

The Administrative Court's Decision on Examination of WhatsApp Conversations During On-Site Inspections

February 2021

Introduction

New amendments introduced into the Law No. 4054 on the Protection of Competition (the **Competition Law**) caused several debates in practice and the examination of digital data during on-site inspections was indeed one of the most heated ones. Not long after, this latter debate escalated to the administrative courts. On 14 January 2021, the Ankara 12th Administrative Court (the **Court**) handed down a significant decision¹ where the panel assessed the scope of the relevant amendment.

Background

As previously examined in our [newsletter](#), inspection of all kinds of digital data stored in digital information systems, including mobile phones and tablets, was allowed with the amendment to the Competition Law. As a matter of fact, even before the amendment, it was commonly agreed that the TCA has wide discretionary power to decide which type of digital data will be subject to on-site inspections. There were actually a number of precedents, such as the *Orthodontics*² decision and the *Frito Lay*³ decision, where the TCA relied on WhatsApp conversations as evidence.

Following the new amendments to the Competition Law, which entered into force on 16 June 2020, the Competition Authority published a new Guideline on Digital Data Review During On-Site Inspections (the **Guideline**) clarifying the rules and procedures to be followed when examining digital data during on-site inspections. As explained at length in our [newsletter](#), the Guideline stipulates that the inspectors may examine mobile phones only if these devices are used for the undertaking's business-related purposes.

Underlying TCB Decision

On 17 January 2019, the Turkish Competition Board (the **TCB**) decided to launch an investigation against LPG retailers in Burdur based on the allegation that they were violating Article 4 of the Competition Law by increasing LPG and fuel oil prices.

During the on-site inspections of the TCA, it was understood that the executives of the investigated undertakings were communicating through a WhatsApp group which they had created to plan and share their moves in the market for the retail sale of white fuel products in the automotive industry. As a result of the investigation, the TCB imposed an administrative fine of TRY 92,358.61 on LPG retailers in Burdur.

The Court's Decision

In the annulment action filed by one of the investigated parties, the administrative court ruled that (i) WhatsApp correspondences may be examined under Article 15 of the Law as they have evidentiary value, and (ii) the violation of Article 4 by the companies is proven by such WhatsApp conversations. The dissenting opinion, on

¹ Ankara 12th Administrative Court's decision dated 14 January 2021 with file number 2020/1976 and decision number 2021/36.

² TCA's decision numbered 18-09/157-77 and dated 29 March 2018.

³ TCA's decision numbered 18-19/329-163 and dated 12 June 2018.

the other hand, asserted that the amendments in the Competition Law cannot have a retroactive effect and thus WhatsApp conversations exchanged before the amendments entered into force cannot be examined by the TCA. Accordingly, the dissenting opinion argued that the infringement decision based on a WhatsApp conversation took place in 2018 should be annulled.

Conclusion

The examination of digital data and especially WhatsApp conversations has been significantly increased since the latest amendments in the Competition Law. Although the Guideline provides some detail as to the method to be applied in examining and taking digital data, the scope of such examination in terms of the relevant time period was not clear. In this respect, the Court's decision (including the dissenting opinion) assessing the scope of application of the amendment carries significant importance for the next stages of the annulment action and eventually for the future practice of the TCA.

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