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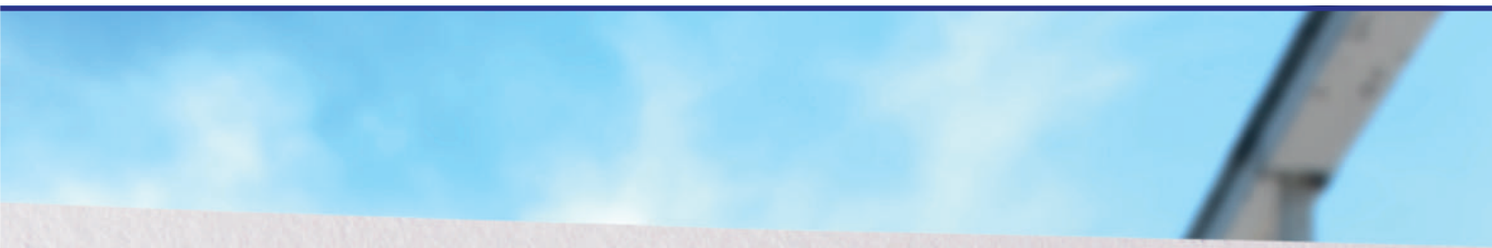

A Renewed Approach to Standard of Proof in Cases about Hindering On-Site Inspections

Retrieving Deleted Messages will not Excuse You

LG Electronics and SVS Fined for Hindering On-Site Inspections

Catch Up with the Latest on the Dawn Raids

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Dear reader,

We will not surprise you if we say that data, online platforms, online markets, data portability, access to data during on-site inspections have been in the spotlight of the Competition Authorities of various jurisdictions, and the Turkish Competition Authority ("**TCA**") is no exception.

The TCA has acknowledged the importance of data and data portability for the online platforms, particularly in NadirKitap case. The main take away of the case is that prevention of data portability has become a competition issue, which may also be supported by the IP policy. Restricting such portability may create burdensome artificial transition costs for the data owners, and hence be an entry barrier. The TCA concluded that restrictions on data portability by a dominant undertaking shall be viewed as an abuse of dominance.

Certain data may serve as evidence of competition law violation or its absence. Several cases on hindrance of on-spot inspections due to deleting messages on WhatsApp deserve a special attention here. The A-101 case in relation to an undertaking in the market for fast-moving consumer goods is essentially on evidence and standard of proof in the hindering of the on-site inspection cases. Since the TCA officials could not find any evidence that could prove the deletion of WhatsApp correspondences had occurred, and if so, when it had occurred, no violation was determined, no fine was imposed. This decision adds a booster point of view to the latest case law (e.g. Sahibinden.com case) as it demands a higher standard of proof in favour of the undertaking requiring concrete evidence to impose an administrative fine due to the hindrance on an on-site inspection. At the same time, in Kınık case, the TCA emphasized that the deletion of WhatsApp messages constituted hindering of inspection even when the data had been retrieved.

Among other 'vectors' of the TCA activities have been concluding investigations via the settlement procedure. As a result, the undertakings who decided to settle also obtained certain reductions in fines. Such examples may serve as an encouragement for the undertakings to settle with the TCA, i.e., to save time and money for all. In parallel, the commitment mechanism has also proved to be popular and effective in Turkey.

Finally, the Special focus of this issue of the Output® is on legal privilege. The TCA designed its specific way to grant this privilege which is subject to two conditions. Just like the Court of Justice of the European Union (**"CJEU"**), the client's communication in any form should be made with an external and independent counsel. Secondly, these conversations should be made with the aim to exercise a right of defence and should be made while there is an ongoing TCA investigation or an annulment lawsuit concerning the outcome of this investigation. Otherwise, the correspondence between independent lawyer and its client would not benefit from the attorney-client privilege. Unquestionably, conversations or legal advice which aim to cover up competition law violation would not be protected.

Sincerely,

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In this issue:

A Renewed Approach to Standard of Proof in Cases about Hindering On-Site Inspections

*The decision of the "TCA" in relation to an undertaking in the market for fast-moving consumer goods Yeni Mağazacılık A.Ş. ("**A-101**"), as well as the dissenting opinion, deserves a special attention. It is essentially on evidence and standard of proof in the hindering of the on-site inspection cases. Since the TCA officials could not find any evidence that could prove the deletion of WhatsApp correspondences had occurred, and if so, when it had occurred, no violation was determined, no fine was imposed (decision 22-28/464-187).*

In November 2021, the TCA launched an investigation to determine whether several undertakings in the fast-moving consumer goods market, including A-101, had violated Article 4 of Law No. 4054 on the Protection of Competition ("**Turkish Competition Law**"). Within the scope of this investigation, the TCA officials conducted an on-site inspection of the premises of A-101. With its decision, the TCA evaluated whether the on-site inspection was hindered. The focus of the decision was on whether any data from the phones of three employees had been deleted, and if so when the deletion had occurred. The TCA emphasized the following issues:

- There was a suspicion that the phones of the three employees in question may have been involved in activities aimed at destroying data, but as a result of the indexing of the phones of two of the employees with forensic devices, no log records of the deletion of the WhatsApp application were found. As the third employee's phone could not be indexed as well, no log records of the deletion procedure could be acquired.

- Therefore, forensic devices had not been able to establish that the employees of the undertaking had deleted the WhatsApp application or reinstalled it after having deleted it.

- Although the Flour and Bakery Products, Ice Cream, and Frozen Products Manager stated that he had deleted the WhatsApp application, he also stated that he had used the business phone for private purposes because his own device had been broken and that he had deleted his private correspondence for privacy reasons. The allegedly broken personal phone also had been brought to the company.

- To impose an administrative fine for hindering on-site inspection, deletion must be proven to have occurred after the start of the inspection, but in this case, no determination could be made as to whether the deletion had occurred on the phones of all three employees and, if so, when the deletion had occurred.

In this context, the TCA decided by majority vote that there was no concrete evidence that the on-site inspection at A-101 had been hindered and therefore, no basis was found for imposing a fine.

In a dissenting opinion, two Board members stated that the absence or inability to obtain a log record could not be claimed as evidence that the ("clean up") activity had not occurred. The TCA had taken many decisions previously in which it had concluded that the deletion from a phone had occurred based on other evidence even though the log record had not been detected. Accordingly, concrete evidence other than log records should have been considered in the present case. For example, the TCA officials had been kept waiting in a meeting room for 15 minutes despite their request to meet with the authorities to initiate the on-site inspection, and when considered together with other evidence, this was a long enough period for data deletion to have occurred. Additionally, those who allegedly had deleted the WhatsApp application were senior employees who had been the direct focus and target of the on-site inspection. The deletion of data from the phone to be examined had been carried out separately by three different employees, indicating that the deletion had not been accidental or reflexive, but deliberate and planned. In addition, all three employees had uninstalled the application from their phones, and at the time of the on-site inspection the application either had not been installed at all or had been installed but the login procedure required for its use had not been performed.

The dissenting opinion also stated that on phones where the application could be reinstalled, all group chats had been cleared, there was no correspondence, and a claim that the application had been uninstalled before the inspection but not reinstalled/activated was contrary to the ordinary course of life unless proven with concrete evidence. Additionally, one of the employees had stated that he had used the WhatsApp application, but the application had not been found to be ready to use; another had stated that he had deleted the WhatsApp application because it had contained private/confidential correspondence.

Restoring deleted applications and examining them from the last backup would not eliminate the result of hindering/complicating on-site inspection. The statements and defences submitted by the undertaking had not included a log record that could be in their favour or concrete evidence that the deletion had occurred before the inspection.

