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

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Introduction

The attorney-client privilege is a common law concept of legal professional privilege in the United States. 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 Law No. 4054 on the Protection of Competition ("**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 on attorney-client privilege exist 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**").

A. Under Turkish Law

Article 8 of the European Convention on Human Rights ("**ECHR**") protects the confidentiality of all 'correspondence' between individuals, it affords strengthened protection to exchanges between attorneys and their clients. This reinforcement can be justified by the fact that attorneys are assigned a fundamental role in a democratic society, that of defending litigants. This essential role

cannot be conducted without a guarantee of the above-mentioned protection. This principle also contributes to the respect of Article 6 of the ECHR which guarantees the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves. This additional protection conferred by Article 8 on the confidentiality of attorney-client relations, and the grounds on which it is based, lead the European Court of Human Rights ("**ECtHR**") to find that, from this perspective, legal professional privilege, while primarily imposing certain obligations on attorneys, is specifically protected by that Article.[1]

Under Turkish law, in accordance with Article 90 of the Turkish Constitution the relevant provision of the ECHR is a part of the domestic legal order. Article 90 of the Turkish Constitution titled "*Approval of international treaties*" states that: "*International treaties duly implemented have the force of law. It is not possible to apply to the Constitutional Court about these with the claim of unconstitutionality. In case of conflicts that may arise due to the fact that international treaties on fundamental rights and freedoms that have been duly implemented contain different provisions on the same subject in domestic laws, the provisions of the international treaty shall prevail.*" Consequently, Article 8 of the ECHR is applicable under Turkish law and will prevail in the hierarchy of norms.

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. Moreover, the attorney has no right to object to the client's own disclosure which shows that rather than a common law sense of privilege, what really exists in Turkish law is a duty of confidentiality, covering only the attorney's disclosure.

A similar disposition exists for Turkish criminal caw. Article 154 of the TCPL provides that attorneys' conversations with their criminally accused clients cannot be overheard or recorded by any public authorities. Correspondences between the criminal defendants and their attorneys are similarly shielded from monitoring or compelled disclosure.

B. Under French Law

In France, the attorney-client privilege is not regulated under the Constitution, which is why it is protected by Article 8 of the ECHR and three main law sources evolved throughout the years.

Indeed, 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**").

In its second article, the RIN specifies the terms and conditions that apply to attorney-client privilege in three paragraphs.

In its first paragraph, it is stated that "*the attorney is considered as the client's necessary confident.*

The attorney-client privilege is of public order and general, absolute, and unlimited in time." Yet, an exception is made "*to the strict requirements of their own defense (the attorneys) before any jurisdiction and in the cases of declaration or disclosure planned for or authorized by law."*

The second paragraph highlights the fact that privilege is applicable to counselling and defense matters and, in any format, whether material or non-material.

Finally, the third paragraph emphasizes that in the case of an attorney working as the only attorney in a law office, they are solely responsible for making the employees of their law office respect the attorney-client privilege. Furthermore, when the attorney works among other colleagues, the privilege extends to all of the firm's attorneys. In case of a violation of privilege by the latter, the lawyer will be held responsible and liable for one year of imprisonment and 15.000 euros fine (Article 226-13 of the FCC).

It is seen from the provisions of the RIN that the French legislator has not created a specific attorney-client privilege for competition law disputes. The French legislator has decided to legislate in a general way. That said, apart from these general provisions, national competition authorities and national courts have set out conditions for attorney-client privilege related to competition law. However, the scope of these conditions differs from country to country.

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

Under Turkish law, while the TAA and the TCPL do not go far as to regulate a general attorney-client privilege, which did not stop the TCA from embracing the attorney-client privilege in its decisions. As for France, the situation differs since the FCA has not regulated this issue.

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.

It can be seen that 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 protection. 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 counsel is provided by an attorney or a legal practitioner. It seems important to highlight the difference between an attorney who provides counsel 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 and used Article 66-5 of the reforming some judicial and legal professions that states that attorney-client privilege covers *"consultations addressed by a lawyer to his client or intended for him, correspondence exchanged between the client and his lawyer"* and not 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

Under Turkish law, it can be seen that 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.

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[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.