

Boundaries of the Turkish Competition Authority's Investigative Powers: Case Handlers vs. Personal Property

Authors: Gönenç Gürkaynak, Esq., Zeynep Ortaç and Gizem Yaşar, ELİG, Attorneys-at-Law

Dawn raids are a key form of investigative tool for the competition authorities. Officials may have broad powers to inspect corporate and residential premises, to seize and/or copy documents, e-mails and other records, and to interview employees. European Commission's ("Commission") investigative powers had undergone a dramatic change with Regulation 1/2003 back in 2004¹ and it seems that the Turkish Competition Authority ("Authority") intends to follow its European counterpart in terms of investigatory authority after almost a decade: The draft law ("Draft Law") to amend Law No. 4054 on the Protection of Competition ("Competition Law") which was brought before the Presidency of the Turkish Parliament in January 2014², if enacted, will grant additional extended investigative powers to the Authority including the power to inspect not just the undertakings', but also their employees' books, documents and data, preserved in "*premises of any nature*". Under Competition Law, without any doubt, the Authority currently does not have the right to examine the personal property of an undertaking's employees. This article aims to provide an insight on the Authority's current investigatory powers and practice regarding the collection of personal property and data during inspections, as well as the potential implications of the Draft Law on the right to private life in Turkey.

The Concept of Personal Property & Right to a Private Life

It is useful to first mark off the boundaries of personal (or private) property. A concept quite hard to define³, discussions on private property generally occur in scope of the legitimacy of government interference⁴, as is the case here. For the purposes of this article, we define personal property as simply as "*things that are owned by persons*"⁵. This definition includes private premises such as homes, lands and means of transport. We also emphasize that personal property is not limited in scope to physical goods⁶, and it is widely believed to encompass personal data⁷.

¹ Wils, W. (2013) *Ten Years of Regulation 1/2003 – A retrospective*, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274013>

² For further information on the Draft Law, see Gurkaynak, G., *On the Verge of Change: Turkish Competition Law* (2014), available at <<http://www.mondaq.com/x/290632/Antitrust+Competition/On+the+Verge+of+Change+Turkish+Competition+Law>>

³ See eg Schwartz, P.M., *Property, Privacy, and Personal Data*, 117 Harv. L. Rev. 2056 (2003), available at <<http://scholarship.law.berkeley.edu/facpubs/69>>

⁴ Barros, B. (2009) *Property and Freedom*, Widener Law School Legal Studies Research Paper No. 08-34, available at <<http://ssrn.com/abstract=1098353>>

⁵ Sparkling, J.G. (1999) *Understanding Property Law*, Matthew Bender & Company, Inc., p.1.

⁶ See eg European Court of Human Rights *Beyeler v. Italy* decision (Application no. 33202/96) dated 5 January 2000, para. 100.

⁷ See eg Litman, J. (2000), *Information privacy - Information property*, Stanford Law Review 52, p.1287.

The discussion here is naturally not on private property vs. public property, but is on property of an undertaking vs. any property that does not belong to the undertaking. Nonetheless, any unlawful interference to a person's property constitutes an infringement of a fundamental right: the right to private life. Article 20 of the Constitution of the Republic of Turkey ("*Constitution*") on the privacy of private life provides that the law, and only the law, can confer upon an authority the power to search "*private papers and property*" of a person. Further, in line with Article 8 of the European Convention on Human Rights ("*Convention*"), the law can confer this authority only 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. Article 20 goes side by side with Article 21 of "*inviolability of the domicile*", which mandates that no domicile may be entered or searched or the property seized therein, unless there exist one or more of the grounds listed under Article 20 and only the law can grant the authority to do so. We note that, upon an amendment in 2010, Article 20's scope is now explicitly stretched to the protection of personal data, in parallel to Article 8 of the Convention.

Turkish Competition Authority's Investigative Powers

Under Article 15(1) of Competition Law, the Authority's sole playground in inspections is the property and premises of the undertaking concerned. The wording of Article 15(1), titled "*On-the-Spot Inspection*", is beyond clear in terms of whose property the case handlers are allowed to examine during an inspection: "*In carrying out the duties assigned to it by this Law, 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, any paperwork and documents of undertakings and associations of undertakings, and take their copies if needed, (b) Request written or oral statement on particular issues, (c) Perform examinations on the spot with regard to any assets of undertakings.*" It is certain that this provision does not allow the Authority to inspect any personal property or data belonging to the employees or even the directors of the undertaking.

The Board has strongly emphasized that only lawful evidence can be used as legal basis for its decisions, as per Article 38 of the Constitution⁸. Needless to say, evidence obtained in breach of Article 15 would be unlawful, and thus cannot be used as evidence in competition law proceedings. As for the practice of the case handlers, there have not been any instances where the case handlers attempted to conduct dawn raids at private premises⁹. When conducting dawn raids at undertakings' premises, the case handlers of the Authority generally ask the employees to set aside their personal belongings¹⁰. That said, it is still questionable whether merely asking the employees to point out their personal belongings is sufficient to ensure that the case handlers stay within the boundaries of Article 15(1) and therefore respect the right to

⁸ See the Board's *Mey İçki* decision dated 17 November 2011 and numbered 11-57/1476-532.

⁹ This information is based solely on publicly available sources.

