



## **Contemporary Dynamics of Dawn Raiding Powers of the Turkish Competition Authority: Current Status of a Debate on Concealment of Evidence**

**Authors:** Gönenç Gürkaynak, Esq. and Cansu İnce, ELIG Gürkaynak Attorneys-at-Law

### **Introduction**

This case summary includes an analysis of the Ankara 2nd Administrative Court’s (“*the Court of First Instance*”) Sahibinden SoE decision (E. 2022/254, 15.04.2022) in which the Court of First Instance stays of execution of the Board’s decision where the Board imposed an administrative monetary fine on Sahibinden for hindering and complicating the on-site inspection as per Article 16 of the Law No 4054 on the Protection of Competition (“*Law No 4054*”) based on the grounds that the deleted WhatsApp messages did not contain business related issues and were still accessible from the other employees’ WhatsApp group (21-27/354-174, 27.05.2021).

### **The Board’s Assessment on the WhatsApp deletion during on-site inspection**

The Turkish Competition Authority (“*TCA*”) raided Sahibinden’s premises on April 9, 2021 within the scope of an ongoing investigation initiated by the Board to determine whether no-poaching/non-solicitation gentlemen’s agreement exists in labor markets and Sahibinden was part of this investigation.

The case handlers found out that some of the employees deleted certain WhatsApp correspondences after the commencement of the on-site inspection. In order to be sure that the relevant deletion process was conducted during the on-site inspection, TCA Information Technologies Department’s opinion was requested and the relevant department confirmed based on the log records that the deletion had indeed happened after the on-site inspection begins. Accordingly, the Board imposed a fixed administrative monetary fine of %0.5 of Sahibinden’s gross income for hindering and complicating the on-site inspection as per Article 16(d) of the Law No 4054.

The Board recently adopted a similar approach in its other decisions concerning hindering and complicating the on-site inspection. There are many recent examples where the Board imposed an administrative fine of 0.5% of annual gross revenue of the relevant undertakings due to the deletion of correspondences even the employees were informed that deletion of such during the on-site inspection constitutes hindering or complicating the on-site inspection and leads to the imposition of an administrative fine (Eti Gıda, 29.04.2021, 21-24/278-123; Pasifik Tüketim, 29.04.2021, 21-24/279-124; Medicana, 17.6.2021, 21-31/400-202; Procter and Gamble, 8.7.2021, 21-34/452-227; İstanbul Gübre, 12.08.2021, 21-38/544-265).

Recently, on March 3, 2022, the Board imposed fixed administrative monetary fine on Kınık Maden Suları A.Ş. due to the deletion of e-mail and WhatsApp correspondences after the employees were informed that they should not do so during the on-site inspection (03.03.2022, 22-11/161-65). In this decision, the Board concluded that recovering deleted data does not change the conclusion that deletion process during the on-site inspection constitutes hindering or complicating the on-site inspection. The Board confirms this approach in its another recent decision (D-Market, 22-03/35-16, 13.01.2022) by stating that the ability of the case handlers to access the deleted data from different devices does not change the fact that the deletion during the on-site inspection causes hindering or complicating the on-site inspection.

### **Sahibinden SoE decision on the deletion process**

Sahibinden requested stay of execution and annulment of the Board's fining decision. The Court of First Instance found that (i) Sahibinden internally conveyed an e-mail message to its employees on the date of the on-site inspection at 11:36 to inform that the employees should not delete e-mail messages and mobile conversations, and should provide all documents that the TCA requested during the on-site inspection, (ii) the case handlers can access the deleted conversations from the other employees' mobile devices, (iii) the deleted messages belonged to the employee's personnel mobile devices and (iv) the deleted messages did not include business related matters.

Based on these findings, the Court of First Instance decided that the relevant act does not lead to administrative monetary fine and the Board's fining decision is unlawful. The Court of First Instance also held that it is clear that if the administrative act subject to the case is applied, Sahibinden will be affected in a way that is difficult or impossible to repair. Consequently, the Court of First Instance decided to stay of execution of the Board's fining decision on April 15, 2022.

Subsequently, the TCA objected the Sahibinden SoE decision before the Regional Administrative Court and Ankara Regional Administrative Court 8th Administrative Chamber rejected TCA's objection against the Sahibinden SoE decision on May 18, 2022. This decision is final and cannot be appealed against. Therefore, the execution of the Sahibinden SoE decision will be stayed.

### **Conclusion**

As seen from the precedents on concealment of evidence during on-site inspections, the Board adopts an aggressive approach and opts to rule that deletion of correspondences during the dawn raid means hindering or complicating the on-site inspection and leads to the imposition of a fixed fine pursuant to Article 16(d) of the Law No 4054 without considering whether the deleted data concerns private content. However, in Sahibinden SoE decision, Ankara 2nd Administrative Court does not follow this strict approach and takes into account the content of the deleted data and the fact that the deleted data could be accessed from other devices. This

shows that the Board and the administrative courts do not adopt the same approach when analyzing concealment of evidence during on-site inspections and it seems that the evaluation of the administrative courts on the matter would limit the Board's strict approach on imposing fixed administrative monetary fine due to hindering or complicating the on-site inspection.

Article Contact: Gönenç Gürkaynak, Esq.

E-mail: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)