

# Kluwer Competition Law Blog

## Dawn Raids in Turkey – Can Companies Avoid Responsibility by Asserting Subjective Grounds for the Deleted Data During On-site Inspections?

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The Turkish Competition Authority (TCA) has rendered a number of decisions, particularly in recent years, on whether on-site inspections have been hindered or complicated. These include two recent decisions on D-Market Elektronik Hizmetler ve Ticaret A.Ş. (“**Hepsiburada**”), one of the largest e-marketplaces in Turkey.

In the first of these decisions, the TCA examined whether the on-site inspection carried out at Hepsiburada within the scope of the investigation<sup>[1]</sup> initiated by the TCA’s decision dated 01.07.2021 and numbered 21-33/433-M was hindered. The TCA concluded that Hepsiburada’s actions did not constitute a hindrance/complication of the on-site inspection and therefore it decided not to impose an administrative fine on Hepsiburada with its decision dated 07.10.2021 and numbered 21-48/678-338 (“**Hepsiburada I Decision**”). However, the decision was taken by a majority of votes and two dissenting votes were cast in favour of the imposition of an administrative monetary fine.

Similarly, the second decision examined whether Hepsiburada hindered and complicated the on-site inspection within the scope of the investigation<sup>[2]</sup> initiated by the TCA’s decision dated 01.04.2021 and numbered 21-18/213-M. But this time, the TCA concluded that Hepsiburada hindered and complicated the on-site inspection and therefore it imposed an administrative fine on Hepsiburada, amounting to 0.5% of its 2020 turnover with its decision dated 13.01.2022 and numbered 22-03/35-16 (“**Hepsiburada II Decision**”).

The focus of these two decisions was similar. In both decisions, the TCA evaluated whether the deletion of the WhatsApp messages that occurred during the on-site inspection constituted a hindrance/complication of the on-site inspection. However, the TCA adopted different approaches in the decisions.

### **Hepsiburada I Decision: No Violation Despite the Deletion**

The TCA officials conducted an on-site inspection at Hepsiburada’s company premises on 19.08.2021. During the on-site inspection, at 10:35 am, the company employees were told not to

delete any content from their e-mails and phones. However, at 11:05 am, an employee was found to have deleted several WhatsApp correspondences. Furthermore, it could be observed that the deleted WhatsApp group chats and individual chats were work-related and were not personal chats. The Decision also states that some of the deleted correspondences were retrieved with the help of a forensic device.

The TCA evaluated the aforementioned issues and concluded that the on-site inspection was not hindered. Accordingly, it was decided not to impose an administrative fine on Hepsiburada by a majority of votes. Two members of the TCA voted against the decision, arguing that the on-site inspection was hindered/complicated and therefore an administrative fine should have been imposed.

### **Why Did Two Members Disagree with the Majority Opinion?**

In the dissenting opinion of two members, several issues are discussed that could shed a light on the concept of the hindrance of the on-site inspection. The dissenting opinion first criticizes the procedural aspects of the Hepsiburada I Decision. In this context, it emphasizes that the Decision lacked reasoning and the only assessment of the TCA is a sentence that stated: *“From the information and documents in the file, it is concluded that the on-site inspection was not hindered.”*

The dissenting opinion also argues that if any correspondence is deleted during the on-site inspection, the TCA should not further evaluate other issues such as whether the deleted data was retrieved and supplied to the TCA, whether the employees were informed sufficiently about not deleting any data during the on-site inspection, whether the deleted data was relevant to the subject matter of the investigation, whether the position of the relevant employee was crucial or whether the deletion occurred by accident. According to the dissenting opinion, such moral elements or subjective reasons should not be considered by the TCA. Instead, the TCA should only focus on material facts, and in this context, whether the deletion was made before or after the on-site inspection began. In this context, the dissenting opinion states that the deletion occurred during the on-site inspection and that this constitutes a hindrance of the on-site inspection. In this regard, the dissenting opinion emphasized the following matters in light of the opinion that Hepsiburada should have received an administrative monetary fine:

- The fact that the relevant persons were warned not to delete anything does not eliminate the undertaking's responsibility. Even if the undertaking has trained, informed, warned its employees or implemented a compliance program, it cannot be relieved of its responsibility for the individual deletions of its employees. A contrary interpretation would render competition law dysfunctional.
- The fact that the deleted correspondences are internal correspondences or whether they show a breach cannot be a justification that the hindrance of on-site inspection has not occurred. In this context, the TCA's and court case law also indicated that the hindrance has occurred even in cases where deletion is made on the grounds that the deleted correspondences are private/personal.
- Since it is not clear whether the deleted data can be fully and clearly retrieved in all cases, the deletion itself (even if all of the data is unquestionably and clearly retrieved), irrespective of whether the data is retrieved, is considered to be a hindrance of on-site inspection. A contrary interpretation would incentivize undertakings to delete the data, as they would be able to avoid

penalties by retrieving the data.

- Finally, subjective factors such as purpose, intent, good faith, or bad faith should not be taken into account in response to the undertaking's arguments that the deletion was not made for the purpose of on-site inspection and that the conduct was in good faith. In order for the infringement to occur in the form of the hindrance of the on-site inspection, the occurrence of the material event (deletion) is sufficient.

