

Competition - Turkey

New decree law raises questions for administrative remedies

Contributed by [ELIG](#)

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[New decree law](#)
[Comment](#)

New decree law

The Decree Law on the Organisation and Duties of the Ministry of European Union and Amendment of Some Laws and Decree Laws, which was published in the *Official Gazette* on August 17 2011, has raised certain questions regarding the administrative remedies available against actions of the Competition Authority and the judicial supervision of such actions.

Article 45 of the decree law added the following sentence to Article 19/A(1) of Law 3046:

"The relevant ministry is authorized to supervise any activity and act of its dependent, relevant and related authorities (including the authorities placed on the table numbered (III) attached to the Law Numbered 5018)."

Following the amendment, Article 19/A of Law 3046 reads as follows:

"The Ministry, with the proposal of the Prime Minister and the approval of the President, may relate the dependent, relevant and related authorities (including the authorities placed on the table numbered (III) attached to the Law of Public Fiscal Administration and Control, Numbered 5018 and dated 10/12/2003) with the Prime Ministry and other ministries. The authority and the duty granted upon the ministry or the minister, to which the said authorities are dependent, relevant and related, as set out in their private laws, are used and performed by the ministry or the minister to which they are related. The relevant ministry is authorized to supervise any activity and act of its dependent, relevant and related authorities (including the authorities placed on the table numbered (III) attached to the Law Numbered 5018)."

The Competition Authority is listed among the administrative authorities in Table III of the Law of Public Fiscal Administration and Control (5018).

Comment

The amendment does not stipulate an administrative method to be used against the actions of the Competition Authority before taking an issue to the administrative courts. Thus, it is still possible to resort directly to the administrative courts in regard to an action of the authority and the relevant practice is still valid.

A mandatory administrative method will be used only if the relevant law stipulates a special objection method.⁽¹⁾ However, such amendment does not stipulate a particular method of objecting.

The system for supervising the independent administrative authorities (eg, the Competition Authority) is split into three categories:⁽²⁾

- administrative supervision;
- fiscal supervision; and
- judicial supervision.

Thus, the administrative and fiscal supervision of independent administrative authorities and the judicial supervision of such authorities are different. Since ministries cannot enjoy judicial supervisory authority, it cannot be claimed that the amendment makes changes to the system of judicial supervision over the actions of the independent administrative authorities. The amendment must be evaluated within the scope of the administrative and fiscal supervision of the independent administrative authorities. In determining which acts of the Competition Authority are subject to

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administrative and fiscal supervision, a distinction can be made between "decisions and acts related to the application of the Law No. 4054 on Protection of Competition" and the "decisions which are adopted regarding its own internal affairs and administration".⁽³⁾ Accordingly, decisions of the Competition Board are deemed to be subject to judicial supervision rather than administrative or fiscal supervision. Further, it is deemed necessary that the authority and other independent administrative authorities are subject to both administrative and fiscal supervision with respect to their expenses and internal affairs and administration, such as the purchase, sale or lease of a building, the purchase of goods and tools and recruitment.⁽⁴⁾

Thus, the amendment does not change the system of judicial supervision for authority actions that create rights and obligations for third parties or for the mandatory administrative methods that should be used to oppose such acts.

Aside from judicial supervision, the authority is not subject to hierarchical or (before the new amendment) administrative supervision of its activities.⁽⁵⁾ The central administration should not have hierarchical powers over independent administrative authorities such as the Competition Authority - that is, the central administration should not be able to issue orders or instructions to independent administrative authorities and to annul or amend their acts. Independent administrative authorities are legal entities separate from the central administration; thus, the central administration cannot have hierarchical power over these authorities.⁽⁶⁾ The amendment has not changed this situation. Although different views exist, this is also accepted with respect to administrative tutelage.⁽⁷⁾ Thus, it is accepted that relations between independent administrative authorities and the central administration cannot be interpreted as if the central administration had powers of repeal, amendment or annulment over decisions of independent administrative authorities.⁽⁸⁾ It could be claimed that the amendment grants a certain amount of administrative tutelage to the central administration over the independent administrative authorities.

However, administrative tutelage is a limited and exceptional power, and the complete scope of such power should be specified in the law.⁽⁹⁾

In the case at hand the law, instead of bringing such regulation, has adopted broad and vague wording: "it is authorized to supervise any activity and act." However, even such wording creates no method of opposing actions of the authority, since the relevant article fails to mention an administrative method, and no such interpretation has been made with respect to the application of other laws which adopt similar wordings.⁽¹⁰⁾ Furthermore, an interpretation that the power of administrative tutelage constitutes a method of objection which is mandatory would have no legal or academic basis. Even in cases where administrative tutelage is explicitly stipulated, this has no effect on judicial supervision. Thus, it seems possible to conclude that the central administration has been granted a "vague power of tutelage whose scope is not duly determined". Similar legal provisions which granted similarly vague powers have been annulled by the Constitutional Court.⁽¹¹⁾ In any case, it does not seem possible to claim that the amendment abolishes the independence of the Competition Authority and other independent administrative authorities which fall under the scope of the decree law.

