

Law Bulletin

Competition Law | Turkey | November 2019

Qualification of WhatsApp Communication as Evidence under the Competition Law

In certain recent decisions the Turkish Competition Board considered WhatsApp correspondence as evidence of anticompetitive conduct. The Turkish Competition Authority (the “**TCA**”) can use any type of communication between undertakings as evidence of anticompetitive conduct. However, we need clarification on the conditions under which WhatsApp correspondence could be obtained by the TCA officials during an on-spot inspection.

The premier Ankara Ortodonti decision¹ in which WhatsApp correspondence were used as evidence for the first time, provides some clues on the way evidence was gathered during an on-spot inspection. The decision mentions several times that evidence of communication through WhatsApp was gathered while searching an employee’s computer and the communication was originally made through a mobile phone line that belongs to the company under inspection. As known, during inspections the TCA officials search the computers and if WhatsApp Web application is open on the computer under inspection, the officials are entitled to investigate it. Another point stressed in the Board decision is that the WhatsApp communication was made through a mobile phone line that belongs to the company under investigation. Although WhatsApp is an OTT which means communication over WhatsApp does not require a mobile phone line, the Competition Board considers the ownership of the mobile phone line as relevant to the issue.

The decision does not answer the question whether WhatsApp in mobile devices could be searched by the TCA officials during an inspection. EU Commission’s explanatory note on Commission

¹ Competition Board Decision no 18-09/157-77, 29 March 2018

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inspections² explicitly states that all mobile devices of the undertaking plus personal devices that are used for business purposes could be searched by the inspectors. On the other hand, Article 15 of the Turkish Competition Law no. 4054 draws the limits of the TCA's investigative powers and states that officials can make on-spot investigations on any company asset. Therefore, the officials can investigate mobile devices that are owned by the company and the mobile devices that uses a mobile phone line owned by the company. However, contrary to the EU practice, personal mobile devices with a personal mobile phone line seem to be off the limits of the TCA's investigative powers, even if they are used for business purposes.

Therefore, evidence gathered from personal mobile devices might raise questions on the legality of the evidence. On the other side, there is no clear guidance on how the Competition Board interprets the powers of investigation stated in Article 15. Therefore, if the TCA officials want to search mobile devices in an inspection, it might be beneficial to declare the devices which are not under company's ownership and the devices which do not use a line owned by the company.

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² http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf para. 10