In the dissenting opinion, in line with the foregoing points, it was stated that the principle of in dubio pro reo ("when in doubt, rule for the accused") was not valid since there had been no doubt but a large amount of concrete evidence of hindering/complicating the inspection. Accordingly, it was argued that A-101 had hindered/complicated the on-site inspection and therefore an administrative fine should have been imposed.

All in all, the decision demands a higher standard of proof to the advantage of the undertaking concerned, requiring concrete evidence in order to impose an administrative fine for the hindrance on an on-site inspection.

Retrieving Deleted Messages will not Excuse You

*The TCA fined the mineral waters producer Kınık Maden Suları A.Ş. ("**Kınık**") for hindering on-site inspections by way of deleting emails and chats from the WhatsApp application. The TCA emphasized that the deletion still constituted hindering of inspection even if the data had been retrieved.*

Within the scope of this preliminary investigation launched in 2021 to determine whether the company violated Article 4 of the Turkish Competition Law, the TCA officials conducted an on-site inspection. When the TCA officials arrived at the company's premises, a general announcement was made to employees not to delete any e-mails, information, documents, or correspondence until the inspection was completed. However, during the inspection, the TCA officials discovered that some e-mails had been deleted permanently after the inspection had started. In addition, it was determined by technical reports that the contents of WhatsApp chats with the Chairman of the Board of Directors of a competitor (namely, Beypazarı Karakoca Doğal Maden Suyu A.Ş.) had been deleted after the beginning of the on-site inspection.

After the inspection, Kınık had claimed that they could supply the TCA with access to an e-mail backup that would allow them to retrieve deleted e-mails. The TCA stated that the deleted data had not been retrieved and emphasized that the deletion would still constitute hindering of inspection even if the data had been retrieved. Also, the undertaking's representative asserted that the e-mails had been deleted solely due to the undertaking's day-to-day operations. Yet, the TCA did not credit this explanation either.

In accordance with the technical opinion from the Department of Information Technologies, which confirmed that the deletion occurred after the on-site inspection had started, the TCA concluded that Kınık had hindered the on-site inspection by deleting e-mails and chats on the WhatsApp application. Accordingly, the TCA decided to impose an administrative fine on Kınık, amounting to five per thousand of its 2020 turnover.

A Honey of an Exemption: An Individual Exemption Granted for Exclusive Patent License Agreement

*In August 2022, the TCA published its reasoned decision in relation to an individual exemption granted to Altıparmak Gıda San. ve Tic. A.Ş. ("**Altıparmak**"). It is related to its patent license agreement with Easysnap Technology, the patent owner of a single-dose, break-open package (decision dated 21 October 2021 and numbered 21-51/715-356).*

Altıparmak is one of the biggest honey products suppliers in Turkey and the owner of well-known "Balparmak" brand. Easysnap is an undertaking focused on the plastic-packaging of special products. Located in Italy, Easysnap owns a patented single-use packaging concept for liquid products. Easysnap and Altıparmak entered into an exclusive patent license agreement granting Altıparmak the exclusive right to produce Easysnap's patented single-use packaging in Turkey until the patent right expires.

However, the agreement was disputed by other honey producers who argued that such exclusivity granted to Altıparmak constitutes exclusion of their undertakings from operating in the market. The complainants also argued that the patent license agreement was void since one of the complainants had obtained a machine that produces Easysnap's package, including the single-use packages, before the agreement had come into effect.

Regarding the assessment of whether the agreement constituted a breach of Article 4 of the Turkish Competition Law by excluding competitors from the market, the TCA determined that the vertical agreement between the parties could be considered as limiting competition and Altıparmak could not enjoy a block exemption since it had not satisfied the threshold stipulated under the Block Exemption Communiqué on Vertical Agreements. However, the TCA assessed and granted an individual exemption to Altıparmak.

In the decision, the agreement was considered as a technology transfer and economic development and improvements were considered. Moreover, the TCA acknowledged that the agreement did not eliminate competition in a significant part of the relevant market, since a variety of honey products were still available that potentially compete with Altıparmak's products packaged with Easysnap's patented concept.

Finally, regarding the intellectual property claims of the complainants, the TCA concluded that such claims should be reviewed in accordance with the relevant intellectual property law and subject to the relevant judicial authorities. As a result, an individual exemption under Article 5 of the Turkish Competition Law was granted to Altıparmak's exclusive patent license agreement with Easysnap.

Fine Reductions Following Settlements: Some Practical Examples

In July 2022, the TCA concluded several investigations via the settlement procedure available under the Turkish Competition Law. As a result, the undertakings concerned also obtained certain reductions in fines. Such examples may serve as an encouragement for the undertakings to settle with the TCA, i.e. to save time and money for all.

For instance, Arnica Pazarlama A.Ş. ("**Arnica**") was investigated and fined for restricting competition in the market by setting their dealers' resale price and restricting the internet sales via e-marketplace platforms through both contracts and de facto applications and introducing restrictions concerning regions or customers. The investigation was concluded with Arnica submitting an application for settlement. The TCA decision that Arnica had violated Article 4 of the Turkish Competition Law resulted in the levy of a total administrative fine of TRY 3,293,008.20 on Arnica. This amount was reduced by 25% within the scope of the settlement application, resulting in a total administrative fine of TRY 2,469,756.14.

Another example of the implementation of the settlement procedure in Turkish Competition Law is that of the Hayırlı El Kozmetik Pazarlama A.Ş. ("**Hayırlı El**") case concluded through the settlement procedure. The TCA concluded the investigation by deciding that Hayırlı El had violated Article 4 of the Competition Law by determining the resale prices. Accordingly, an administrative fine of TRY 385,178.23 was imposed. This amount was reduced by 25% due to the settlement procedure, and consequently, the final amount imposed on Hayırlı El was TRY 288,883.67.

In cases in relation to Olka Spor Malzemeleri Ticaret A.Ş. ("**Olka**") and Marlin Spor Malzemeleri Ticaret A.Ş. ("**Marlin**"), it was determined that they had violated Article 4 of the Turkish Competition Law by determining their dealers' resale prices and imposing online sales restrictions. The amounts of fines were reduced by 25% within the scope of the settlement application. As a result, the administrative fines were TRY 7,442,885.13 for Olka and TRY 549,325.55 for Marlin.

Finally, the DyDo Drinco Turkey İçecek Satış and Pazarlama A.Ş. ("**DyDo**") case. Here the TCA decided that DyDo had violated Article 4 of the Turkish Competition Law by determining the resale prices through interference with the shelf prices of DyDo products. The TCA also found that mitigating factors were applicable in the case. Accordingly, by also considering the duration of the infringement, an administrative fine of TRY 14,302,030.59 was imposed; it was reduced by 20%, due to the settlement procedure, and consequently, the final amount of the fine was TRY 11,441,624.472.

Investigation into Dried Fruits & Nuts Terminated with Commitments

*The commitment mechanism recently introduced in the Turkish Competition Law is proving to be popular and effective. An investigation into Tadım Gıda Maddeleri San. ve Tic. A.Ş. ("**Tadım**"), a Turkish packaged dried nuts and fruits manufacturer, was terminated following a submission of a commitment package on 8 July 2022.*

An investigation was launched in August 2021 to determine whether Tadım had violated the Turkish Competition Law by way of (i) abusing its dominant position in the market for packaged dried nuts and fruits through exclusionary practices restricting the activities of its competitors, and (ii) intervening in the resale prices of its dealers.

During the investigation, Tadım applied to the TCA to initiate the commitment procedures and submitted an extensive commitment package. The package was found proportional to the relevant competition concerns, sufficient to eliminate such concerns, convenient for swift implementation, and effective. Accordingly, the The Turkish Competition Board ("**Board**") accepted the commitment package, rendering the submitted actions as binding, and terminated the investigation.