However, it could be argued that the amendment results in the creation of an optional measure to be taken against actions of the authority. Upon availing of this method, the relevant ministry could resort to the courts or could carry out other acts based on its powers under the law. Therefore, the following applies:

- The Law on the Protection of Competition (4054) specifically stipulates that the Competition Authority is connected to the Ministry of Industry and Commerce (in July 2011, the authority became connected to the Ministry of Customs and Commerce).
- The relationship between the authority and the ministry empowers the ministry to approach the administrative courts if the authority carries out an illegal act or to request the Court of Accounts and the State Supervision Institute to implement fiscal supervision.⁽¹²⁾
- This situation should not be interpreted as though the ministry has the power, as part of the authority, to initiate a lawsuit directly if non-compliance is detected.⁽¹³⁾ The ministry is authorised and obliged to refer any non-compliance that it detects or suspects to the authorised legal and/or administrative authorities.

The amendment has no impact on the option to resort to superior authorities under Article 11 of the Administrative Judiciary Procedural Law (2577). Such provision refers to a superior authority which is placed in a hierarchical system, and the right afforded by the relevant provision may be used only before a superior authority within a hierarchical system.⁽¹⁴⁾ No hierarchical relationship exists between the authority and the ministry. According to Decisions 2006/2169 E. and 2010/562 K of the Council of State Board of Administrative Judiciary Chambers, the right to approach the Competition Board to contest a decision of the Competition Authority is reserved.

Finally, even if the Council of State were to interpret and specify the amendment as a mandatory administrative method, and if the administrative courts were consulted

without using this method, on its first examination of the file the court would refer the file to the ministry under Article 15/e of the Administrative Judiciary Procedural Law. The administrative court will also refer the file to the relevant administrative organ where a lawsuit is initiated before trying an administrative method. The date on which the administrative court becomes involved is accepted as the date on which the administrative organ becomes involved.⁽¹⁵⁾ Thus, even if the scope of the amendment is taken into consideration, it seems unlikely that the amendment will result in a loss of rights.

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Endnotes

(1) İbrahim Topuz and Kadir Özkaya, *Administrative Judiciary Procedural Law with Explanations and Precedents* (Ankara, 2002) p279.

(2) Dilek Memişoğlu, p11. Furthermore, there is also legislative and public supervision, which have no legal nature, over the independent administrative authorities.

(3) Memişoğlu, p11.

(4) Memişoğlu, s11.

(5) Şeref Gözübüyük and Turgut Tan, *Administrative Law General Principles: Book 1* (Ankara 2006) pp372-373. However, the independent administrative authorities and the ministries to which they are connected are stipulated by law.

(6) Gözübüyük and Tan, *Administrative Law General Principles: Book 1* (Ankara 2006) pp372-373.

(7) Dilek Memişoğlu, *The Independent Authorities and Their Supervision in Turkey*, p10, <http://idc.sdu.edu.tr/tammetinler/demokrasi/demokrasi47.pdf>.

Ebru Öztürk, "Where the Competition Authority Stands in the Turkish Administrative System and the Comparison Thereof with Other Independent Authorities", Competition Authority Expert Thesis (Ankara 2003) p25:

"*The Independent Administrative Authorities' (IAA) ties with the central administration is established through their establishment laws, by way of determining the 'relevant' or 'related' ministries. Since the power of tutelage is merely stipulated with respect to local administrations within the constitution, the matter that the relevant or related ministry does not have power of tutelage over the decisions of the IAA would not be in violation of the constitution.*"

In contrast, see Kemal Gözler, *Administrative Law*, p174. The author claims that the independent administrative authorities could be subject to administrative tutelage; however, as yet the legislature has adopted no such regulation.

(8) Gözler, *Administrative Law*, p491.

(9) Gözler, *Administrative Law*, p174.

(10) Gözübüyük and Tan, *Administrative Law General Principles: Book 1* (Ankara 2006) pp379-380. Although the previous version of Article 17 of the Capital Markets Law (2499) contained the wording 'any kind of acts', this was interpreted as covering only the annual accounts and expenses of the Capital Markets Authority.

(11) Constitutional Court, June 22 1988, E.987/18 , K.988/23.

(12) Gözübüyük and Tan, *Administrative Law General Principles: Book 1* (Ankara 2006) p373; A Ulusay, "Independent Administrative Authorities", *Council of State Journal*, No 100, p15.

(13) The fiscal, administrative and judicial supervision of the independent administrative authorities is carried out according to their specific laws and the relevant legislation. According to Article 33 of the Law on the Protection of Competition, the accounts of the Competition Authority are subject to supervision by the Court of Accounts.

(14) Celal Erkut and Selçuk Soybay, *The Constitution and Laws Related to Administrative Judiciary*, p282.

(15) Gözübüyük, *Administrative Judiciary* (Ankara 2003), p163.

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