

The Constitutional Court Rules that the Competition Board's On-Site Inspection Without a Judge's Decision Violates the Right to Immunity of Residence

In 2009, the Turkish Competition Authority ("Authority") had conducted a preliminary investigation to determine whether there was a violation of Article 4 of Law No. 4054 on the Protection of Competition ("Law No. 4054"), regarding restrictive agreements, concerted practices, and decisions about price, production, and sales information and forecasts among undertakings being members of the Automotive Distributors Association and the Automotive Industry Association. As a result of the investigation, the Competition Authority issued a decision on April 18, 2011, imposing administrative fines on the relevant undertakings, including Ford Otomotiv Sanayi Anonim Şirketi (Ford).

Following the final decision of the trial and exhaustion of legal remedies, Ford filed an individual application with the Constitutional Court claiming that its rights had been violated. It was argued that the administrative fine imposed due to the violation of competition laws infringed their right to inviolability of residence, as the inspection was conducted at their workplace was unlawful. They also claimed that the imposition of the fine violated their property rights because the amount of the penalty was determined without taking into account the export turnovers of other undertakings but included their own export turnover, thus constituting discrimination. Furthermore, they argued that the principle of non-bis in idem (not being tried or punished twice for the same act) was violated due to the second investigation of the same act. They also alleged that their right to trial within reasonable time was violated due to the prolonged duration of the proceedings. Lastly, they claimed that their right to access to the courts was violated because the amendment abolished the stage of corrective judgment during ongoing proceedings was enacted. The local courts rejected their claims and upheld the decision, leading Ford to file an individual application with the Constitutional Court as a last resort.

The Constitutional Court reached an outstanding conclusion with its decision dated 23.03.2023 published in the Official Gazette on 20.06.2023, stating that the applicant's right to immunity of residence was violated due to the unlawful inspection conducted at their workplace. Additionally, the Court determined that the duration of 9 years, 10 months, and 26 days between the initiation of the second preliminary investigation against the applicant and the finalization of the administrative judicial process was unreasonable. As a result, the Constitutional Court ruled that the right to a fair trial, specifically the right to a trial within a reasonable time, was violated.

As known, Article 15 of Law No. 4054 grants the Authority the power to conduct on-site inspections when deemed necessary while fulfilling its duties assigned by the law.

On-site inspection is one of the most crucial means of obtaining evidence for the detection of competition violations, wherein competition authorities examine the books, physical and electronic records, and documents maintained in the information systems of the relevant undertaking. It also allows the Authority to obtain copies and physical samples of these materials, request written or oral explanations on specific matters, and conduct on-site examinations concerning all types of assets of the undertakings. The on-site inspection process is a significant but also a delicate procedure where compliance with laws, fair application, and legal safeguards must be ensured at all times. That being said, it is one of the most effective ways of revealing anti competitive actions/ agreements.

In its evaluation made by the Constitutional Court, it was stated that areas where the management affairs of undertakings are conducted, such as offices and workrooms where not everyone can freely enter, can be considered as residences. Therefore, considering the fact that documents were obtained from the computers of company officials, it was acknowledged that the on-site inspection conducted at the applicant's workplace constituted an interference with the right to immunity of residence.

The Constitutional Court has concluded that the provision in Article 15 of Law No. 4054, which allows on-site inspections to be conducted based on the decision of the Competition Authority, without the requirement of a judicial decision as stipulated in Article 21/1 of the Constitution, violates the right to immunity of residence. According to Article 21/1 of the Constitution, no one can enter a person's residence, conduct a search, seize items within, or interfere with their possessions without a judicial decision given in accordance with the proper procedure. In exceptional cases where delay would cause harm, a written order from the authorized body designated by law may be deemed sufficient instead of a judicial decision. The Constitutional Court opined that the provision allowing on-site inspections to be conducted by the Authority without being limited to exceptional cases with potential harm is not in compliance with Article 21 of the Constitution, thus resulting in a violation of the right to immunity of residence.

When examining the relevant regulations of the European Commission, the Commission is granted on-site inspection powers parallel to the provisions of Law No. 4054, as stated in Article 20 of the Council Regulation (EC) No 1/2003 of 16 December 2002. In case the undertaking resists the inspection, the authorized officials appointed by the Commission will be provided with necessary assistance, including the support of law enforcement authorities or similar sanctioning bodies if needed, in order to carry out the inspections. If,

according to the national laws of the member state, the provision of such assistance requires the authorization of a judicial authority, the request for this authorization will be made accordingly. Furthermore, Article 21 of the Council Regulation (EC) No 1/2003 allows for inspections to be conducted in non-commercial places, including the homes of the executives, managers, and other staff of the undertaking, as well as land and transportation vehicles, if there is a reasonable suspicion that documents or other records relevant to the investigation are kept outside the undertaking's premises. However, it is specified that a decision to conduct such inspections cannot be executed without the prior authorization of the national judicial authority of the respective member state. In the context of on-site inspections conducted outside the workplaces, the Commission ensures the protection of fundamental rights and freedoms by requiring the authorization of the national judicial authority. It should be noted that the on-site inspection addressed in the decision of Constitutional Court took place at the premises of the undertaking.

The dissenting opinion of the two members who disagreed with the Constitutional Court's decision stated that an "on-site inspection" was conducted at the applicant's workplace, without any search or seizure taking place. It was emphasized that the inspection was carried out based on the authority granted by Law No. 4054, which the applicant was legally aware of, and that the applicant did not raise any objection during the on-site inspection. Therefore, they argued that this situation cannot be considered a violation of the right to immunity of residence. They further argued that the inspection was conducted in accordance with the purposes of Law No. 4054 and thus served a legitimate purpose. It was also noted that the inspection was conducted with the knowledge of the applicant and focused on the information and documents provided by the applicant. They pointed out that there was no claim that the application involved activities beyond the scope of the inspection, and therefore, it was deemed as a proportional intervention without constituting a violation.

The decision of the Constitutional Court, which will be widely debated in the coming days, has already raised curiosity as to whether the legislative body will proceed with a new regulation in the relevant legal provisions. It is now a subject of speculation whether the decision will have an impact on future on-site inspections.