

# e-Competitions

## Antitrust Case Laws e-Bulletin

### Preview

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## The Ankara 9th Administrative Court annuls the Turkish Competition Authority's decision to impose an administrative monetary fine on a chemical supplier stating that the standard of proof has not been met (*Hicri Ercili*)

**ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), BID RIGGING, BURDEN OF PROOF, CONCERTED PRACTICES, EXCHANGE OF INFORMATION, TURKEY, ANNULMENT, CHEMICAL INDUSTRY, PUBLIC PROCUREMENT**

The Ankara 9th Administrative Court, *Hicri Ercili*, Judgement, 30 May 2022 (Turkish)

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### e-Competitions News Issue Preview

The Ankara 9 th Administrative Court ("*Administrative Court*") annulled the decision [1] of the Turkish Competition Board ("*Board*") where an administrative fine of TL 11,214,051.26 was imposed on Hicri Ercili Deniz Nakliyat Kimyevi Maddeler San. ve Tic. Ltd. Şti. ("*Hicri Ercili*"), a supplier of the chemical products used for the chemical treatment and disinfection processes in water treatment plants in Turkey. The Board imposed the relevant fine on the grounds that Hicri Ercili has violated Article 4 of the Law No. 4054 on the Protection of the Competition ("*Law No. 4054*") by way of collaborating with Ak-Kim Kimya Sanayi ve Ticaret A.Ş. ("*Ak-Kim*") in the 2018 tender of Ankara Municipality ("*Tender*") for the purchase of aluminium sulfate ("*Hicri Ercili Decision*"). [2] The Ankara 9 th Administrative Court found that the findings of Turkish Competition Board do not prove the existence of an anti-competitive conduct through an agreement and/or concerted practice.

### Background

As a result of a full-fledged investigation against the undertakings that are active in the supply of chemical products, the Board concluded that Hicri Ercili and Ak-Kim violated Article 4 of the Law No. 4054. The investigation was launched against 7 undertakings in total; and the Board decided to impose administrative fines on Hicri Ercili and Ak-Kim. The Board noted that there is no need to impose administrative fine on the rest of the undertakings [3] subject to the investigation. The Board imposed the administrative fine by considering that the conduct of Hicri

Ercili and Ak-Kim constitute "cartel" violation under Article 3 of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("*Regulation on Fines*").

## The Board's Assessment on an Agreement/Concerted Practice

In its assessment, the Board evaluated its Finding-1 and 2 obtained from the undertakings together with the economic analysis. As a result, the Board noted that Ak-Kim and Hicri Ercili made offers for the Tender of the Ankara Municipality by acting in collaboration.

The Board first remarked that the high purchasing price of Ankara Municipality determined as a result of the Tender could not be explained by the cost and exchange rate increases in the relevant period. For this assessment, the Board compared the increase in the purchasing prices of other municipalities in 2017 and 2018 with the increase in the purchasing price of Ankara Municipality. As a result, the Board stated that the increase in the purchasing price of Ankara Municipality is much higher than the increase in the purchasing prices of other municipalities whose prices should also be affected by the cost and exchange rate increases. In addition, the Board remarked that the offers made by Hicri Ercili and Ak-Kim to the Ankara Municipality at an earlier cost determination stage before the Tender were much lower than the offers that these companies made for the Tender.

Furthermore, the Board stated that the Finding-2 indicates that Ak-Kim general manager and supply chain manager agreed to hold meetings with the general manager of Hicri Ercili on various dates between 2015 and 2018. [4] Therefore, the Board argued that the Finding-2 demonstrates the existence of meetings held between the said companies over the past years. The Board also noted that in the Finding-1, Ak-Kim employees, while determining the price offer to be made to another municipality, stated that they had made a "high" offer to Ankara Municipality on an earlier date. At this point, the Board argued that the undertakings' defence that the USD exchange rate has risen excessively since mid-August 2018 and thus there was an expectation that exchange rate will rise excessively in a short time do not justify the high price offer made during the Tender. The Board based this assessment on the grounds that (i) the price offered in the Tender had been determined before the date of the correspondence in the Finding-1, that is 04.07.2018 and (ii) the undertakings cannot foresee that the exchange rate will be higher in the Tender date in such an earlier time. The Board also claimed that the increases in the general average cost and price of the aluminium sulfate of both Hicri Ercili and Ak-Kim during the period that they have provided their offers for the Tender fall short when compared to the increase in the purchasing price of Ankara Municipality determined as a result of the Tender. In this context, the Board decided that, Hicri Ercili and Ak-Kim acted in collusion within the Tender which constitutes a violation within the scope of the article 4 of the Law No. 4054.

