

Turkish Constitutional Court Rules That the On-Site-Inspections by the Turkish Competition Authority Without a Court Warrant Violates the Immunity of Domicile

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The Constitutional Court of the Republic of Turkey (“*Constitutional Court*”) published on June 20, 2023 (Tuesday) its reasoned decision dated March 23, 2023 (Thursday) with the application no. 2019/40991 (“*Decision*”), which may potentially impact the standard of due process in the Turkish Competition Authority’s (“*TCA*”) dawn raid practice¹.

The Decision, in brief, rules that the TCA is obliged to obtain a court decision (i.e. a warrant) allowing the TCA officials to conduct a dawn raid. In the standard practice of the TCA, which was in full compliance with the Law No. 4054 on the Protection of Competition (“*Law No. 4054*”), the case handlers of the TCA have been able to legally conduct the dawn raids with the certificate of authorizations that can be issued by the Turkish Competition Board. However, the Constitutional Court found that although the TCA’s practice has been in compliant with the Law No. 4054 in its dawn raid practices, the provisions of Article 15 of the Law No. 4054 regulating the dawn raids is unconstitutional as it does not require the TCA to obtain a court decision before conducting dawn raids in contravention of Article 21 of the Turkish Constitution protecting the immunity of domicile.

Since the Constitutional Court found that the TCA’s practice has been in full compliance with the Law No. 4054 but certain provisions of the Law No. 4054 regulating the dawn raid are unconstitutional, the said provisions of the Law No. 4054 is likely to be amended in the near future to comply with the Decision. In the meanwhile, however, it is considered that the dawn raid practice of the TCA should not be significantly affected in a way that would lessen the frequency of the dawn raids of the TCA. Indeed, with a view to comply with the Decision, the TCA would now be expected to apply to the Criminal Court of Peace (first instance criminal courts) to obtain a warrant allowing the TCA’s case handlers to conduct the necessary dawn raids. This application is already a process that is foreseen by the Law No. 4054 and applied to by the TCA from time to time.

However, such application was only required when the undertakings refuse to cooperate and do not allow the TCA to conduct a dawn raid on their premises. In that event, the TCA is entitled to apply to the Criminal Court of Peace, obtain the warrant, and then to conduct the dawn raid, with the police escort if necessary. In these instances, the Turkish Competition Board applies an administrative monetary fine by 0.1% of the relevant undertakings’ Turkish turnover (and there are also instances where the Turkish Competition Board applied a daily fine by 0.05% of the relevant undertakings’ Turkish turnover for each day that the TCA was

¹ The Turkish Constitutional Court’s decision dated March 23, 2023 (Thursday) with the application no. 2019/40991 (Available at: <https://www.resmigazete.gov.tr/eskiler/2023/06/20230620-5.pdf>) (Last Access Date: June 21, 2023 (Wednesday)).

not able to conduct the dawn raid) due to “hindered or complicated” on-site inspection, and still conducts the dawn raid following the decision of the Criminal Court of Peace.

Indeed, there are numerous decisions of the Turkish Competition Board, where the TCA applied to the Criminal Court of Peace and obtain within one to two days a warrant to conduct the dawn raids in the premises of the undertakings that initially did not allow the dawn raid². As such, obtaining a warrant from the Criminal Court of Peace would not be an unfamiliar process for the TCA and therefore, this additional process is not expected to significantly affect the frequency and/or efficacy of the TCA’s dawn raids. Therefore, the ongoing or future preliminary or full-fledged investigations of the TCA is likely to continue without any disturbance, with usual dawn raids when deemed necessary by the TCA.

On the other hand, for simultaneous dawn raids (i.e. on-site inspection at various undertakings at the same time), the TCA will have to apply to different Criminal Courts of Peace in the relevant jurisdiction depending on where the undertaking is located at. Hence, this might make the coordination of the whole process more complicated and possibly lead to divergent judgements by the Criminal Courts of Peace on granting a warrant to the TCA. On that front, Article 15 of the Law No. 4054 was amended in June 2020 and the relevant provision now states, among others, that the TCA may conduct searches on and obtain copies of the “electronic environment and information systems”. In addition, Article 134 of the Law of Criminal Procedure allows inspecting the computer logs, making copies of computer records, deciphering these records and converting them into text only if “there are strong grounds for suspicion based on concrete evidence and there is no possibility to obtain evidence in any other way”. As such, although the same provision of the Law of Criminal Procedure was in force before 2020, the judges at criminal courts may pay particular attention to the amended version of Article 15 of the Law No. 4054 in evaluating the TCA’s requests of obtaining the necessary warrants and, may be inclined to deepen their review as to whether the TCA should be granted a warrant and some of them may refrain from granting the requested warrant to the TCA.

It should also be noted that the Applicant did not seek a remedy on the grounds that the evidence obtained during the unlawful dawn raid is also unlawful and cannot be used to establish a violation. The Constitutional Court clearly indicated that “(...) *it should be underlined that the Applicant’s application form does not include a complaint that the evidence obtained [by the TCA] is unlawful and using of such evidence is also unlawful during the [investigation of the TCA]. The main allegation of the Applicant regarding the evidence was that the evidence was not sufficient to prove the existence of information exchange on the pricing strategies.*” As such, the Constitutional Court stated that the review of whether the using of evidence obtained by the TCA during the dawn raid was unlawful is not possible. In this frame, the principle of “fruit of the poisonous tree is also poisonous” was not evaluated within the scope of the Decision.

