

---

# **A Landmark Decision by the Constitutional Court about On-site Inspections Conducted by the Turkish Competition Authority: A Judge's Decision is Necessary for Conducting On-site Inspections**

## **A Landmark Decision by the Constitutional Court about On-site Inspections Conducted by the Turkish Competition Authority: A Judge's Decision is Necessary for Conducting On-site Inspections**

**Article by Mustafa Ayna, Özlem Başbüyük Coşkun, Arda Deniz Diler and Selim Turan**

### **Introduction**

The Constitutional Court published a significant decision (“**Decision**”) which includes critical assessments on whether the on-site inspections conducted by the Turkish Competition Authority (“**TCA**”) violate the inviolability of domicile protected under Article 21 of the Constitution of the Republic of Turkey (“**Constitution**”). It is considered that the assessments made in the Decision will shape the future of the on-site inspection procedure implemented by the TCA. Indeed, as a result of its assessments, the Constitutional Court concluded that the on-site inspections conducted solely based on the TCA’s decision are not in compliance with Article 21<sup>[1]</sup> of the Constitution and considered such on-site inspections as a violation of the inviolability of domicile.

The main subject matter of the application filed by FORD Otomotiv Sanayi A.Ş. (“**FORD**”) includes claims about the violation of the right to the inviolability of domicile as the on-site inspection at the premises was unlawful.<sup>[2]</sup>

### **The Premises are be Considered within the scope of Domiciles and therefore On-site Inspections Carried Out by the TCA at These Places Constitute an Interference with the Right to Inviolability of the Domicile**

The Decision mainly examined whether the on-site inspection carried out at FORD's premises, which resulted in the taking of various e-mails from the computers of company personnel, constituted a violation of the “*right to the inviolability of domicile*” protected by Article 21 of the Constitution.

In this context, the Constitutional Court first analysed whether premises are included in the scope of domicile or not. The Constitutional Court pointed out that while premises are also considered to be domiciles, public areas of premises that do not contain a private element and are open to everyone may not be considered within the scope of the concept of domicile. On the other hand, it was stated that the on-site inspections carried out by the TCA are activities carried out in the headquarters,

---

branch offices, and facilities where the undertaking carries out its administrative affairs, and there is no doubt that the parts where the administrative affairs of the undertakings are carried out and the areas where not everyone can enter freely, such as workrooms, are considered domiciles.

Subsequently, the Decision emphasized the characteristics of the institution of “search” to clarify the on-site inspection process. In this respect, it stated that the search is a protection measure carried out in a way that causes the limitation of some fundamental rights of individuals to prevent crime, obtain evidence before or after a crime is committed, and/or apprehend the defendant or suspect. Accordingly, it was concluded that the on-site inspection subject to the Decision constitutes an interference in the right to the inviolability of domicile, considering the fact that the documents had been seized from the company computers during the on-site inspection.

### **Article 15 of the Competition Law is Unconstitutional as It Allows On-site inspections without a Judge's Decision and Therefore the Inviolability of the Domicile is Violated**

Following the foregoing considerations, it was examined whether the interference with the inviolability of domicile constituted a violation in the light of Article 21 of the Constitution, which regulates the right to the inviolability of domicile. In this regard, it was stated that:

- unless there exists a decision duly given by a judge, no one's domicile may be entered or searched or the property seized therein,
- where a delay is prejudicial, a written order of an agency authorized by law may be deemed sufficient instead of a judge's decision given directly,
- the decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within 24 hours; and
- in case of a seizure, the judge having jurisdiction has the obligation to announce his/her decision within 48 hours of the seizure.