Restrictions on Data Portability at Online Platforms for Second-Hand Books as Abuse of Dominance and/or IP Law Issue?

*The TCA published its reasoned decision in relation to an intermediary platform for selling second-hand books NadirKitap Bilişim and Reklamcılık A.Ş. ("**NadirKitap**"). It was fined for abusing its dominance via restricting data portability to other bookselling platforms. The case is prominent as it relates to the Turkish Competition Law and Law of Turkey No. 5846 on Intellectual and Artistic Works ("**Copyright Law**"). The TCA here concludes that there is no conflict between the IP law and competition law as they share the same goal.*

NadirKitap does not sell books under its name, it simply provides services to numerous undertakings that sell second-hand books through its website for a membership fee and commission from the sales. An investigation was launched to determine whether NadirKitap had violated the Turkish Competition Law by abusing its dominant position by way of restricting the portability of the data of its customers that wished to market their products through competing intermediary platforms.

The TCA acknowledged the importance of data and data portability for the online platforms. Restricting such portability may create burdensome and artificial transition costs for the data owners. This may force them to stay where they are, despite another platform being a better/cheaper alternative. The TCA concluded that restrictions on data portability by a dominant undertaking shall be viewed as an abuse of dominance due to creating entry barriers. Prevention of data portability has become a competition issue, which may also be supported by the IP policy. The TCA evaluated the data portability under the Copyright Law, since NadirKitap claimed it had copyright over the databases concerned. The TCA emphasized that the databases with authentic quality elements of creativity only shall benefit from all Copyright Law provisions regarding the protection of the work, which was not the case here. The TCA concluded that NadirKitap cannot benefit from the sui generis right protection either. The relevant product market in this case was defined as intermediary platform services for sales of second-hand books. The second-hand books and new edition books were concluded not to be in the same relevant market since it was difficult for new edition books to create competitive pressure on the second-hand books. In addition, online platforms could not be regarded as substitutes for the traditional channels due to their special features (i.e. accessibility, ease of use/payment, portfolio, transactional costs, customization, etc.).

The TCA assessed that by refusing to share inventory data, NadirKitap (**i**) had blocked the sellers from transferring data to its competitors, (**ii**) restricted the transfer by adding its own logo to the photos of the books, and (**iii**) stated that it was illegal to transfer these images to other platforms. Moreover, it also was determined that NadirKitap had suspended the memberships of data-sharing sellers and thus played a decisive role in stopping sales through the competing undertaking and restricted competition.

As a result, barriers to entry and expansion in the relevant product market had arisen due to the restrictions and the characteristics of the multisided platforms enabling the relatively more straightforward emergence of network effects in the market. In this context, the TCA found that NadirKitap had violated Article 6 of the Turkish Competition Law and imposed an administrative fine of TRY 346,765.63.

Further to the administrative fine, to end the violation and establish effective competition in the market, the TCA ordered NadirKitap to provide the relevant seller members with the book inventory data in an accurate, understandable, secure, complete, accessible, and appropriate manner in case of such a request from the booksellers.

Automotive Manufacturers Association's Information Collection and Sharing Scheme Cleared

*On June 2022, 2022 the TCA granted negative clearance to the Automotive Manufacturers Association's ("**OSD**") individual exemption application regarding its information collection and sharing scheme (Decision No 21-51/714-355 dated 30 June 2022).*

The OSD applied to the TCA with a request for the extension of the scope of the sectoral data currently shared pursuant to the individual exemption/negative clearance decisions obtained in 2012 and 2013. Accordingly, the OSD requested that the scope of the said sectoral data be extended to include "production" and "export" amounts, broken down into different vehicle groups.
After assessing the OSD's application, the TCA concluded that (i) the collected and shared information was not of the nature to affect the sales and pricing decisions of undertakings, and (ii) the relevant information collection and sharing process would not result in coordination and market foreclosure. Accordingly, the TCA decided to grant negative clearance to the OSD's application, pursuant to Article 8 of the Turkish Competition Law.

LG Electronics and SVS Fined for Hindering On-Site Inspections

*On 1 July 2022, the TCA published its reasoned decision in relation to LG Electronics Tic. A.Ş. (**"LG"**) and SVS Dayanıklı Tüketim Malları Pazarlama ve Ticaret Ltd. Şti. (**"SVS"**). The companies were fined for hindering on-site inspections (decision dated 9 September 2021 and numbered 21-42/618-305). Here we provide some highlights of the reasoned decision.*

A preliminary investigation was launched to determine whether several undertakings including LG and SVS had violated Article 4 of the Turkish Competition Law together with their distributors by way of prohibiting online sales of authorized sellers and/or determining their resale prices.

The TCA concluded that LG employees had hindered the on-site inspection by deleting and reinstalling the WhatsApp application. While some of the employees argued that deleting and reinstalling the WhatsApp application was a company policy, the TCA emphasized that it had not been able to reach any findings establishing the existence of any such company policy. Moreover, another employee had stated that they had no knowledge of any company policy or directive that required the deletion of such data. Subsequently, LG also submitted to the TCA that the company executives had not had any information or instructions as to the deletion of data and that the necessary disciplinary actions would be taken against the relevant employees.

As for SVS, the TCA found that SVS employees had hindered the on-site inspection by deleting and reinstalling the correspondences carried out through WhatsApp. While the TCA had been unable to detect when these employees had deleted relevant data, as the accounts were reviewed remotely, it had been confirmed by the statements of SVS employees that the WhatsApp data indeed had been deleted after the on-site inspection had begun.

Accordingly, the TCA decided that both LG and SVS had hindered the on-site inspections and that both undertakings would receive administrative fines of five in thousand of their gross revenues for 2020.

No Need for Further Investigation into THY Opet

*As a result of the preliminary investigation carried out on THY Opet Havacılık Yakıtları A.Ş. (**"THY Opet"**), the TCA decided that a full-fledged investigation was not required. The reasoned version of the decision, dated 06 June 2022 and numbered 22-01/4-1, was published on the official website of the TCA on 1 July 2022.*

A confidential complaint submitted to the TCA alleged that THY Opet had violated (i) its commitments based on the TCA's decision dated 26 February 2014 and numbered 14-08/155-66 about THY Opet's takeover of the right of operation of the fuel storage, sales, and supply units at Istanbul Sabiha Gökçen Airport ("SGA"); and (ii) Article 6 of the Turkish Competition Law through its excessive pricing practices.

First, the TCA defined the relevant product market as "the jet fuel storage and refueling services market" and "the jet fuel sales market" and the geographical market as "SGA." Accordingly, THY Opet was determined to enjoy a dominant position in the jet fuel storage and supply services market whereas not in the jet fuel sales market. Subsequently, the TCA mainly focused on the allegations of excessive pricing in the jet fuel storage and supply services market where THY Opet was found to be in the dominant position. Regarding the jet fuel storage and supply services market, the Board indicated that considering that (i) THY Opet had incurred losses between 2017-2020 and (ii) rental prices paid in Euros had increased in terms of TRY due to the increase in the EUR/TRY exchange rate, it was concluded that THY Opet had not applied excessive prices in the respective market during the period examined.

Markedly, the TCA decided that THY Opet's previous commitments (including price and arm's length conduct commitments) which the company had provided for the acquisition of the fuel storage, sales, and supply facilities by signing a five-year lease contract were inapplicable in this case, as the TCA had reassessed a new contract between THY Opet and the operator of the airport in 2019 and decided that there was no new situation as regards the change of control for the facilities. It, therefore, decided that the new contract was beyond the scope of Turkish Competition Law.
As a result, the TCA rejected the complaint and decided that a full-fledged investigation against THY Opet was not necessary.