² See e.g. Turkish Competition Board’s decisions dated 07.02.2019 and numbered 19-06/51-18; dated 10.06.2010 and numbered 10-42/718-231; dated 26.05.2006 and numbered 06-36/465-127.

Moreover, the Constitutional Court did not see any benefit in sending the case file back to Council of State for Council of State to retrial the case by considering that the execution of on-site-inspection by the TCA is not unlawful, but certain provisions of the Law No. 4054 regulating the dawn raid are unconstitutional. Constitutional Court may have considered that sending the case for a retrial could lead to the annulment of many decisions in the Turkish Competition Board's practice of 25 years. As such, assuming that this was a deliberate choice, it is possible to conclude that the Constitutional Court has indirectly restricted and rejected the application area of the principle that the fruit of a poisonous tree is also poisonous as far as evidence collected so far by the TCA in the dawn raids without court decisions are concerned.

On the other hand, the Decision now still opens a door for new arguments in the ongoing judicial reviews of the Turkish Competition Board's decisions involving evidence obtained during dawn raids based on the principles of "fruit of the poisonous tree is also poisonous" and supremacy of constitution. Since the Decision clearly states that the dawn raids conducted without a warrant violates the immunity of domicile and conducting dawn raids without a warrant will result in the protection of a rule that has been proven to be against the Constitution and this practice would be contradictory to supremacy of constitution and rule of law, the claimants that are seeking the annulment of the Turkish Competition Board's decisions before the administrative courts may argue that (i) the dawn raid of the TCA at their premises was unlawful as it violated the immunity of domicile, (ii) therefore, the evidence obtained during such dawn raid was unlawfully obtained, and (iii) unlawfully obtained evidence cannot be used to establish a violation based on the principle of "fruit of the poisonous tree is also poisonous". However, it should also be noted that the Decision did not find that the relevant Turkish Competition Board's practice was unlawful in its entirety but established a new requirement (i.e. necessity of a warrant obtained from the courts) for due process in the TCA's dawn raids. Therefore, the administrative courts may still take the position that the Decision does not render the evidence obtained during the dawn raids without a warrant unlawful.

The already-finalized judicial reviews of the Turkish Competition Board's decisions (involving a dawn raid) in the favour of the TCA is not expected to be retrialed since the Code of Administrative Procedure allows retrial in very exceptional circumstances, and the Decision does not constitute one of the exceptional circumstances conclusively stated in the Code of Administrative Procedure.

All in all,

- The Decision requires the TCA to obtain a warrant from the competent courts to conduct a dawn raid, and such requirement establishes a new requirement for due process of the dawn raids.
- This additional requirement of obtaining a warrant from the courts is not expected to significantly affect the frequency and/or efficacy of the dawn raids of the TCA.
- The relevant provision of the Law No. 4054 is expected to be amended to comply with the Decision and in the meanwhile, the TCA would still conduct dawn raids with a warrant to be obtained from the competent courts and the track record of the TCA demonstrates that TCA is able to obtain the warrants within one to two days.

- On the other hand, applying to different Criminal Courts of Peace might make the coordination of the whole process more complicated and possibly lead to divergent judgements by the Criminal Courts of Peace on granting a warrant to the TCA.
- Additionally, the amendment in June 2020 and the relevant provision Article 15 now states, among others, that the TCA may conduct searches on and obtain copies of the “electronic environment and information systems”. Hence, the judges at criminal courts may pay particular attention to the amended version of Article 15 of the Law No. 4054 in evaluating the TCA’s requests of obtaining the necessary warrants and some of them may refrain from granting the requested warrant to the TCA.
- The companies may be inclined to request a court warrant from the TCA for the on-site-inspections, however, only time will tell how the practice will evolve.
- The claimants that are seeking the annulment of the Turkish Competition Board’s decisions before the administrative courts may argue that (i) the dawn raid of the TCA at their premises was unlawful as it violated the immunity of domicile, (ii) therefore, the evidence obtained during such dawn raid was unlawfully obtained, and (iii) unlawfully obtained evidence cannot be used to establish a violation based on the principles of “fruit of the poisonous tree is also poisonous” and supremacy of constitution.
- The principle of “fruit of the poisonous tree is also poisonous” was not evaluated within the scope of the Decision and the Constitutional Court did not see any benefit in sending the case file back to Council of State for Council of State to retrial the case by considering that the execution of on-site-inspection by the TCA is not unlawful, but certain provisions of the Law No. 4054 regulating the dawn raid are unconstitutional.
- As such, assuming that this was a deliberate choice, it is possible to conclude that the Constitutional Court has indirectly restricted and rejected the application area of the principle that the fruit of a poisonous tree is also poisonous as far as evidence collected so far by the TCA in the dawn raids without court decisions are concerned. Therefore, the administrative courts may take the position that the Decision does not render the evidence obtained during the dawn raids without a warrant unlawful.
- The already-finalized judicial reviews of the Turkish Competition Board’s decisions (involving a dawn raid) in the favour of the TCA is not expected to be retrialed since the Code of Administrative Procedure allows retrial in very exceptional circumstances, and the Decision does not constitute one of the exceptional circumstances conclusively stated in the Code of Administrative Procedure.

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