

Judicial Remedy Against Decisions Issued by Turkish Data Protection Board

Under the Personal Data Protection Law No. 6698 Article 18 ("DPL") the Personal Data Protection Board ("**Board**") has the authority to impose administrative fines on data controllers due to failure to comply with their various obligations regulated under the DPL, i.e. failure to comply with the obligation to inform data subjects, obligations related to data security, the decisions issued by the Board and registration and notification obligations to the Data Controllers' Registry. However, there is no explicit provision under the DPL about the competent courts for judicial review of decisions of the Board imposing administrative fines which creates confusion and dissatisfaction in practice with regard to the judicial remedies to be followed.

Legislator's Approach against Judicial Remedies at Drafting Stage of the DPL

In the draft version of the DPL, paragraph 4 of Article 18 used to explicitly stipulate that administrative sanction decisions of the Board can be challenged before administrative courts. In parallel to this, the justification of the same Article also stipulated that sanction decisions could be challenged before administrative courts. On the other hand, said paragraph 4 of Article 18 was later removed from the draft law by the Sub-Commission. As a reason for this amendment, Sub-Commission stated that instead of authorizing administrative courts for judicial review of the administrative sanctions imposed by the Board, judicial review process regulated under the Law No. 5326 on Misdemeanors dated 30/3/2005 ("**Misdemeanors Law**") is preferred considering that administrative sanctions imposed by the Board are referred to as misdemeanors under the DPL. This may be preferred simply because Article 18 is titled "Misdemeanors". Despite removal of the explicit provision about the judicial review of the Board decisions imposing administrative sanctions, the references to administrative courts in the justification of Article 18 was not removed and no other provision was included the final version of the DPL stating that the provisions of the Misdemeanors Law shall be applied in terms of the judicial remedy against administrative fines. As a result, in practice, based on the explanations of the Sub-Commission, administrative sanctions given by the Board are challenged before the criminal courts of peace, which are the competent courts regulated under the Misdemeanors Law.

However, it is believed that the criminal courts of peace are not the right authority for the judicial review of the decisions rendered by the Board and it would be more appropriate to resort to administrative courts against such administrative fines.

Why Administrative Courts are Considered More Appropriate?

Administrative sanctions can be defined as decisions made directly by a unilateral act of the administration using the privileges of public power and following up the procedures specific to the administrative law.

Since administrative law rules applied to administrations are different from private law rules applied to natural persons, the judicial review of administrative acts must have a different perspective in terms of merits and procedural rules.

As administrative courts are specialized courts established to deal with administrative cases, they are accepted as the right authority for judicial review of the decisions of the Board imposing administrative fines. Otherwise, review of the Board's decisions imposing administrative fines by criminal courts of peace, which do not have any expertise in administrative law, will not give effective results and it will not give any guidance to the Board for its future practice. Based on the provision included in the draft version of the DPL for the authority of administrative courts and the references to the administrative courts in the justifications of the provisions of the DPL, it can be concluded that the legislator also has shared the same view.

Judicial review process envisaged against the decisions of the Turkish Competition Board also supports this approach. Similar to the Board, the Competition Board is also a public authority imposing administrative fines by using public power on issues regulated under the Law No. 4054 on Protection of Competition ("**Competition Law**"). However, different from the DPL, Article 55 of the Competition Law clearly regulates that actions against administrative sanctions given by the Competition Board shall be brought before the competent administrative courts. Accordingly, Administrative Courts of Ankara, where the headquarters of the Competition Authority is located, are competent for the court actions to be brought against the decisions of the Competition Board. This enables more consistent and appropriate evaluations in terms of administrative law and the courts in question gain expertise in terms of competition law.

In case a similar way is preferred against the decisions of the Board, the Board decisions will be subject to examination before the Ankara Administrative Courts which have deep expertise on administrative law matters since the administrative courts where the administrative authority conducting the administrative act is located are competent in accordance with Article 32/1 of the Administrative Procedure Law No. 2577 ("**APL**"). These courts will also be able to gain expertise in terms of Board decisions and make more appropriate evaluations.

In case it is accepted that the decisions of the Board are subject to review of the administrative courts, the parties who have been sanctioned with administrative fines may also benefit from the right to apply to the superior administrative authorities regulated in Article 11/1 of the APL without having the risk of missing legal periods for filing an administrative case. Although this application, which is foreseen in article 11 of the APL, is not a mandatory application, it may have positive results in favor of the relevant persons in many cases and will also allow the Board to reevaluate its decisions.

On the other hand, even if it is accepted that the administrative courts are not competent against the decisions of the Board and criminal courts of peace are competent unless it is clearly regulated in the DPL, it should still be possible to apply to superior administrative authorities against the

decisions of the Board pursuant to Article 11 of the APL since there is no contrary prohibition in the Misdemeanors Law. On the other hand, since the application to the superior authority pursuant to Article 11 of the APL will only stop the administrative legal periods, such an application may not have the desired effect in practice if the criminal courts of peace are deemed to be in charge of reviewing Board's decisions. Because if the parties who have received administrative fines choose to apply to the superior authorities in accordance with Article 11 of the APL against a Board decision and if they do not file an action before the criminal courts of peace within the required period, there is a risk that the administrative fine may be finalized before the Board.

Personal Data Protection Authority's ("DPA") Explanations concerning the Possibility to Apply to the Administrative Courts against Board Decisions

Pursuant to Article 15 of the DPL which regulates the procedures and principles of ex-officio examinations and examinations upon complaint, the Board must provide a response to the data subjects at the end of the examination upon complaint and the request will be deemed to be rejected if no response is given within sixty days from the date of the complaint. Furthermore, it is clearly pointed out in the justification of relevant article that after the lapse of the sixty-day period following the date of the complaint, the time for filing an action before administrative courts will begin. Furthermore, with Article 15, the Board was also given the power to decide whether to stop data processing or transfer of data abroad before the final decision, in the event that irreparable or impossible damages arise and the conditions of unlawfulness occur clearly. In light of this, in the justification of said article, it is further stated that the relevant persons can file actions against the decisions made by the Board before administrative courts. Although Article 15 does not include an explicit provision about the authority of administrative courts and only the justification of relevant article refers to administrative courts, in practice the DPA accepts the jurisdiction of administrative courts against the decisions given in the scope of Article 15.

Considering that it is explicitly accepted by the DPA that administrative courts are competent for the judicial review of the decisions made within the scope of Article 15 of the DPL based on the justification of relevant article only, applying to criminal courts of peace for judicial review of the decisions rendered by the Board within the scope Article 18 is not a consistent approach despite the references to administrative courts in the justification of the same article. Thus the Board must take the same approach against these similar matters and accept the competency of administrative courts against the decisions given in the scope of Article 18.

Conclusion

In summary, we conclude that it would be more appropriate to apply to administrative courts against Board's decisions imposing administrative fines. This will ensure that a single judicial authority will be responsible for review of all types of decisions made by the Board and this is very important in eliminating any inconsistencies that may arise from review of different types of decisions given by the same Board by different courts. Accordingly, a general explicit provision concerning the

competency of administrative courts against the decisions of the Board must be included in the DPL. On the other hand, even until such legal arrangement is made, applying to administrative courts instead of criminal courts of peace can be considered at least to allow this issue to be evaluated before the administrative courts and enable us to see their own evaluation of their authority.

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