The EU General Court Upheld the Google Infringement Decision to a Large Extent

*On 13 September 2022, the General Court of the EU ("**General Court**") upheld the European Commission's ("**Commission**") decision that Google LLC ("**Google**") had unlawfully restricted manufacturers of Android devices and mobile network operators to strengthen its dominant position in the search engine market (Case T-604/18). At the same time, the amount of the fine was reduced, and certain violations of Google's right to defence/to be heard were found.*

Following an investigation launched in 2015 in connection to Android, the Commission fined Google almost EUR 4,343 (approx. TRY 73,221) billion for abusing its dominant position via imposing anticompetitive contractual restrictions on mobile device manufacturers and mobile network operators. Subsequently, Google brought an action against the Commission's decision. The General Court upheld the Commission in this case to a great extent and only annulled the part of the Commission finding that portfolio-based revenue share agreements were abusive.

First, according to the General Court, the relevant markets covered by the portfolio-based revenue share agreements do not have a significant portion of the market as stated by Google. Furthermore, the Commission's analysis was based upon two elements: the contested practice's coverage and the 'as efficient competitor' ("**AEC**") test. The General Court emphasized that the AEC test conducted by Commission had not supported the abusive nature of the portfolio-based revenue share agreements, and Google had not been provided with a chance to object to these deficiencies through a hearing. The General Court highlighted the importance of a hearing in this case due to the deficiencies identified in the Commission's application of the AEC test.

Additionally, the General Court upheld the claim the Commission had violated Google's procedural rights concerning the portfolio-based revenue share agreements, including its right to be heard. As a result, it was decided that the finding regarding the abusive nature of the portfolio-based revenue share agreements was to be annulled as these agreements lacked the capacity to constitute abuse.

On the other hand, the General Court confirmed that restrictions in the anti-fragmentation agreements had strengthened Google's dominant position by deterring innovation and limiting the diversity of the offers available to users. The General Court also stated that due to customers' propensity to utilize the search and browser applications that are easily available to them on their devices, the pre-installation constraint had generated an anti-competitive "status quo bias" in the case of distribution agreements.

Consequently, the General Court reduced the fine from EUR 4,34 (approx. TRY 73,17) billion to EUR 4,125 (approx. TRY 69,55) billion.

[1] The amounts in EUR and TRY were calculated at the average buying rate of exchange of the Central Bank of Turkey. For 2022, this rate is EUR 1 = TRY 16.86

15 Marble Manufacturers Fined a Symbolic Amount in Greece

*On 19 September 2022, the Hellenic Competition Commission ("**HCC**") published its decision that 15 marble monument manufacturers were fined for concluding an anti-competitive agreement with Mytilene Charity Institutions ("**MCI**") for price fixing and allocating market in A and B cemeteries in Mytilene.*

The HCC concluded that 15 undertakings, all manufacturers of marble monuments in A and B cemeteries in Mytilene, had

entered into an unlawful agreement with MCI, the purpose of which was to engage in price-fixing and market allocation in projects related to the manufacturing of marble burial monuments. The agreement was also implemented via the mechanism of the collection of donation amounts inextricably linked to the issuance of permits for the construction of burial monuments in the MCI-managed A and B Cemeteries of Mytilene. Consequentially, it was determined that the parties had colluded and agreed on adopting a specific conduct in the relevant market, which was seen as a violation of competition law per se.

The HCC determined that the MCI's involvement in the cartel had begun in March 2007 and ended in January 2021, a period of approximately 14 years. The period of involvement for other undertakings in the cartel was determined case by case. The HCC fined the undertakings concerned a symbolic amount of EUR 50 each, while the MCI was fined EUR 15,612. Lastly, one of the manufacturers under the investigation was deemed not to have violated competition law and hence was not fined.

Sector Inquiry into Online Advertising in Germany

*On 29 August 2022, the German Federal Cartel Office ("**FCO**") investigated and published the sector inquiry that includes technical aspects of online advertising as well as history of its development. It also includes the analysis of the market position of certain players in online advertising sector. The FCO took an interdisciplinary approach by analyzing technicalities of online advertising with relevant legislation, namely Digital Markets Act, GDPR and other legal instruments.*

It is acknowledged that online advertising as a business model is vital for online services and constitutes a big portion of the income generated by certain tech firms, namely Google and Meta as acknowledged by inquiry itself.

Within the inquiry, FCO stated that online advertising can be separated into search and non-search online advertising and inquiry highlighted the importance of intermediaries with regard to non-search online advertising. After delving into technical aspects of software and platforms that operate and manage the demand and supply of advertising, inquiry deals with the importance of user data for advertising and availability of user data. Furthermore, FCO discussed, how possible restrictions to user data may benefit companies having access to independent comprehensive user data, like Google. It focuses on the negative effects of such possible restrictions from the view of consumers, ad publishers and developers.

It should be emphasized that FCO assessed the influence of Google over online advertising sector and stressed the Google's considerably large influence on online advertising space. Therefore, it may be concluded that an antitrust investigation in Germany into the influence of certain players over the online advertising space is highly probable.

Safeguard Measures Investigation into Grinding Media Concluded

On 27 July 2022, the Ministry concluded a safeguard measures investigation concerning the imports of "grinding media and similar articles for mills" through Communiqué No. 2022/2 on Safeguard Measures in Imports.

The investigation was initiated on 9 October 2021 upon a complaint from a domestic producer, Grindballs Çelik Bilya San ve Tic. A.Ş., about the imposition of safeguard measures on imports of "grinding media and similar articles for mills." Following the initiation of the investigation, Çemaş Döküm Sanayi A.Ş., a producer of cast media, was included in the investigation process.

Through the like or directly competitive product analysis the Ministry concluded that although some differences exist in production methods, cast and forged media are substitutable products considering that when the performance of one product is improved, and the price of the other is decreased, they can capture markets from each other. Moreover, regarding the unforeseen developments in imports the Ministry evaluated that (i) the exports of grinding media had increased unforeseeably, (ii) unit prices had decreased and important exporter countries in the said product had directed their exports to Turkey, (iii) such exporters had determined Turkey as a target market, and (iv) this had caused an increase in the share of imports in the Turkish market. The import trends also were determined to show a sudden and sharp increase by disrupting the general trend.

With respect to the determination of serious injury or threat thereof the Ministry found that the domestic industry had suffered serious injury due to the increase in imports by considering the profitability and economic indicators of the domestic industry. Furthermore, an evaluation found that other factors (such as the increased production capacity of domestic producers, inadequacy of the technology used by domestic producers in production, level of domestic prices, and export sales) that might have had an impact on serious injury were not relevant. Consequently, an additional financial liability was applied as a safeguard measure amounting to USD 200/ton, USD 195/ton, and USD 190/ton for the first term, the second term, and the third term, respectively, to the imports of "grinding media and similar articles for mills".

Dumping Investigation of European and Korean Hot-rolled Flat Steel Concluded

*On 7 July 2022, the Ministry concluded a dumping investigation concerning the imports of "hot-rolled flat steel" originating in the European Union ("**EU**") and South Korea ("**Korea**") through Communiqué No. 2022/21 on the Prevention of Unfair Competition in Imports.*

The concerned investigation was initiated on 9 January 2021 upon a complaint from the Turkish Steel Producers Association on behalf of domestic producers (lodged by Ereğli Demir ve Çelik Fabrikaları T.A.Ş., Çolakoğlu Metalurji A.Ş., Habaş Sınai ve Tıbbi Gazlar İstihsal Endüstrisi A.Ş., and Tosçelik Profil ve Saç Endüstrisi A.Ş., and supported by İskenderun Demir ve Çelik A.Ş.) claiming that the imports of hot-rolled flat steel originating in the EU and Korea had been dumped and thereby caused injury and/or threat thereof to the relevant Turkish domestic industry.

