
The Constitutional Court of Turkey Examined the Constitutionality of the Amendments Made in 2020 to Turkish Competition Law

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The Constitutional Court of Turkey (the “**Court**”) delivered a judgment on 9 November 2022^[1] regarding the action for an annulment application made by the 137 members of the Grand National Assembly of Turkey against amendments introduced in 2020 to various articles of Law No. 4054 on the Protection of Competition (“**Competition Law**”).

The Decision makes the constitutional review of the amendments (i) in relation to the TCA’s authority to impose structural remedies and to take copies of the examined data and documents during dawn raids and (ii) that empowers the TCA to change the status of its personnel via Table no. (I) mentioned in Article 34 and temporary Article 6 of the Competition Law. Considering the latter, as the status of civil servants can be regulated only via law, such an amendment was viewed as contrary to the Constitution of The Republic of Turkey (the “**Constitution**”). The Court decided to annul the amendment accordingly.

With regard to the former, as the Court reviewed the two most important powers of the TCA (its powers to impose structural remedies and the rights it has regarding dawn raids), the decision and the dissenting opinions provide valuable insights. For that reason, a constitutionality review of the decision on the rules that are provided below is our main focus:^[2]

- The power of the Turkish Competition Authority (“**TCA**”) to order a structural remedy as stipulated in Article 9 of the Competition Law as:

*“If, in response to a denouncement, a complaint or the request of the Ministry or on its own initiative, the Board determines that there is an infringement of Article 4, 6, or 7 of this Act, then it shall notify in its final decision the behaviours that the relevant undertaking or associations of undertakings must carry out or refrain from to re-establish competition, **and any structural remedies in the form of undertakings transferring certain businesses, partnership shares or assets.** Behavioural and structural remedies must be proportionate to the infringement and necessary to bring the infringement effectively to an end. Structural remedies shall apply only where previous behavioural remedies imposed have been ineffective. In case the final decision finds that behavioural remedies have been unsuccessful, the relevant undertaking or associations of undertakings shall be given at least six months*

to comply with the structural remedy.”

- The power of the TCA to take copies and physical samples of the data and documents examined during dawn raids based on Article 15 of the Competition Law:

“In carrying out the duties assigned to it by this Act, the Board may perform examinations at undertakings and associations of undertakings in cases it deems necessary. To this end, it is entitled to:

*a) Examine the books, all types of data and documents of undertakings and associations of undertakings kept on physical or electronic media and in information systems **and take copies and physical samples thereof.**”*

As a result of the examination conducted by the Court, these amendments in relation to the TCA’s authority to impose structural remedies and to take copies of the examined data and documents during dawn raids were found not contrary to the Constitution.

Constitutionality Review of the Power of TCA to Order a Structural Remedy

According to Article 9 of the Competition Law, if the TCA determines that there has been an infringement of Article 4, 6, or 7 of the Competition Law, it can order structural remedies to re-establish competition in the market. Within the meaning of Article 9 of the Competition Law, a structural remedy could be *“in the form of undertakings transferring certain businesses, partnership shares or assets.”*

In the annulment application, the applicants argued that the TCA’s authority to impose a structural remedy is contrary to the right to property and freedom of work and contract protected by the Constitution. In their claims, the applicants argued the following:

- The TCA ordering structural remedies leads to the transfer of assets without a judicial decision;
- If such a divestment is made in accordance with a structural remedy ordered by the TCA, and the relevant decision of the TCA is annulled by the administrative courts, irreparable damages will occur; and
- Articles 4, 6, and 7 of the Competition Law concern the “behaviours” of the undertakings, and the current instruments are enough to regulate those behaviours; therefore, the power of the TCA to order a structural remedy is not proportionate.

First, the Court acknowledged that the Competition Law to some degree limits the right to property and freedom of work, yet it ensures the sound and orderly functioning of the markets. In its review, the Court examined the amendment in relation to the TCA’s power to order structural remedies from the perspectives of the quality of law principle and the proportionality test.