Despite these principles embodied in Article 21 of the Constitution, the Constitutional Court stated that a judge's decision is not required for on-site inspections under Article 15 of Law No. 4054 on the Protection of Competition (“**Competition Law**”). Therefore, it was stated that the Competition Law authorizes the TCA's experts to conduct on-site inspections at premises considered to be domiciles without a judge's decision. The Decision also emphasized that while the Competition Law stipulates that on-site examinations shall be conducted without the requirement of a judge's decision and that the TCA's experts have the authority to enter areas deemed as domicile without a judge's decision, a judge's decision is required in case the on-site inspection is hindered or likely to be hindered. In this respect, the Constitutional Court stated that the requirement of a judge's decision introduced by Article 21 of the Constitution applies to any situation in which public officials want to enter the domiciles of individuals against their will and that the relevant provision of the Competition Law that makes the requirement of a judge's decision exclusive to the existence of hindrance or the possibility of hindrance is unconstitutional.

In the same respect, it also was stated that within the scope of the Competition Law, the on-site

---

inspections that can be carried out by the TCA decision are recognized as a rule and not limited to cases where a delay is prejudicial. The Constitutional Court concluded that this situation is also contrary to Article 21 of the Constitution.

The Constitutional Court further stated that even if it is assumed for a moment that the TCA's decision to conduct an on-site inspection is limited to cases where a delay is prejudicial, the absence of the obligation to submit the TCA's decision to the approval of the judge having jurisdiction within 24 hours would render the current regulation incompatible with Article 21 of the Constitution. Indeed, in the case subject to the Decision, since FORD did not take any action to prevent the on-site inspection, it was concluded that the on-site inspection had been carried out without a judge's decision and therefore, Article 21 of the Constitution and the inviolability of domicile had been violated.

### **Highlights of the Decision and Conclusion**

Another critical aspect of the judgment is that the Constitutional Court also notified the Turkish Grand National Assembly of the judgment to solve the structural problem. In this framework, in light of the evaluations made in the decision, the Turkish Grand National Assembly may amend the provision on on-site inspection in the law in accordance with the issues emphasized in the Constitutional Court Decision.

At this point, it should be stated that the decision of the Constitutional Court is applicable and binding only for the applicant and the administrative act or decision subject to the application since the decision of the Constitutional Court was taken as a result of an individual application. Indeed, Article 15 of the Competition Law has not been abrogated by the Constitutional Court Decision. However, as stated above, since the Decision was also sent to the Turkish Grand National Assembly, the Assembly may consider amending the law. In addition, this Decision may be used as a basis for claims of unconstitutionality in lawsuits filed before the administrative courts and may pave the way for the Constitutional Court's review through concrete norm control and, ultimately, the annulment of Article 15 of the Competition Law.

It remains to be seen whether the Decision will have an impact on ongoing cases and investigations and whether it will lead to an amendment of the law.

*Published by Concurrences on June 23, 2023.*

---

[1] Article 21 of the Constitution titled “*Inviolability of the domicile*” is as follows:

---

*“The domicile of an individual shall not be violated. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on these grounds, no domicile may be entered or searched or the property seized therein. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted.”*

[2] The application also included claims about violation of (i) the right to property as an administrative fine was imposed on the grounds that it had committed behaviours restricting competition; (ii) the prohibition of discrimination in connection with the right to property as FORD's export turnover was taken into account in determining the amount of the fine, whereas the export turnover of other undertakings was not; (iii) the principle of not twice in the same thing (“*ne bis in idem*”) as the same act was investigated for the second time; (iv) right to trial within a reasonable time due to the long duration of the proceedings; and (v) right of access to a court due to the abolition of the rectification of judgment stage by the law that entered into force while the trial was in progress.

It was concluded that FORD's right to trial within a reasonable time also had been violated. In this regard, it was reasoned that the period of 9 years, 10 months, and 26 days between 24 June 2009, when the preliminary inquiry process was initiated against FORD, and 20 May 2019, when the administrative judicial process was finalized, was unreasonable. On the other hand, except for the violation of the inviolability of domicile and violation of the right to trial within a reasonable time, FORD's other allegations were not accepted by the Constitutional Court.