

Antitrust / Competition

A New Era for the On-Site Inspections by the TCA

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 practice.

With this decision the Constitutional Court concluded that the provisions of Article 15 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") regulating the dawn raids are unconstitutional as it does not require the TCA to obtain a court warrant before conducting dawn raids, in contravention of Article 21 of the Turkish Constitution protecting the immunity of domicile. In the standard practice of the TCA, which was confirmed by the Constitutional Court that it is compliant 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 ("**Board**").

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. As such, obtaining a warrant from the Criminal Court of Peace would not be an unfamiliar process for the TCA.

On the other hand, the Decision now still opens a door for new arguments in the ongoing judicial reviews of the 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



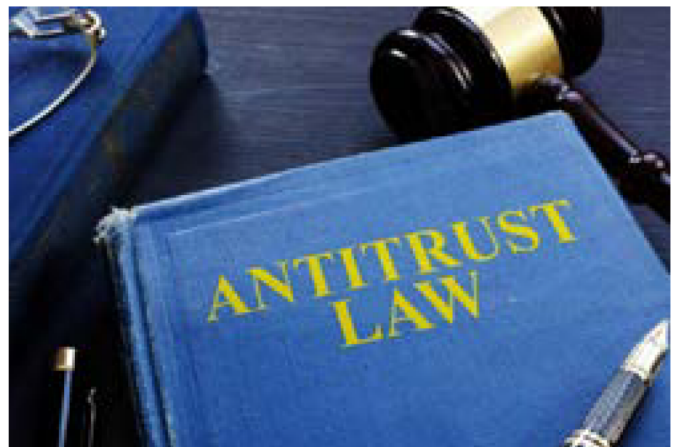
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contradictory to supremacy of constitution and rule of law, the claimants that are seeking the annulment of the Board's decisions before the administrative courts may argue that (i) the dawn raid of the TCA at their premises was unlawful as it violated 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".

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, which is not expected to significantly affect the frequency and/or efficacy of the dawn raids of the TCA. Finally, 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.





Practice Area News

Board Decides on Getir's MFC Clauses. Within its recent decision (September 15, 2022, 22-42/606-254), the Turkish Competition Board found that Getir (online food delivery platform) de facto enforced both narrow and wide MFC conditions upon member restaurants. The Board analyzed Getir's market shares both based on turnover and commission and decided that the MFC clauses applied by Getir do not disallow Getir from benefiting block exemption.

Board Imposes Fine on NAOS for Hindering on-site Inspection. The Turkish Competition Board decided (November 6, 2022, 22-45/659-283) to impose an administrative monetary fine on Naos İstanbul Kozmetik San. ve Tic. Ltd. Şti. due to hindering and complicating the on-site inspection. The Authority also cooperated with the Information and Communication Technologies Authority to clarify whether the mobile phones submitted to the case handlers for the inspection were actually used by the employees.

TCA Releases Preliminary Report on the Online Advertising Sector Inquiry. Back in January 2021, the Turkish Competition Authority initiated an inquiry into the online advertising sector. On April 7, 2023, the Authority officially announced its preliminary report on the online advertising sector inquiry. The Preliminary Report outlines the Authority's key findings from its online advertising sector inquiry, as well as opening an avenue to receive feedback from stakeholders until July 7, 2023.

Board Does Not Impose Fine on Hepsiburada for Hindering on-site Inspection. The Turkish Competition Board decided (October 7, 2021, 21-48/678-338) not to impose an administrative monetary fine on Hepsiburada for hindering on-site inspection, despite the dissenting opinions of two Board members and the Authority's case team suggesting that an administrative monetary fine should be imposed. The dissenting opinions have a straightforward approach which provides considerations on whether the deleted information concerns private content or the employee(s) acted in good faith.

In the Firm

• **ELIG Gürkaynak Attorneys-at-Law.** ELIG Gürkaynak represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. We also collaborate with international law firms on Turkish competition law matters.

In addition to our strong Turkish competition law practice, our international experience provides us with a high capability in multinational competition law issues.