Board's decision dated 17 January 2020 and numbered 20-05/48-M.

[5] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (concluded 15 November 1965)