The investigation period for the dumping determination was determined as 1 October 2019 to 30 September 2020, while the injury assessment period was determined as 1 January 2018 to 30 September 2020. In this regard, some of the interested parties had opposed the investigation period and injury investigation period, claiming that (i) the relevant WTO Committee had issued a recommendation letter stating that the injury investigation period shall not be less than three years, (ii) the last quarter of 2019 had been included twice in the analysis, and (iii) this had created an inconsistency. In response to those arguments, the Ministry stressed that the injury investigation period and investigation period had been determined by considering the alleged dumping periods of the injury thereof as well as the timing of the application /application examination / investigation initiation stages.

In terms of the Ministry's determinations regarding the product scope of the measures, it was decided that (i) sheets in a plate form rolled in the plate mill, (ii) high-speed steels and tool steels, (iii) products with 0.006% or less carbon content (IF steel), and (iv) IF steel products were excluded from the scope of the anti-dumping duty. In response to claims by the parties regarding that certain product types could not be produced by the domestic industry, the Ministry held that there was no precondition regulating that all the imported products and/or the exact same ones could be produced by the domestic industry; and that otherwise, it would become impossible to impose a measure against unfair competition in imports.

With respect to the import of products originating in the EU, the Ministry employed a sampling method to complete the investigation in due time, and the biggest European exporters, ArcelorMittal and Tata Steel, were selected for the sampling. Individual margin calculation requests from other non-sampled companies located in the EU could not be met since the number of exporters/producers was so large and it would be unduly burdensome and prevent the timely completion of the investigation. In this regard, the Ministry calculated the following dumping margins:

Origin	Company	Dumping Margin (% CIF)
European Union	ArcelorMittal	39.65
	Tata Steel	30.64
	Liberty Steel	23.47
	ThyssenKrupp	23.47
	Others	49.70
Korea	POSCO	14.62
	Hyundai Steel	14.08
	Others	18.59

As the dumping margins for and import volumes from the EU and Korea were found to be above negligible levels and the imported products competed with each other as well as with the domestic, like products, the effects of the imports originating in the EU and Korea were assessed cumulatively by the Ministry. Accordingly, the Ministry found that there had been a price undercutting of 4-8% caused by the imports from the concerned countries. With respect to price depression, the Ministry deemed that the significant decrease in the domestic industry's profitability indicated that there had been a price depression substantially higher than price undercutting margins.

The domestic industry's economic indicators showed that (i) the domestic industry could manage to increase its production, capacity utilisation rate, and market share due to the effect of the expanding domestic market, (ii) the domestic industry's inventory circulation speed and productivity had increased, (iii) the domestic industry's unit industrial cost and operating expenses had decreased, (iv) despite the increase in its production, productivity, and inventory circulation speed and the significant decreases in its unit cots, the unit profit/profitability significantly had declined as a result of the fact that the decrease in the unit prices was more than the decrease in the cost, and (v) a significant decline in its economic indicators such as product cash flow and rate for return of the investments had occurred because of the significant decrease in the unit profit/profitability. As a result of the holistic evaluation of the given data, it was determined that deterioration in the domestic industry's economic indicators had occurred.

Considering that the domestic industry's material injury coincided with the imports from the subject countries and the increase of the market share of those imports during the

same period and that the concerned imports had undercut and/or depressed the domestic industry's prices significantly, it was evaluated that the main reason for the domestic industry's material injury was the dumped imports from the subject countries. With respect to other factors that may have caused injury (imports from third countries, export sales of the domestic industry, COVID-19's effects, competition in the domestic market between the domestic producers, safeguard measures imposed in 2018, increases in workers' wages, an increase in investments and its effects on profitability) these were found not able to break the causal link between the dumped imports and the material injury/threat thereof to the domestic industry. Consequently, the Ministry, by applying the public interest principle and within the framework of the lesser duty rule, imposed the following anti-dumping duties on the imports of certain hot-rolled flat steel originating in the EU and Korea:

[1] *Classified under CN Codes 7208.10.00, 7208.25.00, 7208.26.00, 7208.27.00, 7208.36.00, 7208.37.00, 7208.38.00, 7208.39.00, 7208.40.00, 7208.52.10, 7208.52.99, 7208.53.10, 7208.53.90, 7208.54.00, 7211.13.00, 7211.14.00, 7211.19.00, 7212.60.00, 7225.19.10, 7225.30.10, 7225.30.30, 7225.30.90, 7225.40.15, 7225.40.90, 7226.91.20, 7226.91.91, 7226.91.99.*

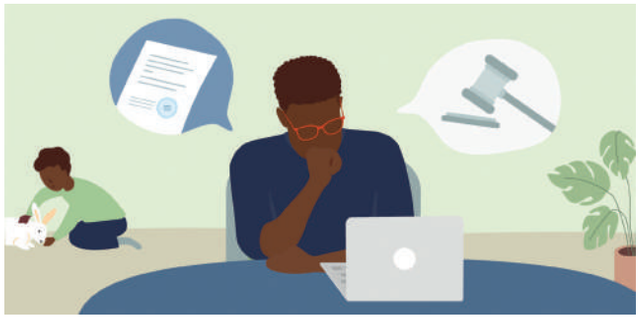
Origin	Company	Anti-Dumping Duty (% CIF)
European Union	Acciaierie d'Italia S.P.A	10.9
	ArcelorMittal Belgium N.V.	
	ArcelorMittal Bremen GmbH	
	ArcelorMittal Eisenhüttenstadt GmbH	
	ArcelorMittal France SAS	
	ArcelorMittal Méditerranée SAS	
	ArcelorMittal Poland S.A.	
	ArcelorMittal Sagunto S.L.	
	ArcelorMittal Sestao S.L.	
	ArcelorMittal Asturias S.A.	
	Tata Steel Ijmuiden BV	7
	Liberty Galati S.A.	8.95
	Liberty Ostrava A.S.	
	Thyssenkrupp Steel Europe AG	8.95
	Thyssenkrupp Hohenlimburg GmbH	
	Others	12.8
Korea	POSCO	7
	Hyundai Steel Company	7
	Others	8.95

Amendment of the Regulation on Distance Contracts

*Additional obligations were imposed on intermediary service providers in distance contracts and significant changes were made to the consumers' right to withdraw from a contract with the adoption of the Regulation on the Amendment of the Regulation on Distance Contracts ("**Regulation**"), published in the Official Gazette of Turkey on 23 August 2022, and with the effect as of 1 October 2022.*

Under the Regulation, the intermediary service provider is jointly and severally liable to the seller or the provider for the provision of preliminary information and the compliance of its contents and method with the law, if a distance contract is established through the system developed by the intermediary service provider to mediate the establishment of a distance contract. Furthermore, between the seller and the provider, intermediary service providers must prove that the customer is notified of their withdrawal right. The Regulation states several other obligations, such as keeping records imposed on intermediary service providers.

Moreover, regarding the costs of the goods' return, if the right to withdrawal is exercised, a new rule has been put into place. If it is agreed upon in the preliminary information and the amount payable in case of return through the carrier is anticipated by the seller, the customer shall bear the return expenses, up to the delivery charges, in this context. However, if the consumer receives damaged items, they won't be expected to cover the costs of returning them.