The Quality of Law: The Court concluded that the relevant norm stipulating structural remedies is

well established and has clear boundaries as to when and how a structural remedy can be ordered. The Court also highlighted that structural remedies are only applicable where an applied behavioural remedy is proven to be ineffective. Therefore, the Court decided the provision is in line with the principle of the rule of law, as specified in Article 2 of the Constitution.

The Proportionality Test: Concerning the proportionality test, the Court acknowledged the following:

- structural remedies are suitable to achieve the goal of re-establishing the competitive process.
- In regard to the necessity principle, in certain cases, it is known that behavioural remedies do not perform well compared to structural remedies.
- Last, on the narrow proportionality test, a structural remedy does not itself serve as an execution nor a distraint order. Therefore, the order, e.g., divesting a business, should be fulfilled by the relevant undertakings themselves and failure to fulfil solely results in a monetary fine rather than the TCA itself executing its order. The Court also highlighted that the correction of a structural remedy via administrative proceedings is possible.

Overall, as structural remedies are found well-established and proportional to reach the goal of sound and orderly markets, the Constitutional Court denied the request for annulment.

Constitutionality Review of the Power of TCA to Take Copies and Physical Samples of all Kinds of Data and Documents Examined during On-Site Inspections

With respect to the Court's examination of the constitutionality of the TCA's power to obtain samples of all kinds of evidence during on-site inspections, the applicants argued that the rule does not satisfy the legal certainty principle based on the following:

- The absence of a legal guarantee, such as a representative of the undertaking being present in order to obtain the documents, contradicts the principle of legal certainty.
- the lack of legal guarantees on the protection of personal data, as no limitation is set on the TCA's power to obtain documents and data.

The court primarily examined the right to request personal data protection under Article 20 of the Constitution. The Court stated that since the wording of Article 20 of the Constitution includes “everyone,” there is no clear definition of the *ratione personae* of the protection of personal data and legal persons also can enjoy the right to request the protection of personal data.

Within its assessment under Law No. 6698 on Personal Data Protection (“**Personal Data Protection Law**”), the Court also clarified that since undertakings also can be natural persons and may also be subject to on-site inspections, the Personal Data Protection Law and the legal guarantees it provides such as the deletion of personal data, the anonymization requirements, and the obligation to inform also would apply to the TCA's power to take copies of the data and documents.

Following this determination, the Court moved onto its constitutionality review, concluding that the TCA's authority to take copies and physical samples of all kinds of documents is in line with the Constitution:

- As regards the proportionality test:
 - On the suitability test, the Court recognized that obtaining documents would help the detection of anti-competitive practices.
 - On the necessity test, the Court affirmed that obtaining such documents via TCA agents is necessary to reveal any potential infringements of the Competition Law. It added that as acknowledged in most of the cases, no chance to obtain proper and well-preserved evidence would exist if such authority was not granted to the TCA.
 - On the narrow proportionality test, the Court highlighted that such obligations are not only prone to the protection of competition concerns. It drew attention to the existence of relevant financial reporting and auditing requirements that indicate such documentation and record-keeping obligations. The Court also explained that the TCA has no authority to use force when exercising dawn raids, the right to defence is granted for each piece of evidence obtained, and the personnel of the TCA are obliged to non-disclosure about the evidence taken. As such, the restriction on the right to protection of personal data is proportionate.

As a side note, it should be mentioned that the Court's suggestion that legal persons also can enjoy the right to request the protection of personal data under Article 20 of the Constitution is not well reasoned. While the Court claimed that legal persons fall in the scope of personal data protection according to Article 20 of the Constitution, it also states that "*the principles and procedures regarding the protection of personal data shall be laid down in law.*" The Personal Data Protection Law, which is the main piece of law on the principles and procedures regarding the protection of law, stipulates that "personal data" means any information relating to an identified or identifiable natural person. Given that the TCA only has the right to take copies of "all" the data of "undertakings," the reliance of the Court on the Personal Data Protection Law while reaching a conclusion seems fragile. Although the Court mentioned that the principles in the Personal Data Protection Law will apply in the cases of natural person undertakings, discussions on how those principles will apply to legal persons in the face of the clear definition given in the Personal Data Protection Law are disregarded by the decision.

