

Attorney-client privilege in context of internal investigations

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Attorney-client privilege is widely debated, as its interpretation is difficult in cross-border litigation and investigations. This update aims to:

- shed light on the relevant legal provisions under Turkish law;
- draw the boundaries of the concept; and
- highlight its relevance to white collar crime.

The Advocate Law of 19 March 1969 (1136) regulates attorney-client privilege for attorneys. According to Article 36 of the Advocate Law ("Right to Keep Secrets") attorneys cannot disclose any document or information obtained while practising their profession.

Similarly, Article 130/2 of the Criminal Procedural Law sets out that any material which is seized as a part of a search conducted in an attorney's office must be returned immediately to the attorney if the material is understood to relate to the professional relationship between a client and that attorney.

In a recent decision, Ankara 15 Administrative Court (2017/412-3045) analysed the legal basis of attorney-client privilege and, among other things, referred to Article 36 of the Constitution, which regulates the right to fair trial. A more comprehensive analysis is awaited from the Council of State as to whether attorney-client privilege is a constitutional right.

There are insufficient sources on specific guidance for attorney-client privilege when it comes to white collar crime. Therefore, the extent to which attorney-client privilege will apply to the relationship and communications between in-house or outside counsel and perpetrators of white collar crime remains unclear.

In the absence of any directly applicable rules, similar practices may indicate the likelihood and degree of privilege that would be applied in this instance. Competition law is one such area.

In Decisions 15-42/690-259 and 16-42/686-314, the Competition Board held that companies subject to an investigation may refrain from disclosing correspondence made with their attorneys (and documents subject to this correspondence) provided that they explain who produced these materials (ie, in-house or outside counsel) and their purpose (eg, for establishing a legal defence). The Competition Board recognises attorney-client privilege for outside counsel only when the purpose of the document is to establish a legal defence.

The conditions of attorney-client privilege can be scrutinised by the authorised institutions or courts. In the absence of any clear guidance for Turkish practice with regard to attorney-client privilege and white collar crime, the Competition Board's interpretation is a reference for future disputes and investigations, even though it will not be directly binding on institutions and courts adjudicating the matter from the beginning for each incident.

In this sense, good practice would be to assume privilege only when working with outside counsel to establish a legal defence.

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