Violations Related to the Retention Periods and Security of Personal Data in France

On 8 September 2022, the French Supervisory Authority (**CNIL**) *conducted an online investigation of the infogreffe.fr website of the French commercial court registries official economic interests group Infogreffe (**INFOGREFFE**), which provides a legal and official information publishing service on companies via the website. As a result of the investigation, CNIL fined INFOGREFFE EUR 250,000 for the violation of Articles 5.1.e and 3.2. of the **G**eneral Data Protection Regulation **(GDPR)**.*

In response to a complaint, the CNIL conducted an online investigation of the infogreffe.fr website with a primary focus on the security measures put in place by the INFOGREFFE as well as the established data retention periods. According to the infogreffe.fr website, the personal information of members and subscribers (bank details, first and last names, postal and e-mail addresses, phone and mobile phone numbers, secret questions and their answers) would be kept for 36 months after the final order for a service and/or document.

Nevertheless, the CNIL reported that 25% of the service users' data had been stored after the predetermined retention times. The CNIL also stated that only a very small number of accounts had been the subject of the manual anonymization carried out upon user request. Therefore, the CNIL decided that INFOGREFFE had failed to comply with the obligation to keep data for a period of time proportionate to the purpose of the processing under Article 5.1.e of the GDPR.

The CNIL also discovered that the company had not mandated the use of a secure password when users set up accounts on its website and due to the limited password size of the firm, 3.7 million users had been unable to enter secure passwords. Furthermore, the CNIL stated that INFOGREFFE had stored the passwords, secret questions, and answers used by users throughout the password reset process in its database in clear text as well as sent non-temporary passwords for account access in clear text via email. Hence, the CNIL determined that INFOGREFFE had not taken the steps necessary to ensure the protection of the personal data of the members and users.

Consequently, considering that INFOGREFFE had violated articles 5.1.e and 3.2 of GDPR, the CNIL fined it EUR 250,000.

Focus on Protection of Personal Data in Banking Sector & Genetic Data in Turkey

*In August 2022, the Data Protection Authority of Turkey ("**KVKK**" or "**Authority**") presented several important documents in relation to the personal data protection, focusing on the genetic data, as well as protecting personal data in the banking sector.*

First, the Authority proposed rules for handling genetic data, in accordance with the Law of Turkey on the Protection of Personal Data ("**Law**"). The Law classifies genetic information as "sensitive personal data". The KVKK claimed that because the improper management of genetic data might have severe effects on people as well as the national security and economy, "it is vital to connect the processing of genetic data to particular laws and processes, as well as to increase awareness in the social sphere."

Secondly, the KVKK issued the Guideline Regarding Good Practices on the Protection of Personal Data in the Banking Sector ("**Banking guidelines**"). The Banking guidelines aim to set good practice examples within this framework and to direct data controller banks in carrying out their personal data processing activities in accordance with the Law and any secondary legislation issued by the KVKK. The document contains broad description of the concepts and practices that banks must follow for the protection of personal data. Banks are still required to abide by the Law and any applicable secondary legislation.

Several Data Protection Issues for TikTok in Italy

*On 15 July 2022, the Italian Data Protection Authority ("**Garante**") warned TikTok about the change of its privacy policy stating that the process of personal data for personal ads would be no longer based on the explicit consent of the users but on the legitimate interests of TikTok and its partners. Further, TikTok halted its planned privacy notice update in Europe upon contact with Ireland's Data Protection Commission ("**DPC**").*

Garante stated that TikTok was in violation of the Italian Personal Data Protection Law transposed from the EU Directive 2022/58 to the domestic law because the change exhibited a lack of adequate legal basis, also according to the GDPR. Furthermore, TikTok's privacy policy jeopardized children by targeting them with inappropriate personalized ads. Following the warning, TikTok paused the implementation of its privacy policy within the European Union.

Similarly, the DPC engaged with TikTok regarding its privacy notice update, which would no longer request the consent of users to receive targeted advertising. The DPC stated that TikTok halting the implementation of the update would allow sufficient time for the DPC to carry out an analysis of the practice.

Pegasus Data Infringement Notice

*The Turkish Data Protection Authority published the data infringement notice of Pegasus Airlines ("**Pegasus**") pursuant to Article 12(5) of Law No. 6698 on the Protection of Personal Data stipulating that the data controller has the obligation to notify the Authority and data subjects in case processed personal data is obtained unlawfully by third parties.*

Unauthorized access to personal data occurred through the service established for flight teams to conduct the necessary plans and coordination because of the browser listening feature of the service having been left turned on. This violation was determined through information security intelligence and posts publicly shared on social media. While some of those that accessed the relevant personal data without authorization were contacted and ordered to destroy the said data, it is noted that the full scope of the breach is still unknown.

Attorney-Client Privilege from Competition Law Perspective: Comparison Between Turkish and French Legal Systems

by Caner K.Çeşit, İdil Gizay Doğan, and Rana Antar

Introduction

The attorney-client privilege is a common law concept of legal professional privilege. The concept also exists in civil law countries where there is a secrecy obligation on the part of professionals in guaranteeing that clients' confidential information is kept secret from disclosure to third parties. The civil law concept of attorney-client privilege is generally regulated under special laws such as legal practitioner acts or through national criminal law. Even if the principle of attorney-client privilege generally has a significant place in all legal systems, it creates an ambiguous area within the scope of competition law depending on the country. However, neither Turkey nor France has specific dispositions under their national laws which are Turkish Competition Law, the French Civil Code ("**FCiC**"), and the French Commercial Code ("**FCoC**"). However, for Turkey, the Turkish Competition Authority (**TCA**) sets specific conditions related to this matter, whereas, in France, the French Competition Authority ("**FCA**") is still ambiguous on the subject.

Within the scope of this article, the general legal basis of attorney-client privilege in Turkish and French legal systems will be mentioned and the reflection of the principle under competition law will be examined in these legal systems.

I. The General Concept of Attorney-Client Privilege

It is possible to observe that under Turkish law dispositions attorney-client privilege exists in the Turkish Constitution, the Turkish Attorneys Act No. 4515 ("**TAA**"), and the Turkish Criminal Procedure Law No. 5271 ("**TCPL**"). As for France, attorney privilege is specified by the French Attorneys Ethics Code ("**RIN**").

Article 36 of the TAA, with the upper heading "Confidentiality Obligation", states "Attorneys are prohibited from revealing the matters entrusted to them or learned due to their duty as attorneys or their duties in the Union of Turkish Bar Associations and its associations." Yet, Article 36 does not grant the client any specific right to privilege.

A similar disposition exists for Turkish criminal law. In France, the attorney-client privilege is defined by the RIN. The latter gathers three main sources of law on attorney-client privilege that are Article 66-5 of the law number n°71-1130 on reforming some judicial and legal professions, Article 4 of the decree n°2005-790 of 12 July 2005 relating to the ethics of the legal profession, and Article 226-13 of the French Criminal Code ("**FCC**").

II. The Attorney-Client Privilege from a Competition Law Perspective

A. Under Turkish Law

In the Turkish legal system, there is no clear specific legal provision regarding attorney-client privilege for competition law disputes in the Competition Law. That said, in its Guidelines on the Examination of Digital Data during On-site Inspections[2], the TCA stated that data copied during on-site inspections are protected under the principle of professional privilege. Accordingly, any correspondence between a client and an independent lawyer with no employee-employer relationship with the client aimed at the exercise of the client's right to defense is accepted to belong to the professional relationship and covered by the attorney-client privilege.

However, correspondences that are not directly related to the exercise of the right to defense do not benefit from the privilege, especially if they involve giving assistance to an infringement of competition or concealing an ongoing or future violation.

It is known that the TCA has broad powers when collecting information and documents. The duties and powers of the TCA are regulated by Article 27 of the Competition Law, and Articles 14 and 15 of the same law indicate how the TCA will act while fulfilling these duties and authorities. Pursuant to Article 14 of the Competition Law, the TCA may request "any information it deems necessary from all public institutions and organizations, undertakings and unions of undertakings" while performing its duties and authorities regulated by Article 27. Again, pursuant to Article 15 of the Competition Law, if deemed necessary, the TCA may conduct on-site inspections at the premises of undertakings or associations of undertakings. In line with this extensive competence, there is an impression that the TCA may examine communications between clients and their attorneys.