## The Assessment of the Administrative Court

Hicri Ercili, which is active in the field of chemical products used for chemical treatment and disinfection processes in water treatment plants, brought the case to judicial review before the Administrative Court. In its analysis of the case file, the Administrative Court evaluated that the e-mail correspondence in the Finding-1 of the investigation file, which is the basis for the investigation subject to the case at hand is an internal correspondence between Ak-Kim's own employees. Furthermore, the Administrative Court noted that in the relevant internal correspondence, Ak-Kim employees determine the approximate cost for the offer to be made for the tender in relation to the supply of aluminium sulfate to be used in the coagulation process in the İzmit Drinking Water Treatment Plant. In this regard, the Administrative Court found that the fact that the Ak-Kim employees mentioned

the offer they made for the Tender one day before the correspondence cannot indicate collaboration between the undertakings. Moreover, the Administrative Court noted that there is no indication that a price has been determined during negotiations between Hicri Ercili and Ak-Kim in the relevant internal correspondence. The Administrative Court underlined that there is no involvement of Hicri Ercili in this internal correspondence of Ak-Kim where the employees of Ak-Kim aim to determine the offer to be made to another municipality's aluminium sulfate tender. In addition to this, the Administrative Court assessed that the relevant correspondence does not contain any information indicating the communication of Hicri Ercili with Ak-Kim. The Administrative Court also noted that the e-mails regarding the Finding-2 concern the meetings to be held due to the commercial relationship between Ak-Kim and Hicri Ercili. Finally, the Administrative Court stated that the prices that both companies offer in the Tender are not similar to each other.

Considering these, the Administrative Court concluded that the findings in the case at hand do not prove that Ak-Kim and Hicri Ercili entered into agreements and concerted practices that have the effect of preventing, distorting or restricting competition in the market or that may have such an effect. The Administrative Court also underlined that the findings do not reveal the determinations and evaluations that the decisions regarding the market were taken by way of collaboration and negotiations.

Additionally, the Administrative Court found that when Ankara Municipality held the Tender (April 2017/October 2018), there were significant increases in the cost of the undertakings. By way of an example, during the relevant period the cost of sulfuric acid, one of the basic raw materials of aluminium sulfate, increased by 99%, while the cost of aluminium hydroxide increased by 50%. There was also a 72% increase in electricity prices, 14% in labor costs, 36.5% in diesel oil prices and a 66% increase in the producer price index. In terms of analysis regarding the exchange rates on the dates when the Ankara Municipality held the Tender, it was seen that the dollar buying rate of the Central Bank of Turkey on 11.04.2017 was USD 1 = TL 3.7153, while the dollar rate on 10.10.2018 was USD 1 = TL 6.0885, and there was also a 64% increase in foreign currency indexed costs. Considering these and that the undertakings, including Hicri Ercili, submitted offers that are different from each other's offers and are far below the approximate cost amounts determined by the municipalities, the Administrative Court assessed that it is not possible to argue that the undertakings acted in collaboration for their offers during the tenders. Therefore, the Administrative Court annulled the decision of the Board.

## Conclusion

Hicri Ercili decision is noteworthy as Administrative Court annulled the relevant decision of the Board on the basis that the findings are not sufficient to enable the determination of the alleged violation. Accordingly, the Administrative Court concluded that the increased price offers for the relevant tender can be explained by the cost increases and the exchange rate increases. The relevant decision provides guidance on the interpretation of the standard of proof under in terms of the assessment conducted under Article 4 of the Law No. 4054.

[1] Board's decision dated 19.11.2020 and numbered 20-50/693-304.

[2] Decision of the Ankara 9 th Administrative Court dated 30.05.2022 and numbered 2022/1193.

[3] The undertakings that the Board did not impose any administrative fine are as follows:

Aykimsan Hiçyılmaz Kimyasal Ürünler İnşaat Gıda Turizm Sanayi ve Ticaret Ltd. Şti., İrmak Kimya Sanayi Turizm Nakliyat Tarım Ürünleri ve Geri Dönüşüm Sanayi Ltd. Şti., Koruma Klor Alkali Sanayi ve Ticaret A.Ş., May Asit Kimyevi Maddeler Ticaret ve Sanayi Ltd. Şti. And Sulfert Kimya Sanayi Ticaret A.Ş..

[4] The Board found that the relevant meetings were agreed to be held on 05.12.2018, 06.01.2015, 20.01.2015 and 24.03.2016.