

The Turkish Constitutional Court ruled that the “on-site inspection” carried out by the Competition Authority without a judge order violated the inviolability of domicile.

The Constitutional Court's decision dated 23.03.2023 regarding the individual application no. 2019/40991 has been published in the Official Gazette dated 20.06.2023 no. 32227. The decision inevitably constitutes an important turning point in Turkish competition law since; the on-site inspection was conducted in accordance with the procedure stipulated in Article 15 of the Law No. 4054 on the Protection of Competition (the "**Law No. 4054**") -without a judge order- and it is concluded that the lack of judge order in on site inspections constitutes a violation of the inviolability of domicile, and that this issue should be notified to the Grand National Assembly of Türkiye (the "**GNAT**") for the resolution of the structural problem arising from the legislation.

The said decision has brought along various debates in the legal context. On one hand, the legal validity of the "on-site inspections" carried out without a court order before this decision, the fines imposed on the enterprises that resisted these inspections, or the fines imposed based on the evidences obtained as a result of these inspections have started to be questioned, on the other hand, how the GNAT will execute this challenging "legislative duty", and in this context, what kind of a balance it will implement between the sanctity of inviolability of domicile as emphasized by the Constitutional Court and the on-site inspection practice, and which practice the Turkish Competition Authority will adopt until this legislative process is completed has been a matter of concern.

I. Subject of the Application to the Constitutional Court

The application relates to the alleged violations of the inviolability of domicile, the right to property, prohibition of discrimination and the right to a fair trial, which allegedly was materialized during the investigation carried out against the undertakings, including the applicant Ford Otomotiv Sanayi Anonim Şirketi, upon the complaints that automobile manufacturers had acted together to restrict the supply of automobiles and increased the prices in 2009 following the special consumption tax reduction implemented in 2009, which led to the Turkish Competition Board's (the "**Board**") violation decision dated 18.04.2011 and the subsequent process in the administrative judicial period.

II. Evaluation of the Violation Claim Regarding the Inviolability of Domicile

According to the file, competition experts had conducted an on-site inspection -without a court order- at the applicant's workplace and documents consisting of the transcripts of e-mails obtained from the computers of the company employees has been collected.

The Constitutional Court evaluated the applicant's allegations that the inviolability of the domicile can only be interfered in basing on a judge's decision pursuant to Article 21 of the Constitution and that this on-site inspection conducted at the workplace did not include sufficient legal security. Within this framework, it has been evaluated by the Constitutional Court that:

- on-site inspection is an activity that is mostly carried out in the headquarters, branches and premises of the undertaking, which are considered as domiciles for the purposes of Article 21 of the Constitution, but not in premises accessible by everyone,
- Article 15 of the Law No. 4054 provides that competition experts are authorized to access areas deemed as domicile based on the Board's decision without a judge's decision,
- under this provision of Article 15 of the Law No. 4054, it is seen that the on-site inspection can be carried out by the Board's decision; whereas, the on-site inspection by the Board's order is not limited to the cases where there is an inconvenience in delay.

Furthermore, it has been emphasized that pursuant to the first paragraph of Article 21 of the Constitution, instead of a judge's decision, the written order of an authority authorized by law may be deemed sufficient only in cases where there is an inconvenience in delay, and accordingly, the regulation that does not make the on-site inspection made by the order of the Board exclusive to cases where there is an inconvenience in delay is not in compliance with Article 21 of the Constitution.

In addition, it is concluded that even if it is accepted that the Board's decision to conduct an on-site inspection is exclusive to cases where there is an inconvenience in delay, the absence of the obligation to submit the Board's decision to the approval of the judge in charge within twenty-four hours is also incompatible with the additional safeguard in Article 21 of the Constitution.

In the case, the subject of the decision, since the applicant has not attempted to hinder the on-site inspection, the on-site inspection has been carried out at the applicant's workplace without the need for a judge's decision. It has been concluded that although this practice is in compliance with Article 15 of the Law No. 4054, it is in violation of the safeguard in the second sentence of the first paragraph of Article 21 of the Constitution.

This being the current situation, it has been decided that, in this case, the interference with the applicant's right to inviolability of domicile was in breach of the second sentence of the first paragraph of Article 21 of the Constitution and that the right to inviolability of domicile guaranteed by the Constitution was infringed.

III. Evaluation of the Claims Concerning the Right to Property

In the subject case of the decision, the Board, with its decision dated 18.04.2011, had concluded that the applicant infringed Article 4 of the Law No. 4054 and had decided to impose an administrative fine of TRY 68,844,704.73, which corresponds to 9 per thousand of the gross revenues generated at the end of the fiscal year 2010.

a. Alleged Violation Regarding the Inclusion of Export Revenues in the Monetary Fine

The applicant alleged that the inclusion of export revenues in the determination of gross revenues with respect to the administrative fine undermined the principle of legality given that the scope of the Law No. 4054 covers the markets for goods and services in the Republic of Türkiye. As a result of the examination of this allegation, the Constitutional Court did not find any contradiction with the law in the Board's opinion that the provision on gross revenues did not make a distinction in terms of the market from which the revenues were obtained, and evaluated that the consideration of the applicant's entire gross revenues, including export revenues, in the assessment of the fine did not involve arbitrariness or an obvious error of discretion, and therefore decided that the right to property was not violated. The applicant's allegation that the prohibition of discrimination was violated in connection with the right to property due to the inclusion of export revenues was also rejected for being manifestly unfounded.

