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# **Administrative Court Decided to Stay the Execution of Turkish Competition Authority's Decision of Administrative Monetary Fine for Hindrance of On-site Inspection (Sahibinden.com)**

## **Administrative Court Decided to Stay the Execution of Turkish Competition Authority's Decision of Administrative Monetary Fine for Hindrance of On-site Inspection (Sahibinden.com)**

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### **Introduction**

As is well known, the Turkish Competition Authority (“TCA”) is authorized to examine all data and documents on electronic platforms and information systems during the on-site inspections pursuant to the amendment dated 16.06.2020 on Article 15 of Law No. 4054 on the Protection of Competition (“**Competition Law**”). Subsequently, the TCA published the Guidelines on the Examination of Digital Data during On-Site Inspections on 09.10.2020.

In line with the relevant changes in legislation, the scope of on-site inspections conducted by the TCA's case handlers has reached another level. The TCA has started to inspect mobile devices, including personal devices (mobile phones, tablets, etc.) if they contain digital data belonging to the undertaking. In this context, it is observed through the published decisions that the TCA recently adopted a strict approach with regard to on-site inspection processes. In case any data is deleted during the on-site inspection, the TCA decided to impose administrative monetary fines by stating that these practices cause hindrance or complication to the on-site inspection regardless of whether the relevant data relates to personal use.

During the practice of these broad powers, the undertakings have raised various allegations to the TCA including privacy concerns and claimed that the deletion of the data related to personal use should not be regarded as a hindrance or complication to the on-site inspection. Moreover, they alleged the deleted data can be reached by the TCA by other means of ways such as from the devices of other employees who are a participant in the relevant conversation, and thus, the on-site inspection is not hindered. However, the TCA has rejected these arguments and imposed administrative fines on the relevant undertakings whose employees deleted data during the on-site inspection.

### **Overview of the TCA's Sahibinden.com Decision**

A recent example of the prominent precedent decisions of the TCA on this issue is related to the on-

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site inspection carried out at the premises of Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. (“**Sahibinden.com**”), one of the largest marketplaces in Turkey which has great market power in the sale/rental of real estates and the sale of vehicles. Through its decision dated 27.05.2021 and numbered 21-27/354-174, the TCA concluded that Sahibinden.com hindered the on-site inspection (“**Sahibinden.com Decision**”).[\[1\]](#)

On 09.04.2021, the case handlers of the TCA have carried out an on-site inspection within the scope of an ongoing investigation against certain undertakings including Sahibinden.com. During the inspection of certain employees’ mobile devices, the case handlers became suspicious that the employees deleted the correspondences within two *WhatsApp* groups and the following default explanation “*Messages and calls are end-to-end encrypted. No one outside of this chat, not even WhatsApp, can read or listen to them. Tap to learn more.*” appeared on the top of the relevant group chats.

As the case handlers reached the relevant group chats during the inspection of another employee’s device, the case handlers found that the participants of a *WhatsApp* group exchanged messages between the period 12:10 and 12:24, after the arrival of the case handlers at the premises of Sahibinden.com at 09:51. On this point, the Sahibinden.com Decision also includes the TCA Information Technologies Department’s opinion that the relevant messages were indeed deleted after the commencement of the on-site inspection in line with the log records evaluated.

Accordingly, based on the understanding that the correspondences within the relevant *WhatsApp* groups were deleted after the commencement of the on-site inspection, the TCA imposed an administrative monetary fine of TRY 4,807,073.00 on Sahibinden.com amounting to 0.5% of its annual turnover for the financial year 2020 on the grounds of the hindrance of the on-site inspection.

### **Sahibinden.com’s Request for Stay of Execution before the Administrative Court**

On 13.06.2022, the TCA has published the Ankara 2<sup>nd</sup> Administrative Court’s (“**Court of First Instance**”) decision dated 15.04.2022 and numbered E. 2022/254 on Sahibinden.com’s request for a stay of execution and annulment of the Sahibinden.com Decision mainly based on the grounds that the deleted messages were personal correspondence on the personal devices of the relevant employee and the relevant messages were still available on other *WhatsApp* group participants’ devices.[\[2\]](#)

The Court of First Instance concluded that Sahibinden.com Decision is unlawful based on the following reasons:

- Sahibinden.com sent an internal e-mail message at 11:36 on the day of the on-site inspection informing its employees that no correspondences should be deleted and all requested documents should be provided to the case handlers.
- The case handlers reached the deleted correspondence while examining the phones of other

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Sahibinden.com employees.

- The device, on which the employee deleted data, was a personal phone.
- The deleted correspondence did not include any business-related content; thus, the deletion is not of a nature to constitute a basis for an administrative fine.

In light of the foregoing, the Court of First Instance has decided to stay the execution of the Sahibinden.com Decision. Subsequently, as also published on the TCA's web-site on the same date, the Ankara Regional Administrative Court rejected the TCA's annulment request for the Court of First Instance's stay of execution decision.[\[3\]](#)

## Conclusion

In line with the TCA precedents, the TCA currently has a strict approach with regard to hindrance on on-site inspections. Indeed, it is understood from the precedents that the TCA does not distinguish whether the deleted data has private/personal content. Conversely, in case the Council of State follows the same approach as the Court of First Instance, the Court of First Instance's stay of execution decision has the potential to limit the TCA's broad interpretation when imposing administrative monetary fines for deletion of digital data without evaluating the content.

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[\[1\]](#) <https://www.rekabet.gov.tr/Karar?kararId=32d4b596-dda0-41ab-b949-ad6c3f041219>

[\[2\]](#) <https://www.rekabet.gov.tr/Safahat?safahatId=b195dfc5-3527-4233-9286-a05748ed3c81>

[\[3\]](#) <https://www.rekabet.gov.tr/Safahat?safahatId=6880b2f9-cddf-4cfe-a3c9-5f8d78dabf46>