

# e-Competitions

Antitrust Case Laws e-Bulletin

December 2018 - II

---

## The Turkish Competition Board fines a company for obstructing an on-site inspection by cutting off the electricity and preventing internet access (*Mosaş*)

**PROCEDURES, INVESTIGATIONS / INQUIRIES, OTHER SERVICES, SANCTIONS / FINES / PENALTIES, TURKEY, PERIODIC PENALTY**

Turkish Competition Board, Mosaş, n° 18-20/356-176, 21 June 2018

---

**Gönenç Gürkaynak** | ELIG Gürkaynak (Istanbul)

**Burcu Can** | ELIG Gürkaynak (Istanbul)

e-Competitions News Issue December 2018 - II

### Background

The Turkish Competition Board (“**Board**”) initiated a preliminary investigation on March 8, 2018 (Decision No. 18-07/124-M), in the traffic signalization sector. Subsequently, the Turkish Competition Authority’s (“**TCA**”) case handlers conducted an on-site inspection on June 5, 2018, at the premises of Mosaş Akıllı Ulaşım Sistemleri A.Ş. (“**Mosaş**”) in Konya.

Mosaş provides railway signalization and electrification, and highway signalization and intelligent transportation systems. The Board’s preliminary investigation against Mosaş concerns undertakings and associations of undertakings active in the traffic signalization sector, but there is no publicly available information on the nature of the alleged infringement.

### Mosaş’s actions during the on-site inspection

According to the Board’s summary of the events in its decision, the TCA case handlers duly informed Mosaş’s employees of the preliminary investigation before starting the inspection, and presented their authorization documents along with their TCA identity cards. During case handlers’ inspection of the computers at Mosaş’s facility, the internet connection was interrupted twice. The case handlers also noticed that the e-mails on one of the computers were being deleted during their review. Additionally, they discovered that there were certain communications among Mosaş employees in an online chat group, where some employees instructed other employees to “*disconnect the internet so that they [case handlers] cannot access,*” “*break down the modem,*” and “*delete the e-mails,*” and also circulated the case handlers’ photos. The case handlers took screenshots of these conversations as evidence of obstruction of their inspection by Mosaş’s employees.

A Mosaş executive and Mosaş's in-house counsel told the case handlers that they would conduct an internal meeting to assess whether allowing the on-site inspection to continue was in the best interest of Mosaş, and if not, they could prevent the case handlers from conducting the on-site inspection. This conversation was followed by a power outage, which occurred while the case handlers were taking screenshots of the computers showing that the e-mails under review were being deleted. Although electricity was restored after a certain amount of time, the case handlers could not regain access to internet.

The case handlers requested from Mosaş employees to contact their internet service provider to fix the connection issue, but they were told that the internet service provider was not answering their calls and that the Mosaş employees did not have the service provider's contact details. After the inspection, the TCA issued an information request to the relevant internet service provider and learned that (i) there was no systematic internet connection failure in Mosaş's area at the time, and (ii) their call center had no record of a complaint regarding an internet connection failure.

According to the TCA's decision, the case handlers repeatedly warned Mosaş employees against obstructing on-site inspections and reminded them of the potential fines for such obstruction, but to no avail. After the case handlers' warnings, one of the Mosaş employees removed the computers that the case handlers were inspecting. Moreover, Mosaş employees did not allow the case handlers to print the documents that they had copied on their external hard drive. After negotiating with the case handlers, Mosaş employees ultimately allowed them to print these documents on the condition that Mosaş employees would record a video of the process. Mosaş employees also refrained from signing the affidavit drafted by the case handlers to document the events (*i.e.*, obstruction) that had occurred during the inspection.

### The Board's assessment on Mosaş's actions during the inspection

In its decision on June 21, 2018 (Decision No. 18-20/356-176), the Board emphasized that the on-site inspection is an important tool for the TCA to be able to determine whether there has been an infringement of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). It is therefore crucial for the TCA to be able to conduct its on-site inspections effectively.

The Board found that the actions of Mosaş's employees had obstructed the on-site inspection. Accordingly, the Board imposed administrative fines under both Articles 16 and 17 of the Law No. 4054, including (i) a fixed fine for obstructing the on-site inspection in the amount of 0.5% of Mosaş's 2017 turnover (TRY 81,500.87), and (ii) a proportional fine of 0.05% of Mosaş's 2017 turnover (TRY 8,150.09) for each day that the violation continued (*i.e.*, until Mosaş invites the TCA for another on-site inspection).

### The Board's second decision on the amount of the proportional fine

In response to the Board's decision, Mosaş sent a written invitation to the TCA on June 22, 2018 (one day after the Board's decision), for another on-site inspection. The TCA case handlers inspected Mosaş premises on June 28, 2018.

On July 5, 2018, the Board rendered a second decision to determine the duration of the infringement for the purposes of calculating the amount of the proportional fine under Article 17 of the Law No. 4054 (Decision No. 18-22/378-185). The Board decided that the infringement had been terminated on the date that the TCA received

Mosaş's invitation for a second on-site inspection (June 22, 2018), and thus ruled that the infringement had lasted for 17 days. Accordingly, the Board imposed a proportional fine of TRY 138.551,53 under Article 17 of the Law No. 4054.

### **Mosaş's request for a reassessment of the Board's fine decision**

On June 26, 2018, Mosaş applied to the TCA for a reassessment of the Board's decision finding that Mosaş had obstructed the on-site inspection. In its application, Mosaş argued that:

- Pursuant to Article 15 of the Law No. 4054, when an on-site inspection is obstructed, the TCA should obtain a court order, and given that the case handlers did not attempt to obtain such a court order, Mosaş assumed that the inspection had been completed.
- Mosaş representatives did not sign the on-site inspection affidavit documenting the obstruction, and they were not informed of the law regarding potential administrative monetary fines for obstructing an on-site inspection.
- The Law No. 4054 does not require a written invitation for an on-site inspection to terminate the infringement; nor did the case handlers' affidavit include or mention such a requirement.

In its assessment of these claims, the Board held that:

- Even if Mosaş representatives refrained from signing the affidavit documenting the obstruction, they had signed the second affidavit regarding the on-site inspection, which explicitly included the relevant provisions of the Law No. 4054 on the potential repercussions of obstructing an on-site inspection. In any event, the Board noted that, as a general principle, ignorance of the law is no excuse (*ignorantia juris non excusat*).
- Given that the case handlers' affidavit on the obstruction of the on-site inspection unequivocally recorded that the inspection had not been completed, Mosaş's claim based on the lack of a court order does not have any merit.
- Even if the law does not specifically require a company to send a written invitation to the TCA to complete the on-site inspection, it is still a practical requirement for this company to demonstrate its intention to allow such an inspection in writing, which Mosaş did on June 22, 2018.

As a result of its reassessment of the Board's decision of June 21, 2018, and in light of the factors listed above, the Board ultimately decided that there was no need to revoke, amend, or replace its decision.

### **Conclusion**

The three decisions of the Board regarding the Mosaş inspection offer crucial lessons for companies on how they should behave during an on-site inspection. Additionally, these decisions are particularly noteworthy because they clearly illustrate how (i) the Board evaluates the evidence that case handlers present with respect to the obstruction of an on-site inspection, and (ii) a company can terminate its obstruction of the on-site inspection.