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The Turkish Competition Authority Reaffirmed Its View on Attorney-Client Privilege Limited to Right of Defence: A Stark Contrast with the EU

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With its decision issued on 30 March 2023 (**Storytel Decision**), the Turkish Competition Authority (**TCA**) evaluated Storytel Turkey Yay?nc?l?k Hizmetleri A.?.'s (**Storytel**) claim that some documents obtained during on-site inspections were covered by attorney-client privilege. This post presents a comparative analysis of the TCA's approach regarding attorney-client privilege presented in the *Storytel* decision and the current (and wider) view of the Court of Justice of the EU (**ECJ**) following *Orde van Vlaamse Baliest*, which emphasises the importance of communications between lawyers and their clients to be protected under the right of respect for private life without requiring them to demonstrate that such correspondences are directly related to the right of defence.

The TCA's View on Attorney-Client Privilege

Law No. 4054 on the Protection of Competition (**Competition Law**) does not include a specific legal provision regarding attorney-client privilege. However, in the Guidelines on the Examination of Digital Data during On-Site Inspections (**Guidelines**), it is specified that the "*principle of professional privilege*" applies to data retrieved during on-site inspections.

Furthermore, in the Guidelines, the TCA makes it clear that this protection applies to "*any correspondence between a client and an independent lawyer with no employee-employer relationship with the client aimed at the exercise of the client's right of defence"*. However, if correspondence is not directly related to the exercise of the right of defence, especially involving giving assistance to an infringement of competition or concealing an ongoing or future violation, it does not benefit from the protection.

Against this background, for the professional privilege to be applied, correspondences must (**i**) be related to the right of defence, (**ii**) made between a client and its independent lawyer, and (**iii**) not made to assist any violation or to conceal an ongoing or future violation.

Some indications of where the TCA stands with respect to the scope of the attorney-client protection, in particular when a communication "*relates to the exercise of the client's right of defence,*" can be found within the TCA's decisional practice.

In its Enerjisa decision, the TCA examined whether certain documents obtained during an on-site inspection benefit from attorney-client privilege. Specifically, the document subject to the decision was an audit report concerning the outcome of the competition compliance program conducted by Enerjisa's attorneys who provided legal advice. The TCA decided that *"correspondence that is not directly related to the exercise of the right of defence, made to assist any violation or to conceal an ongoing or future violation, shall not benefit from the protection,* ***even if it relates to the subject of preliminary investigation, investigation or inspection****"*. The *Enerjisa* decision was appealed before the administrative courts. The first instance court annulled the decision based on the fact that the audit report produced by Enerjisa's independent attorney is of the nature of a *"document prepared for obtaining legal advice from an independent lawyer"* and includes recommendations for Enerjisa's compliance with competition legislation and prevention of future competition infringements (see the decision here). Accordingly, the first instance court ruled that the relevant document should be evaluated within the scope of the right of defence and should benefit from attorney-client privilege.

However, the first instance court's decision was annulled by the Regional Administrative Court (see the decision here). The Regional Administrative Court stated that even if the "*independent attorney*" condition had been fulfilled, the audit report contains statements and evaluations that may result in an infringement of competition law. Furthermore, at the date of the audit report, no investigation into the violation of competition law or lawsuit filed for the annulment of an investigation existed. For these reasons, the Regional Administrative Court ruled that the condition of the right of defence had not been fulfilled.

After all this back and forth, the Council of State upheld the decision of the Regional Administrative Court (see the decision here).

As things stand, it could be inferred that the TCA's view on attorney-client privilege is limited to the advice relating to the exercise of the right of defence, which based on the review of the courts is found to exist when an ongoing legal proceeding has been initiated before the date of correspondence. In addition, the TCA will exclude any correspondence that is considered to be contextually intended to assist any infringement or to conceal an ongoing or future infringement from the scope of protection.

Evaluations Made in the Storytel Decision

The material subject to Storytel's request relates to a 259-page document obtained during the TCA's on-site inspection. Storytel claimed that "*the recipient or sender of some of the documents obtained was an independent lawyer who had no employer-employee relationship with Storytel and was not a payroll employee of Storytel or any Storytel subsidiary"*. Storytel further argued that the relevant document should be considered to fall within the scope of the attorney-client privilege, irrespective of whether any administrative proceedings (e.g., a preliminary investigation or investigation) had been initiated at the time it was exchanged. The TCA determined that given that the date of the relevant document corresponded to the period before the initiation of the preliminary investigation, the relevant document could not be deemed as "*directly relating to the exercise of the right of defence"*.

The TCA adopts a strict approach in its assessment as to whether the documents obtained during

on-site inspections fall within the scope of attorney-client privilege. This approach seems to contradict that presented in the ECJ's *Orde van Vlaamse Baliest*, which clarified the scope of attorney-client privilege under EU law by extending its limits further beyond the right of defence.

Approach under Orde van Vlaamse Baliest

A paradigm shift in the approach to attorney-client privilege happened with the ECJ's *Orde van Vlaamse Baliest* judgement. Prior to *Orde van Vlaamse Baliest*, according to *AM&S Europe Ltd* correspondence between external EEA-qualified lawyers and their clients were protected if such communications were made for the purpose, and in the interest of, the client's right to defence.

However, this approach (i.e., limiting attorney-client privilege to the right of defence) was not accepted by the European Court of Human Rights ("**ECHR**"). The ECHR, in its judgment of 6 December 2012, expressed that "*Article 8(1) European Convention for the Protection of Human Rights and Fundamental Freedoms protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients.*" In the same vein, in its judgment of 9 April 2019, *Altay v. Turkey*, the ECHR emphasized that when individuals seek advice from a lawyer, they reasonably anticipate their conversations to be private and confidential.

In *Orde van Vlaamse Baliest*, the ECJ considered the question referred by the Grondwettelijk Hof (Constitutional Court of Belgium), in which the applicants sought the suspension and annulment of a Flemish decree which required lawyers while acting as an intermediary, whether they are bound by legal professional privilege to inform the other intermediaries concerned in writing stating the reasons why they cannot fulfil their reporting obligation under that Flemish decree (para 13, Case C-694/20). The referring court asked the ECJ to clarify whether the Flemish decree infringed the right to a fair trial as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and the right to respect for private life as guaranteed by Article 7 of the Charter. The ECJ ruled that the privilege notification obligation provided in the Flemish decree could lead to a breach of attorney-client privilege since it implied disclosure to other intermediaries. It found that "*other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her*" according to Article 7 of the Charter.

Against this background, it can be said that the ECJ now has taken a wider approach by not limiting the attorney-client privilege to the boundaries of the right of defence, indicating that the right of respect for communications between lawyers and their clients should be protected under the right of respect for private life (para 30, Case C-694/20).

Conclusion

The Storytel decision upholds the TCA's stringent stance on attorney-client privilege, recognizing it only for correspondences made after the initiation of an administrative proceeding. This view contrasts with the ECHR's case law and the ECJ's *Orde van Vlaamse Baliest* judgement, both of which attribute more weight to the basic right to communication between clients and lawyers by not requiring them to demonstrate that such correspondences are directly related to the rights to

defence.

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