### **Hepsiburada II Decision: Cross-Examinations Revealed the Violation**

Within the scope of another investigation, on 15.06.2021, the TCA conducted an on-site inspection at the company premises of Hepsiburada.[3] During the inspection, an examination of the Senior Talent Specialist's phone by a forensic digital device revealed that some correspondences were deleted from a WhatsApp group that consisted of employees from the human resources department. Obtained correspondences showed that the employees jointly agreed on deleting messages but not to leave group chats. The TCA experts conducted a cross-examination by comparing the relevant group chats on the phones of each group member and, in respect of individual chats, by comparing the relevant chat on the phones of the two parties to the chat. The cross-examination revealed that some employees only have a system message[4] in the relevant chats and employees performed deletions at different times after the inspection started.

The TCA emphasized that the cross-examinations show that many correspondences were deleted after the inspection started, in accordance with the employees' joint decision to delete their WhatsApp correspondences. In this context, the TCA also took into consideration the written opinion of the Department of Information Technologies in another similar file that the system message dated on the day of the inspection alone can conclusively show that data was deleted as of the time the inspection started. Taking this opinion into consideration, together with the other documents obtained regarding the deletion of correspondences, the TCA stated that the system message dated hours after the start of the inspection also indicated that some correspondences in the relevant groups had been deleted on the day of the inspection. However, it was underlined that the opinion in question and the system messages in the relevant groups were only used to support the general attitude of the undertaking towards data deletion.

Statements of the undertaking representative which were recorded on the "On-Site Inspection Report" were also evaluated by the TCA. The arguments of the undertaking were (i) all its employees were warned not to perform any deletions, yet employees individually performed deletions, (ii) some employees had been working for the undertaking for a short period of time, (iii) the deleted information could be accessed on other devices, and therefore acts of data deletion should not be considered as the hindrance of on-site inspection. However, the TCA rejected these arguments, emphasizing the following points:

- The obtained documents do not show any warning to the employees of the undertaking not to delete data and, on the contrary, they show that the undertaking was engaged in a systematic activity to delete correspondences/documents relating to the subject matter of the investigation.
- The messages regarding the deletion were sent by the human resources manager of the undertaking and most of the deletion activities were carried out by senior employees. Moreover, the seniority, title, and length of service of the employee who deleted any information/document/data during the on-site inspection are not of importance. This is because

any deletion, regardless of the person who performs this action, causes the on-site inspection activity to be improperly carried out.

- In addition, a large number of employees of the undertaking's human resources department carried out the deletions in a collective and systematic manner, and these employees are the most important persons from whom evidence can be obtained as to whether anti-competitive agreements have been made in the labour market. Therefore, it cannot be accepted that the deletions in question were individual.
- It is also not acceptable that all deleted data can be accessed through different devices since it is not possible to determine the limits/scope of the deletion actions, and there is a possibility that not all deleted data can be accessed, and it is not possible to clearly determine whether all data that can be assumed to have been deleted during the inspection has been obtained.

Accordingly, the TCA decided that Hepsiburada hindered and complicated the on-site inspection and imposed an administrative fine on the undertaking, amounting to 0.5% of its 2020 turnover.

## Conclusion

As can be seen, these two decisions are quite similar in terms of the facts of the concrete case. However, while the TCA did not find an infringement in the Hepsiburada I Decision, it imposed an administrative fine on the undertaking in the Hepsiburada II Decision on the grounds that the on-site inspection was hindered and complicated.

It can be inferred that the retrieval of deleted data was the reason for not finding an infringement in the Hepsiburada I Decision. However, as stated in the dissenting opinion, the TCA's position cannot be clearly demonstrated as the decision in question does not include detailed reasoning. Moreover, in the Hepsiburada II Decision, it was stated that the restoration of deleted data would not change the finding that the on-site inspection was hindered.

In this respect, it is possible to say that the Hepsiburada I Decision differs from the TCA's previous decisions. However, taking into account the TCA's assessments in the more recent Hepsiburada II Decision (which are in line with the points emphasized in the dissenting opinion in the Hepsiburada I Decision), it does not seem possible to say that the TCA has changed its case law. Thus, it is still to be questioned why the TCA adopted a different approach in the Hepsiburada I Decision.

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[1] Investigation initiated by the TCA to evaluate the allegations that Numil Gıda Ürünleri San. ve Tic. A.Ş.'s actions and behaviours in the infant formula market violate Articles 4 and 6 of Law No. 4054 on the Protection of Competition ("**Competition Law**").

[2] Investigation initiated by the TCA to evaluate the allegations that some of the undertakings', including Hepsiburada, actions and behaviours in the labour market violate Article 4 of the Competition Law.

[3] HEPSİBURADA II Decision concluded more recently than HEPSİBURADA I Decision even

though the on-site inspection evaluated within the scope of the HEPS?BURADA II decision is earlier.

[4] The system message is: “Messages and calls are end-to-end encrypted. No one outside of this chat, not even WhatsApp, can read or listen to them. Tap to learn more.” WhatsApp screen shows this system message when a chat is started for the first time or when the correspondence in an existing chat is completely deleted.

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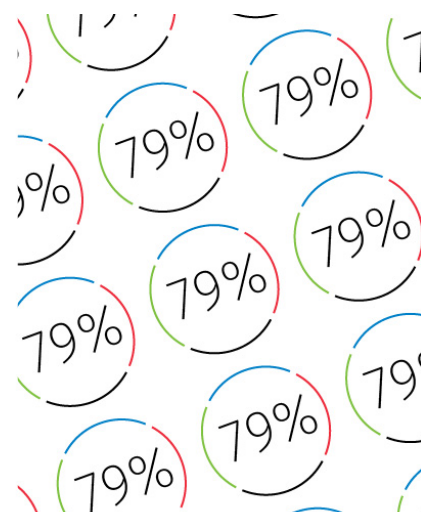
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