



## **Navigating Attorney-Client Privilege: A Closer Look at the Turkish Competition Board’s Oriflame Decision**

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### **I. Introduction**

This case summary aims to provide information on the Turkish Competition Board’s (“**Board**”) decision<sup>1</sup> regarding Oriflame Kozmetik Ürünleri Tic. Ltd. Şti. (“**Oriflame**”), shedding light on the Board’s approach to the principle of attorney-client privilege concerning documents obtained by the Turkish Competition Authority (“**Authority**”) during on-site inspections. In its decision, the Board evaluates Oriflame’s request that a portion of the documents seized during the Authority’s on-site inspection within the scope of a preliminary investigation be considered under the attorney-client privilege, given that the relevant correspondence pertains to the interaction between the undertaking (i.e., Oriflame) and its independent attorney.

### **II. The Authority’s Investigative Powers and Attorney-Client Privilege**

Pursuant to Article 15(1) of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”), the Authority’s case handlers are vested with the authority to conduct unannounced raids on the investigated undertakings’ premises. Furthermore, Article 15 empowers the case handlers to scrutinize the books, paperwork and documents of undertakings and trade associations stored in physical or electronic format, as well as in information systems, and make copies if deemed necessary during the on-site inspection.

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<sup>1</sup> The Board’s *Oriflame* decision, dated 17.08.2023 and numbered 23-39/735-252.

The Turkish Constitution, Law No. 5271 on Turkish Criminal Procedure, and Attorneyship Law No. 1136 contain certain provisions that impose an obligation upon lawyers to refrain from disclosing their clients' information. These laws also afford members of the legal profession the right to seek an exemption from testifying against their clients, thereby availing themselves of the protection of the attorney-client privilege for documents seized by public authorities, provided such documents pertain to their clients.

Under Turkish competition law, although Law No. 4054 does not explicitly address the attorney-client privilege specific to competition law investigations, paragraph 12 of the Guidelines on the Examination of Digital Data ("**Guidelines**") stipulates that data copied during on-site inspections are safeguarded by the principle of attorney-client privilege. The Guidelines outline two cumulative conditions for enjoying this privilege: the relevant correspondence must be between the undertaking and its independent attorney (without an employment relationship), and the correspondence should pertain to the exercise of the undertaking's right of defense. Furthermore, the Guidelines emphasize that correspondences not directly linked to the utilization of the undertaking's right of defense do not enjoy the privilege, particularly if they involve aiding the undertaking in committing an infringement or concealing an ongoing or future violation.

Beyond applicable laws, precedents hold significant weight in practice for the Board when deliberating on matters of attorney-client privilege. Consequently, the scope of such privilege is also delineated by the decisional practice of the Board and the administrative courts.

### **III. The Evaluation of Oriflame's Request by the Board**

In its decision on Oriflame case, the Board conducted an assessment to determine whether specific documents, gathered by the Authority's case handlers during an on-site inspection, qualified for attorney-client privilege as asserted by Oriflame. Following the on-site inspection, Oriflame submitted a petition to the Authority, asserting that the recipient and/or sender of certain documents and correspondence obtained from one of Oriflame's employees' computer and mobile device were independent attorneys of Oriflame, with no employment relationship between them. Based on this, Oriflame asserted that the relevant documents/correspondence should be returned to Oriflame, requesting the Authority to recognize their eligibility for attorney-client privilege.

In its assessment, the Board clarified the objective of attorney-client privilege, emphasizing its role in preventing the disclosure of confidential information exchanged between attorneys and clients within the scope of professional practice. Stressing the importance of correspondence with an independent attorney, the Board specified that such communication must relate to the client's (here, Oriflame's) right of defense. However, the Board asserted that documents/correspondence between the client and an independent attorney cannot be granted privilege if the communications are not directly associated with the exercise of the right of defense or if they facilitate an infringement or conceal an ongoing or future violation, in line with paragraph 12 of Guidelines.

Additionally, with regard to the criterion that correspondence must serve the use of the right to defense, the Board referred to criteria established in the decision of the Ankara Regional Administrative Court, 8th Administrative Judicial Chamber ("*Court*").<sup>2</sup> The Board considered various criteria outlined in the Court's decision and noted that the dates of the documents/correspondence in question precede the initiation of the preliminary investigation against Oriflame. Upon reviewing the timelines, the Board determined that the documents in question does not fall within the purview of attorney-client privilege as the dates in question precede the initiation of the preliminary investigation against Oriflame.

The decision also highlighted that Oriflame's employees accompanied the on-site inspection, and copies of the collected documents were provided to Oriflame officials. The Board further noted that Oriflame's employees did not raise concerns about the collected documents, specifically regarding certain correspondence between Oriflame and its independent attorney. Consequently, the Board pointed out that following the inspection, case handlers and representatives of Oriflame co-signed an on-site inspection affidavit, which did not contain any assertions by Oriflame regarding the confidentiality of the documents obtained under the attorney-client privilege.

#### **IV. Conclusion**

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<sup>2</sup> Ankara Regional Administrative Court, 8th Administrative Judicial Chamber's decision dated 10.10.2018 and numbered 2018/658.

In its Oriflame decision, the Board emphasizes that for a communication to be granted attorney-client privilege, it must meet specific criteria. These criteria include the requirement that the communication is exchanged between the client and an independent attorney, devoid of any employment relationship. Furthermore, the communication must be conducted for the explicit purpose and in the interest of the client's rights of defense, and it should be directly relevant to the ongoing preliminary investigation. The decision also indicates that the Board considers whether the undertaking has asserted the confidentiality of the documents obtained under the attorney-client privilege when assessing such requests.

The Board's Oriflame decision is important as it underlines the criteria for invoking attorney-client privilege, hinging on multiple factors such as the communication's direct relevance to the right of defense and its role in preventing aiding or abetting infringement. It establishes a precedent for future cases, offering guidance and creating a framework that harmonizes the Authority's investigative powers with the imperative of safeguarding privileged communications.

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*(First published by Mondaq on March 13, 2024)*