
Awareness is the New Black? The TCA Decided Not To Fine An Undertaking for Data-Deletion During an On-site Inspection

Article by Safa Uygur, Beyza Timur, Yaren Boyalı, Ahmet Fevzi Kılıç

Turkish Competition Authority (“TCA”) decided not to fine Berkler Danışmanlık ve Gayrimenkul Ticaret Ltd. Şti. (“Berkler”) for hindrance of the on-site inspection through data deletion on the grounds that (i) the relevant employee was not present in the company premises during the inspection and (ii) (s)he was unaware of the subject-matter of the inspection and (iii) of his/her obligation not to delete any data during the inspection.¹ The decision can be contrasted with TCA’s Softtech² and Euopen³ decisions, where the TCA ruled that the delivery of in-company warnings against data deletion by the employees during an inspection is solely the responsibility of the undertaking and lack/late delivery of such warnings cannot be an excuse for data deletion, and the responsibility of preventing the interference with the data within the scope of inspection and the environment in which the relevant data is kept solely belongs to the inspected undertaking.

On 02.03.2023, the TCA commenced a preliminary inquiry which was launched to investigate the allegations of anticompetitive collusion regarding real estate sales and rental fees by real estate agents/commissioners/consultants in Ankara. During the course of the inquiry, concerns emerged regarding a potential hindrance/complication by Berkler of the on-site inspection conducted at its premises, since it was discovered that the owner of Berkler had allegedly deleted certain correspondence during the on-site inspection.

The development of the event unfolded as follows: the inspection team entered the business premises of Berkler on March 10, 2023, at 10:18 AM, and presented their documents of authority to the company officials. During the inspection, at 10:19 AM, a warning was given to the company employees not to delete any data by the case-handlers. The owner of Berkler, who was not present at the location, was informed by phone and arrived at the inspection site at 11:00 AM. It was then discovered that certain WhatsApp messages had been deleted at 10:40 AM. The owner explained his/her grounds for the deletion as follows: (i) when (s)he was called by her/his advisor, (s)he thought that it was an inspection related to the Sahibinden investigation, for which (s)he had previously been called, (ii) (s)he was not aware of the purpose of the visit and (s)he was not warned about the deletion, (iii) (s)he regularly delete data from his/her phone to maintain the processing speed at a certain level.

In its assessment, the TCA stated that this case differs from previous Board decisions, since (i) the employee, who deleted the messages, was not present in the undertaking’s premises during the on-site inspection and was not aware of the warnings issued by the experts, (ii) therefore (s)he was not aware of the requirement not to delete any data and the subject of the on-site inspection, and (iii) deletion might have been a part of his/her routine. Based on the foregoing, the TCA decided that there was no hindrance of the on-site inspection despite the deletion of data during the on-site inspection, hence did not issue a fine.

Contrastingly, in its Softtech decision⁴ the TCA fined an undertaking as one junior HR Specialist deleted her/his e-mail messages during the on-site inspection, despite undertaking’s defences that (i) it sent a warning to its employees to not delete any messages during the on-site inspection, (ii) the employee did not

see the warning message and deleted her/his messages with a panic due to her/his lack of experience. In its assessment, the TCA clearly stated that “...whether or not such a warning is given is an internal matter for the undertakings and will not be taken into account in any assessment of the hindrance/complication of on-site inspection”. Similarly, in its European decision⁵, where the undertaking was fined as its employee deleted certain messages, the TCA reiterated that “it is the responsibility of the undertaking to prevent interference with the data within the scope of inspection and the environment in which the relevant data is kept”. Furthermore, although the TCA accepted in Berkler case that the deletion of the messages might have been part of an individual’s daily routine, similar defences were rejected in LG/SVS decision⁶ on the grounds that there was no evidence that would prove the existence of such a routine⁷.

Berkler decision clearly hinges on the premise that the employee was not in any way aware of its obligation not to delete any data during the on-site inspection. However, the implications of the case is still far reaching since the TCA’s above-mentioned stance could be misperceived by undertakings as a *carte blanche* because the decision gives the impression that it would have been advantageous not to inform company employees who are not present at the premises during an on-site inspection with respect to the subject-matter of the inspection and their obligation not to delete any data during the inspection. Moreover, the decision may also lead to the conclusion that the obligation to warn against data deletion lies with the experts, but not the undertaking. Last but not least, the acceptance in Berkler case that the deletion of the messages might have been a part of an individual’s daily routine may create legal uncertainties since in other cases the TCA did not accept the same argument without a convincing fact.

¹ TCA’s decision dated 23.03.2023 and numbered 23-15/267-90.

² TCA’s decision dated 15.09.2022 and numbered 22-42/614-258.

³ The TCA’s decision dated 23.09.2021 and numbered 21-44/645-322.

⁴ The TCA’s decision dated 15.09.2022 and numbered 22-42/614-258.

⁵ The TCA’s decision dated 23.09.2021 and numbered 21-44/645-322.

⁶ The TCA’s decision dated 09.09.2021 and numbered 21-42/618-305.

⁷ Other examples include TCA’s decision dated 28.04.2023 and numbered 23-19/365-127, where it stated that “the statement that the act of deletion is not specific to the on-site inspection must be supported by other deletions during a certain period of time before the on-site inspection and such deletions should be repeatedly done at certain periods”. Also in its decision dated 28.04.2023 and numbered 23-19/363-125, the TCA did not validate the undertaking’s defences that the deletions resulted from the “automatic deletion” feature in WhatsApp, since the existing evidence did not support the explanations made by the inspected undertaking.