

The Turkish Constitutional Court Ruled that the Right to Inviolability of Residence was Violated Due to Dawn Raid Conducted Without a Judicial Decision

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Dear Clients, Colleagues and Business Partners,

In the Turkish Constitutional Court's ("**Constitutional Court**") decision published in the Turkish Official Gazette dated 20 June 2023 and numbered 32227, it was decided that the right to inviolability of residence guaranteed by Article 21 of the Constitution was violated due to the dawn raid carried out by the Turkish Competition Authority ("**Authority**") at the workplaces of the undertakings without a judicial decision. Further, it was ruled that the reason of such violation was the failure of the on-site inspection authority granted by the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") to comply with the guarantees provided in the first paragraph of Article 21 of the Constitution.

Assessment of the Constitutional Court Decision

In summary, in the application numbered 2019/40991 before the Constitutional Court, it was claimed that the right to inviolability of residence may only be interfered with by a judicial decision pursuant to Article 21 of the Constitution and that the dawn raid carried out at the workplace did not include sufficient legal guarantees.

In the application adjudicated by the Constitutional Court, it was decided that the right to inviolability of residence was violated due to the on-site inspection without a judge's decision and it was pointed out that the violation was due to the fact that the relevant provisions of the Law No. 4054 were not regulated in accordance with the guarantees in the first paragraph of Article 21 of the Constitution. In this context, it was ruled that there was no legal interest in ordering a retrial since the violation of the right to inviolability of residence was independent of the outcome of the proceedings; however, in order to review the legal provision that led to the violation and to solve the structural problem in order to prevent similar new violations, it was ruled that a copy of the decision be notified to the legislative body (Grand National Assembly of Türkiye) for information and appreciation and sent to the 13th Chamber of the Council of State for information.



What is important in the decision of the Constitutional Court is the determination that dawn raid is an activity carried out in the headquarters, branches and facilities where the undertaking carries out its management activities, and in this respect, the parts where the management activities of the undertakings are carried out and areas such as workrooms, which are not freely accessible to everyone, will be considered under the scope of the term “*residence*”, considering the authorisations listed under Article 15 of the Law No. 4054. The Constitutional Court stated that the concept of residence also covers workplaces, and in this context, the office where a person carries out his/her profession, the registered headquarters where the activities of a company operated by a private person are carried out, the registered headquarters and branches of legal entities and other workplaces may also be considered within this scope.

Another important issue in the decision is whether the on-site inspection conducted pursuant to Article 15 of Law No. 4054 should be evaluated under the concept of search. According to the established case-law of the Constitutional Court, a “search” is a protection measure carried out in order to prevent a crime by obtaining evidence before or after the commission of a crime and/or to apprehend the accused or the suspect, which may lead to the restriction of certain fundamental rights of individuals, and as a rule, it is a measure that requires a judicial decision. The search restricts fundamental rights such as the right to privacy, the inviolability of residence and the inviolability of body. In the present case, an on-site inspection was conducted by competition experts at the workplace of the relevant undertaking pursuant to Article 15 of Law No. 4054. The on-site inspection process regulated under this Article can be explained as the on-site inspection conducted by the Board officials at the workplaces of undertakings or associations of undertakings. Within this scope, the Board officials may examine the books, all kinds of data and documents kept in physical and electronic media and information systems of the relevant undertaking, take copies and physical samples thereof, request written or oral explanations from the undertaking regarding certain issues, and finally conduct on-site inspections regarding all kinds of assets of the relevant undertaking.

Accordingly, the Constitutional Court evaluated that the inspection carried out at the applicant's workplace “constituted an interference with the right to inviolability of residence”, taking into account the fact that documents were obtained from the computers of the undertaking officials during the inspection subject to the application.

The Constitutional Court also concluded that the current regulation, which does not limit the possibility of conducting on-site inspections upon the order of the Competition Board to cases where there is an inconvenience in delay, is contrary to Article 21 of the Constitution. In addition, the Constitutional Court found Article 15 of Law No. 4054 unconstitutional in that it does not carry the obligation to submit the Board's decision to the approval of the judge in charge within twenty-four hours.

On the other hand, in the Dissenting Opinion of the Decision, it is stated that the inspection conducted at the applicant's workplace is not a “search” activity, but an “on-site inspection” activity assigned to the Competition Authority by law. In this respect, it was emphasized that there was no search or seizure in the case of the application and that the on-site inspection carried out in the present case pursuant to the authorisation granted by Law No. 4054 cannot be considered as a violation of inviolability of residence.

Finally, the Constitutional Court also addressed the allegations of (i) violation of the right to a fair trial, (ii) violation of the right to property and (iii) violation of the prohibition of discrimination in terms of taking into account the export revenues of the undertaking in the assessment of the administrative fine. Accordingly, in terms of the allegations regarding the violation of the right to a fair trial, the Constitutional Court concluded that the period of 9 years, 10 months and 26 days between the date when the second preliminary investigation process was initiated and the date when the administrative judicial process was finalised was not admissible in the present case and ruled that the right to a fair trial was violated

In addition, in terms of the allegations regarding the violation of the right to property by the administrative fine imposed, the Constitutional Court, underlining that the right to property can only be restricted for public interest purposes and by law, made an assessment in the light of the principles of (i) legality, (ii) legitimate aim, (iii) moderation, (iv) convenience, (v) necessity, and (vi) proportionality. Therefore, regarding the allegation that the consideration of export revenues in the determination of the administrative fine violated the prohibition of discrimination, the Constitutional Court stated that the inclusion of the export revenues of the relevant undertaking in the calculation, unlike the other undertakings party to the investigation, lacked grounds in the present case, since the other undertakings did not have foreign revenues.

Conclusion

In the light of the above-mentioned decision of the Constitutional Court, it can be concluded although the on-site examination in the present case subject to the application was carried out in accordance with the competition law legislation, it was indeed considered that the relevant provision of the Law No. 4054 is not in compliance with the Constitution. In this framework, considering that the Constitutional Court ruled that the decision should be notified to the legislative body (Turkish Grand National Assembly) for their information in order to review the relevant provision of the Law No. 4054 and to solve the structural problem, it is understood that the issue will be of greater importance in the upcoming period.

Considering that no court decisions other than the ones in relation to prevention of on-site inspections have been obtained in relation to on-site inspections carried out by the Authority under the Law No. 4054 to this date, the kind of method that will be followed in the future in the light of the above-mentioned Constitutional Court judgement remains a matter of curiosity. Moreover, the legislative body's future approach to possible legislative amendments in light of the Constitutional Court's judgement and, more importantly, the courts' rulings in terms of the pending cases, considering that a copy of the judgement was ordered to be sent to the 13th Chamber of the Council of State, are among the issues that need to be carefully monitored. In conclusion, it would be appropriate to say that the decision of the Constitutional Court sheds light on a new era and may bring fundamental changes in practice.

You may access the relevant decision via this [link](#).

For any further information, please do not hesitate to contact us.

Kind regards,



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