Dissenting Opinions: The Inviolability of the Domicile and Protection of Personal Data Enshrined

It should be noted that the decision on the power to obtain examined data and documents was not reached unanimously. Indeed five of the 15 members of the Court opposed the constitutionality of the amendment that authorizes the TCA to take copies and physical samples of all kinds of evidence during dawn raids.

Five dissenting opinions, including that of the president of the Court, revolve around the same

points: the TCA's power to conduct on-site inspection restricts the right to request the protection of personal data and the inviolability of domicile as fundamental rights protected under Articles 20 and 21 of the Constitution.

In their dissenting opinions, the members set forth that even if the TCA is considered to be bound to the Personal Data Protection Law, no limitation is made to the nature of the data that could be obtained by the TCA under the relevant article (the exact wording used in the article is “**all types of data**,” though as we have mentioned, this refers to all data of “undertakings”). For that reason, the dissenting members argue that the TCA's power to obtain and process all types of data belonging to the undertaking under Article 15 of the Competition Law may include personal data belonging to real persons which can even include “special categories” of personal data guarded by further safeguards under Article 6 of the Personal Data Protection Law.[\[3\]](#) According to those safeguards, personal data fall within the scope of Article 6 of the Personal Data Protection Law and can be processed only in the cases set by law.

According to the dissenting members, since no restrictions have been made on the nature of data that can be obtained by the TCA under Article 15 of the Competition Law, the “*set by law*” safeguard cannot be deemed satisfied. For that reason, in the dissenting opinions, it is therefore argued that Article 15 of the Competition Law is contrary to the rule of law principle that requires that any law must be certain, in that it is clear and precise, and its legal implications should be foreseeable.

With regard to the inviolability of domicile, dissenting opinions point out that on-site inspections restrict this principle. According to Article 21 of the Constitution, no domicile may be entered or searched, or no property therein can be seized unless a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others exists.

Indeed, according to the dissenting opinions, the concept of “domicile” should be interpreted in a way that includes the workplace. It is also set forth that the European Court of Human Rights is also of the same opinion.

The dissenting members defend that once the concept of domicile is extended to workplaces, the TCA's power to perform examinations at the undertakings' premises is rendered contrary to Article 21 of the Constitution as no requirement in Article 15 of the Competition Law or in general necessitates the approval of a judge. According to Article 15 of the Competition Law, the approval of a judge is needed only where an on-site inspection is hindered or likely to be hindered. However, the dissenting members of the Court argue that such a rule itself reveals that the TCA's power to conduct an on-site inspection is contrary to the Constitution because the TCA does not seek the approval of a judge prior to conducting dawn raids.

Conclusion

The TCA is a very active competition authority in conducting dawn raids and consistently applies its right to fine those undertakings whose conduct during dawn raids is considered as hindering, such as deleting emails and applications. The authority given to the TCA is always questioned to a certain degree because, unlike other cases, a decision by a court is not required for the TCA to conduct dawn raids. Although it can be argued that this latest decision also brings some certainty regarding this point, given that the dissenting members of the Court analysed it through the principle of “inviolability of domicile,” the majority maintained their conclusion within the principle of the protection of personal data. Therefore, it is safe to conclude that although the Court's decision affirms the constitutionality of the two powers under scrutiny and states that they are necessary for the TCA to accomplish its task of protecting competition in the markets, the legality of the TCA's on-site inspection powers will be continued to be discussed and even challenged further down the line.

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[\[1\]](#) The decision was published in *The Official Gazette* on 30 March 2023.

[\[2\]](#) The subject matter of the constitutionality review appears in **bold**.

[\[3\]](#) Personal data relating to race, ethnic origin, political opinion, philosophical belief, religion, religious sect or other belief, appearance, membership in associations, foundations or trade unions, data concerning health, sexual life, criminal convictions and security measures, and the biometric and genetic data are deemed to be special categories of personal data.