¹⁰ See Gurkaynak, G., Yildirim, K., Ozgokcen, H. (2009) *Evidence in Competition Law*, Anniversary Volume in memory of Haluk Konuralp, Volume 3, Yetkin Publications, pp. 20-21.

privacy. In fact, this practice has recently raised concerns in the Turkish competition law arena.

As for the collection of private data, it is clear that electronic information is a gold mine for competition authorities¹¹ in a world where most communication, including communication among cartel members¹², is carried out electronically. As it is common for employees to store both personal and professional data in their business computers, it is in practice a challenge for the case handlers to filter out personal information when retrieving evidence from business computers belonging to the inspected undertaking. There has not been any major discussion in Turkish competition law as to whether circumstantially retrieved personal data constitutes an infringement of Article 15(1). In any case, the Authority has been careful in not sharing any such personal information with public, or using such data as evidence, as apparent in the Board's precedents¹³.

A Look into the European Model

Under Regulation 1/2003, the Commission's authorized officials have the right to carry out on-the-spot voluntary inspections of business premises, i.e. any premises, land and means of transport of undertakings and associations of undertakings. Undertakings are not obliged to submit to such voluntary inspections. On the other hand, the firms are obligated to submit to mandatory inspections initiated by way of a Commission decision.

A most interesting change brought by Regulation 1/2003 was the authority granted to the Commission's officials to inspect "*other premises*" (Article 21), including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned. Nonetheless, this authority can only be exercised via Commission's decision and this cannot be executed without prior authorization from the national judicial authority. There must also exist a reasonable suspicion that books or records related to the business/subject matter of the inspection, which may be relevant to prove a serious violation of Articles 101 and 102 of the Treaty on the Functioning of EU, are being kept at such premises.

So far, the Commission has made "*good use*"¹⁴ of its widened powers under Regulation 1/2003. The Commission has also published an explanatory note to an authorization to conduct an inspection ordered by way of a Commission decision under Regulation 1/2003 ("*Explanatory Note*").

What Will the Draft Law Change?

A long awaited draft brought into life with the contribution of competition law academics, practitioners and the business world, the Draft Law is rather controversial on many aspects,

¹¹ ABA Section of Antitrust Law, *Antitrust Discovery Handbook, Second Edition* (2003) p.76.

¹² See eg Board's *BSH* decision dated 12 June 2012 and numbered 12-32/916-275.

¹³ See eg Board's *Citroen* decision dated 23 September 2010 and numbered 10-60/1274-480.

¹⁴ Wils, p.12.

including the extended investigatory powers it grants to the Authority¹⁵. It would be understandable if the law maker desired to follow the EU approach and grant similar investigatory powers to the Authority, as Turkish competition legislation is closely modeled on the EU law. However, judging from the way the proposed Article 15(1) is drafted, it is quite hard to assert that proposed Article 15(1) would confer powers to the Turkish case handlers similar to those granted to the Commission's officials with Articles 20 and 21 of Regulation 1/2003.

The most crucial deviation from Regulation 1/2003 is the lack of clarity regarding the circumstances under which the case handlers can inspect the property (tangible, intangible, moveable, immovable) of employees. Article 21 of Regulation 1/2003 allows inspection outside the business premises (*"including the homes of directors, managers and other members of staff of the undertakings"*) only if (i) a reasonable suspicion exists, (ii) which may be relevant to prove a serious violation (such as a cartel)¹⁶, (iii) and upon the Commission's decision, which can only be executed with prior authorization from the national judicial authorities.

Contrary to Article 21 of Regulation 1/2003, while empowering the Authority to search the directors' and employees' books, data and documents, Article 15(1) of Draft Law requires the existence of neither a reasonable suspicion relating to a serious infringement, nor the Board's and a court decision as pre-conditions for the use of this power. The case handlers can conduct dawn raids simply with an authorization document issued by the Authority and not by a judicial body, or even the Board. Furthermore, Article 15(1) does not limit the span of these premises and merely stipulates that the case handlers can conduct their inspections at *"premises of any nature"*, without providing any further specification.

Under the EU regime, collection of private data is also specifically addressed in the Explanatory Note, which requires the officials of the Commission to process all personal data obtained during an inspection in compliance with Regulation No. 45/2001. While there is currently no primary legislation in Turkey similar to Regulation No. 45/2001 which regulates the protection of personal data, there is a draft law on the protection of personal information; and it is advisable that the Competition Law and the future law on the protection of personal information speak to each other, especially in terms of processing private data.

Most importantly, considering the close ties of the matter with human rights and in particular the protection of private life, the vagueness of the Authority's investigative powers under the Draft Law should not survive post-enactment. The requirements that the case handlers must fulfill during dawn raids and when collecting personal data must be articulated in the Draft

¹⁵ See eg Turkish Industry and Business Association's (TUSIAD) opinion on the Draft Law, submitted to the Turkish Parliament on 7 February 2014, available in Turkish at http://www.tusiad.org.tr/__rsr/shared/file/RekabetinKorunmasi-TUSIADGorus.pdf

¹⁶ Pinar, H. (2011) *The European Commission's Powers of Inspection in European Competition Law*, Competition Journal, Volume 12, No.4, p.132, available in Turkish at <http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fRekabet%2bDergisi%2fdergi61.pdf>

Law (and eventually in the Competition Law) in a way that ensures full legal certainty. Needless to say, it seems that further discussions and concerns will be flaming up in the near future in Turkish competition law circles, with the Draft Law's enactment approaching closer and closer.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published in Mondaq on September 1, 2014)