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

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Introduction

In accordance with the Turkish Competition Authority's ("TCA") decision dated 25.11.2021 and numbered 21-57/796-M, the TCA initiated an investigation against undertakings in the market for fast-moving consumer goods to ascertain whether Article 4 of Law No. 4054 on the Protection of Competition ("Competition Law") has been violated. Within this scope, the TCA conducted an on-site inspection on 08.12.2021 at the premises of Yeni Maęazacılık A.Ş. ("A101").

During the on-site inspection, the TCA's case handlers recorded an 'On-Site Inspection Report' according to which some employees exhibited suspicious behaviours that may result in hindrance/complication of the on-site inspection.

Accordingly, the TCA published its decision dated 23.06.2022 and numbered 22-28/464-187 on whether the above-mentioned on-site inspection was hindered or complicated by employees of A101.

Delving Into the Rendered Decision

During the on-site inspection, the case handlers of the TCA determined that several employees did not have WhatsApp installed on their phones, whereupon the log records of the App Store were examined to determine whether the relevant application had been deleted. Additionally, the TCA encountered incidents giving rise to the suspicion that three senior employees of A101 carried out activities to delete the data on their mobile phones, and the TCA's case handlers performed indexing with forensic digital devices. Upon their examination, none of the phones had WhatsApp installed, and the case handlers made the following determinations through forensic digital devices:

- One mobile phone had no log record on the usage or deletion of WhatsApp,
- One mobile phone had no log record on the deletion of WhatsApp, and
- The owner of one mobile phone stated that she has deleted WhatsApp on the basis that it had private information.

Following the above determinations, the case handlers re-installed WhatsApp and proceeded with the on-site inspection from the date of the latest backup.

In line with the TCA's case law, in order to impose an administrative fine on an undertaking with

the claim of hindering or complicating the on-site inspection; it should be proven that the action of deletion was performed after the commencement of the on-site inspection by the TCA.

As the case handlers have not been able to index the relevant mobile phones through forensic digital devices, the case handlers could not determine any log records regarding the WhatsApp application being deleted. Furthermore, forensic digital devices have also failed to ascertain whether WhatsApp applications were deleted before the start of the on-site inspection or not. In that regard, the TCA has concluded that there is no need to impose an administrative monetary fine on A101. Interestingly though, **two dissenting votes have been cast in favour of the imposition of an administrative monetary fine.**

Dissenting Opinion

The dissenting opinion initially evaluates how court precedents approach on-site inspections in view of the TCA's previous decisions before delving into the specifics of the case. Thereafter, it was emphasized that even if log records provide reliable and precise information on the existence of deletion, it is difficult to determine every log record during mobile phone examinations. Hence, while the presence of a log record will almost certainly indicate that a deletion has taken place, in the opposite scenario where a log record is not available or when it is not possible to obtain a log record, it should not be asserted that such action has not taken place. According to the dissenting opinion, it is essential to gather and evaluate other evidence and information in order to render an accurate conclusion. Further to this deliberation, the dissenting opinion has assessed the following matters in consideration of their opinion that A101 should have been imposed an administrative monetary fine:

- The TCA's case handlers were kept waiting at the premises of A101 for 15 minutes. It has been considered that, along with other evidence, such a period was long enough to delete data or tamper with evidence.
- Employees who allegedly/have deleted WhatsApp were senior employees who were the focus and target of the on-site inspection. More to the point, the deletion of the relevant data from mobile phones was carried out by three different employees, which suggests that the action of deleting was neither accidental nor a reflex triggered in panic, but rather conscious and planned.
- It is also indicated that all three employees have uninstalled/deactivated the login of WhatsApp from their mobile phones. In addition, when re-installed, none of the group chats found within WhatsApp had any correspondence. The dissenting opinion also states that if the chats were indeed deleted prior to the on-site inspection as claimed, there should have been at least some incoming correspondence after the arrival of the case handlers.
- The act of deleting chats or the application in and of itself constitutes a hindrance/complication of the on-site inspection, regardless of whether or not the case handlers have been able to retrieve the deleted correspondence, and whether or not there is any infringing behaviour. In this sense, it does not matter if the correspondences are of private nature.

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- Moreover, in the statements and defences of the representatives of A101, instead of including a log record or concrete evidence that proves that the deletion was carried out prior to the on-inspection, abstract statements were given place.

Conclusion

In its precedents, the TCA has mostly decided to the detriment of undertakings and imposed administrative fines on the grounds that they hindered or complicated the on-site inspections despite the lack of concrete evidence as to whether the employees of the undertakings carried out the deletion of the business-related correspondence, and if so, whether this was conducted during the on-site inspection. In that vein, the dissenting opinion has a similar approach in its assessment to the previous TCA deliberations on the matter.

That said, this decision adds a booster point of view to the latest case law 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. Indeed, a similar approach was adopted by the Ankara 2nd Administrative Court in the Sahibinden Decision^[1] in which the Court found the TCA's broad interpretation when imposing an administrative fine was unlawful while concrete evidence is lacking.

In a way that resembles the Sahibinden Decision, the TCA emphasized in the current decision that, although the behaviours of employees created suspicion regarding the deletion of the WhatsApp application, it was not sufficient to establish a violation and impose a fine on the undertaking. According to the evaluation of the TCA, in order to decide on the existence of a violation and impose an administrative fine, it must be proven beyond any doubt that the action of deletion was performed by the employee(s) and during the on-site inspection.

^[1] The TCA's decision dated 27.05.2021 and numbered 21-27/354-174.