The TCA recognized the existence of the privilege in Competition Law with the Dow Decision. In the said decision the expression "correspondence made for the purpose of exercising the right of defense" was used. In the CNR Decision[3], the TCA also considered the attorney-client privilege. It was stated that the said privilege aimed to protect this communication by preventing the mandatory disclosure of the correspondence made by the undertakings with their attorneys while they were receiving legal consultancy services.

The TCA made it clear in its Enerjisa Decision[4] that the privilege was not absolute. Within the scope of the preliminary investigation conducted by the TCA on Enerjisa, some documents taken during the on-site inspection were claimed to be within the scope of attorney-client privilege. It was understood that the document in question was an audit report on the outcome of the Competition Compliance Program conducted by Enerjisa's attorneys, from whom it received legal advice. The TCA responded to this allegation that "Correspondence not directly related to the exercise of the right of defense, made to assist any violation or to conceal an ongoing or future violation, shall not benefit from the protection, even if it relates to the subject of preliminary investigation, investigation or inspection" and refused to include this document in the scope of the attorney-client privilege.

After applying to Administrative Courts for the annulment of the decision, the Administrative Court[5] clarified the application of the attorney-client privilege in the field of Competition Law. The

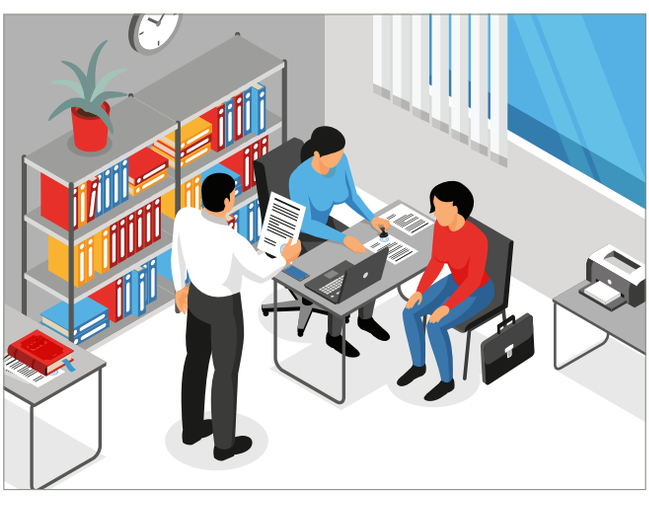
Administrative Court stated that the audit of the undertaking in terms of competition law by independent attorneys and the audit report are within the scope of the first condition which is "a legal advice from an independent lawyer," and that the audit report contained advice in order to comply with competition law and prevent any infringement of the latter thus fulfilling the second condition of the exercise of the right of defense. The Administrative Court thus included the audit report in the scope of the attorney-client privilege since it emphasized that the audit report did not aim to breach competition law but had on the contrary the purpose to comply with competition law.

The Administrative Court also seeks the existence of two conditions for the application of attorney-client privilege in competition law, the correspondence must be related to the right of defense and this correspondence should be made between a client and its independent lawyer.

However, in the Enerjisa Decision, the TCA appealed to the Regional Administrative Court[6] which decided the opposite and did not include the documents within the scope of the attorney-client privilege. The Regional Administrative Court stated that even if the "independent attorney" condition is fulfilled, the audit report contains statements and evaluations that may result in an infringement of the competition law and that at the date of the audit report no investigation for the violation of competition law or lawsuit filed for the annulment of an investigation existed which does not fulfil the condition of the right of defense.

It has been claimed in 2019[7] that a document obtained during an on-site inspection at the premises of Huawei were under the scope of the attorney-client privilege. The employees claimed that the document concerned a compensation action to which Huawei was a party and that it was a correspondence between Huawei's Legal Counsel and other Huawei's officials and independent lawyers and that the document was within the scope of the rights of defense. After the examination of the document, it was seen that only two e-mails between the undertaking's legal counsel and the undertaking officials were seized and that it is not the part of the e-mail chain between the independent lawyer and the undertaking's legal counsel. The TCA considered that the document was not within the scope of the attorney-client privilege since the correspondence was not made with an independent lawyer.

In 2020[8], some obtained documents during an on-site inspection at the premises of Çiçeksepeti were claimed to be under the protection of the attorney-client privilege. After the examination of the TCA, it was understood that the attorney mentioned in the documents was a permanent employee at Çiçeksepeti. It was thus decided that the document does not fulfil the independent lawyer condition and the document does not benefit from the protection.



Finally, in 2021[9], after an on-site inspection conducted at the premises of Trendyol some documents have been seized from the undertaking's Compliance and Risk Director and the Human Resources Assistant General Manager. Trendyol's attorneys claimed that these documents benefitted from the attorney-client privilege and requested the return of the documents. However, it has been evaluated that the documents in question were not within the scope of the attorney-client privilege, since the documents in question do not have the characteristics of correspondence with an independent lawyer for the exercise of the rights of defense, and the request for the return of documents has been rejected.

It is possible to observe that the TCA and Turkish courts have followed the European trend and have set two conditions for the acceptance of documents to be protected under the attorney-client privilege. That said, in the Enerjisa case, the Regional Administrative Court significantly narrowed the scope of the protection by stating that the audit report should be connected to an ongoing proceeding.

B. Under French Law

As mentioned above, no specific provision has been set out in French law specific to the attorney-client privilege for competition law disputes just like in Turkey. However, the situation differs from the Turkish point of view when it comes to the case-law of the FCA and the French courts. As part of a competition investigation, the French legislation gives the power to the FCA to seize all of the emails. The FCA must then extract the emails under attorney-client privilege.

A case precedent has redefined attorney-client privilege in French law, especially with a judgment made by the French Supreme Court on 22 March 2016[10]. In this case, the phones of a lawyer and his client had been taped – after a court order – for an investigation. The content of the phone calls had been used for the investigation. Yet, by doing so the court infringed the principle of attorney-client privilege. When the two parties referred to the court to overturn the possibility of using the conversations, the French Supreme Court excluded counselling activities[11] from the scope of the attorney-client privilege.

Therefore, one could wonder about the difference in treatment of data under attorney-client privilege whether legal advice is provided by an attorney or a legal practitioner. It seems important to highlight the difference between an attorney who provides advice and an in-house legal practitioner. In the case of competition law, the two of them have the same competencies yet privilege does not apply to in-house legal practitioners since they are not registered to a bar and therefore not considered attorneys. Nonetheless, a court order was issued by the Paris Court of Appeal on 8 November 2017[12] stating that the correspondence between two in-house legal practitioners on the legal strategy made by the undertaking's lawyer can be set under privilege, consequently overruling the decision made by the French Supreme Court on 22 March 2016.

On 26 January 2022[13], the French Supreme Court gave an interesting ruling on attorney-client privilege. An undertaking contested the seizure of documents during on-site inspections conducted by the FCA arguing that they were under attorney-client privilege before the Appeal Court of Paris. The latter gave satisfaction to the undertaking arguing that the content of the documents seized was about the legal strategy and therefore under privilege. But the FCA decided to take the matter before the French Supreme Court which confirmed the Court of Appeal's judgment. The FCA argued that the data exchanged was between two in-house legal experts. It relied on Article 66-5 that stated that attorney-client privilege covered "consultations addressed by a lawyer to his client or were intended for him, correspondence exchanged between the client and his lawyer". It did not apply to exchanges between in-house legal experts. But the French Supreme Court stated that the Court of Appeal had legally justified its decision by stating that "the confidential data covered by the secrecy of the correspondence exchanged with a lawyer, and contained in the documents seized, constituted its essential object." Therefore, the French Supreme Court chose to focus on the content of the documents rather than on the nature of the people involved in the exchange of data, consequently widening the range of use of attorney-client privilege. In this context, according to the French Court de Cassation, the appeal court rightly found that the documents in question, even if they are not sent or received by a lawyer, concerned a defense strategy put in place by a law firm.