b. Other Alleged Violations of the Right to Property

Other allegations asserted by the applicant within the framework of the right to property and the Constitutional Court's evaluations can be summarized as follows.

i. The legality of the interferences: The applicant alleged that the principle of legality of crimes and punishments had been violated. In this framework, the applicant asserted that the increase of the fine as a result of considering three disconnected acts as one continuous act did not meet the criterion of legality standard, that the interpretation of the exchange of information as constituting a *per se* infringement was not foreseeable and that the failure to take into account certain mitigating circumstances in the assessment of the fine was contrary to the explicit provision of the law.

ii. Procedural safeguards of the right to property: The applicant also alleged that the failure to comply with procedural safeguards rendered the interference with the right to property disproportionate. In this respect, it was alleged that the Board's decision, the decisions of the courts of first instance and the Council of State were unjustified and that some of the allegations and defenses were not taken into consideration.

iii. The principle of equality of arms: The applicant alleged that the right to a fair trial was violated as the investigators were in a more advantageous position in terms of access to all documents.

With regards to these allegations the Constitutional Court, by emphasizing that the matters that should be evaluated by the courts of first instance and the Council of State and the matters

that fall within the discretionary power of public authorities were not intervened by itself, unless there was a very substantial justification, and concluded in summary that there was no arbitrariness or manifest error of discretion and that the decisions were not unjustified, accordingly the right to property was not violated.

It was submitted that it was not possible for the Constitutional Court to conduct an assessment as to whether the use of the evidence in the proceedings violated the procedural safeguards of the right to property since the applicant had not included, in the individual application form, a complaint that the documents collected during the on-site inspection were obtained unlawfully and that their use in the proceedings was unlawful. While the Constitutional Court could have made important findings and assessments as a result of such an examination, this has not been possible due to the aforementioned deficiency.

IV. Evaluation of the Violation Claim Regarding the Right to a Fair Trial

The applicant's allegations within the framework of the right to a fair trial and the Constitutional Court's evaluations can be summarized as follows.

i. The right of not to be tried or punished more than once for the same act: The applicant alleged that the reinvestigation of the period in question violated the principle of *ne bis in idem* (the rule of double jeopardy), given that it was initially decided that there was no need to initiate an investigation in relation to this period subsequent to the special consumption tax reduction. The Constitutional Court held that this principle, which is protected under Article 36 of the Constitution, does not constitute an obstacle to re-investigation in the event that new evidence is obtained regarding an act that previously resulted in acquittal, and that this situation is also recognized as an exception in terms of Protocol No. 7 to the European Convention on Human Rights, and concluded that the reinvestigation of the relevant period was based on new evidence and did not constitute a violation.

ii. The right of access to court: The applicant alleged that the right of access to court was violated as a result of the abolition of the remedy of rectification of judgment, which was available at the time of the action for annulment, during the course of the proceedings. The Constitutional Court held that the allegation was manifestly unfounded on the grounds that the right of access to a court does not provide a legal remedy against a court decision and that there was no interference with the right of access to a court.

iii. The right to trial within reasonable time: As a result of the examination of the applicant's allegations that the right of not to be tried within a reasonable time was violated, the Constitutional Court found that the period of 9 years, 10 months and 26 days between 24.06.2009, when the second preliminary investigation process was initiated, and 20.05.2019, when the administrative judicial process was finalized, was not reasonable and ruled that the right to be tried within a reasonable time within the scope of the right to a fair trial guaranteed under Article 36 of the Constitution was violated.

V. Conclusion

It is not yet clear how this decision of the Constitutional Court will affect the practice regarding on-site inspections and it will definitely be the subject to various debates in legal circles. In this respect, the stance to be taken and the course of legislative activity to be performed by the GNAT, upon the decision to notify the structural problem regarding the possibility of conducting on-site inspections without a judge's order, which appears to be in accordance with the current provisions of the Law No. 4054 but now found to be unconstitutional, is of critical importance in terms of Turkish competition law regulations and practices.

The GNAT is obviously in front of a challenging matter that requires a tough and detailed examination. It is expected that the GNAT, having an important decision to be made following the Constitutional Court's decision, will adopt a balancing legislation between inviolability of domicile and the on-site inspection practice, and will take into consideration the European Union practices while making this legislation. During this process, a careful assessment regarding the determination of the competent courts should be made, by considering the possibility of differences in court decisions for undertakings under the jurisdiction of different courts in cases where it is required to conduct on-site inspections in multiple undertakings within the same file.

In the event that there is any change in the legislation or practice following the Constitutional Court's violation decision on such a fundamental ground in this matter, which is at the center of competition law practice in terms of revealing infringements and collecting the evidence required for the determination of infringement, the impacts will be undeniably significant.

At this point, where the legality of the evidences collected during on-site inspections conducted without the decision of a judge, how the procedure will be carried out in the event that a court decision is sought for on-site inspections in the future, and how the effectiveness in revealing violations will be affected have all become a matter of debate, it would be beneficial to closely follow the developments until the date when the uncertainty will be resolved.

The views expressed in this memo are those of the authors and aimed only at providing brief information on the relevant subject matter. This memo does not constitute a legal document or a legal opinion or legal advice. Please do not hesitate to contact our offices should you require more detailed information on any of the issues mentioned in this memo.