Moreover, a new addition to the French Code of Criminal Procedure ("**FCCP**") will confirm the aforementioned remark, since the new article 56-1-1 of the FCCP allows a party subject to a seizure operation to object to the seizure of documents covered by professional secrecy. This decision should therefore allow the in-house legal experts of undertakings to widen the range of the documents of which they will be able to contest the seizure.

It is seen from the French case law that attorney-client privilege is subject to a lot of developments. Indeed, it is possible to observe that the decisions vary according to the type of case, the type of parties and the relevant court which will rule on the case.

Conclusion

The TCA introduced a narrower concept of the attorney-client privilege. The TCA designed its specific way to grant this privilege which is subject to two conditions. Just like the CJEU, the client's communication in any form should be made with an external and independent counsel. This condition excludes in-house counsel from this protection. Secondly, these conversations should be made with the aim to exercise a right of defense. This way the purpose of this conversation would be deemed legitimate. Additionally, in light of the court decision, this communication should be made while there is an ongoing TCA investigation or an annulment lawsuit concerning the outcome of this investigation. Otherwise, the correspondence between independent lawyer and its client would not benefit from the attorney-client privilege. Unquestionably, conversations or legal advice which aim to cover up competition law violation would not be protected.

Whereas under French law, it is seen that French courts have made a distinction between attorneys and counsels. Since attorneys are registered to the bar, their correspondences with their clients will be protected by the attorney-client privilege. When the position of the CJEU is examined, it will not be surprising for the FCA to follow in the future the same current approach and set specific criteria for the delineation of the attorney-client framework. Still, in order to respect the principle of legal certainty it would be useful that the FCA will set criteria with a legal basis.

[1] ECtHR 6 December 2012, Case No. 12323/11, Michaud v France, paras. 118-119.

[2] The Guidelines is adopted by the TCA's decision dated 08.10.2020 and numbered 20-45/617.

[3] The TCA's decision dated 20.08.2014 and numbered 14-29/596-262.

[4] The TCA's decision dated 06.12.2016 and numbered 16-42/686-314.

[5] The Ankara 15th Administrative Court's decision numbered E. 2017/412, K. 2017/3045 and dated 16.11.2017.

[6] The Ankara Regional Administrative Court 8th Administrative Case Division's decision numbered E. 2018/658, K. 2018/1236 and dated 10.10.2018.

[7] The TCA's decision dated 14.11.2019 and numbered 19-40/670-288.

[8] The TCA's decision dated 02.07.2020 and numbered 20-32/405-186.

[9] The TCA's decision dated 20.04.2021 and numbered 21-24/287-130.

[10] The French Supreme Court's decision date 22.03.2016 and numbered 15-83.205.

[11] Counselling is the activity done by a lawyer who never participates in court proceedings.

[12] The Paris Court of Appeal's decision dated 8.11.2017 and numbered 14/13384.

[13] The French Supreme Court's decision dated 26.01.2022 and numbered 17-87.359.

Events

GC Summit Türkiye 2022

ACTECON was the Networking Sponsor of the GC Summit Türkiye 2022 hosted by The Legal 500 (Legalease) on Thursday, 13 October 2022 at Çırağan Palace Kempinski. Mr. Bahadır Balkı, our Managing Partner delivered a welcome speech before the drinks reception. The event was attended by many GC's and in-house counsels as well as other legal professionals. https://www.actecon.com/en/news-articles/p/gc-summit-turkiye-2022-231

8th Annual International Arbitration & Corporate Crime Summit

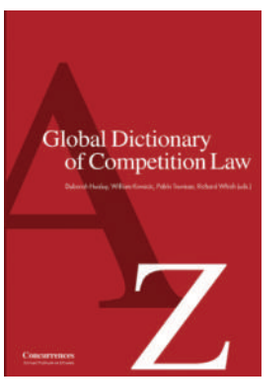
Our Counsel Mr. Erdem Aktekin made a presentation on "Competition Law in Digital Markets" at Turkey & EMEA - 8th Annual International Arbitration & Corporate Crime Summit on the 1st of September 2022. The Summit highlighted essential issues of 2022 (post pandemic) and covered essential hot topics of technology, arbitration updates, corporate crime and competition law.

Who's Who Legal (WWL) -World's Leading Competition Lawyers in 2022

Mr. Bahadır Balkı, our Managing Partner has once again been selected by Global Competition Review and Who's Who Legal as one of the "World's Leading Competition Lawyers" in 2022.

The Global Dictionary of Competition Law Project

Mr. Fevzi Toksoy, our Managing Partner has contributed to the Global Dictionary of Competition Law project by explaining Control Notion. https://www.concurrences.com/en/dictionary/notion-of-control-85989



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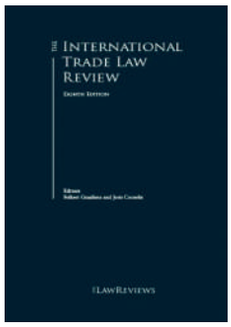
Trade & Customs 2023, Lexology Getting the Deal Through

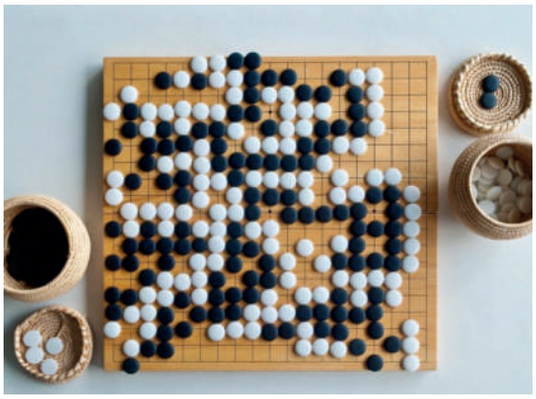
The International Trade Law Review, Eighth Edition, The Law Reviews



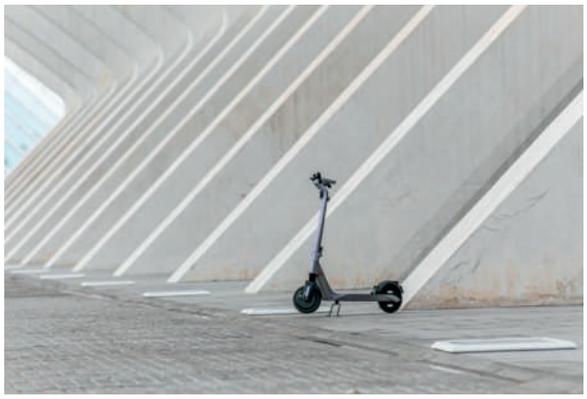
Automotive Companies are Cleared of the Allegations of Stockpiling and Competitively Sensitive Information Exchange!

Lack of Evidence is not Evidence: TCA's Differing Approach to Standard of Proof for Hinderance of On-Site Inspections

Of SIEC-Test and Thresholds: Merger Control 2022 in Turkey



Turkish Competition Authority Terminated its Investigation Against Leading e-Scooter Rental Firm with Commitments



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ACTECON is a corporately governed firm providing services in competition law, international trade remedies and regulatory affairs. We offer effective strategies from law & economics perspective, ensuring that strategic business objectives, practices, and economic activities comply with competition law, international trade rules and regulations.