

Turkish Competition Board Holds an Association of Undertaking Responsible for Obstruction of On-Site Inspection by One of its Members

Authors: Dr. Gönenç Gürkaynak, Efe Oker and Su Akgül of ELIG Gürkaynak Attorneys-at-Law

(1) Introduction

The Turkish Competition Board (“**Board**”) imposed an administrative monetary fine of TL 47,409 on Turkish Union of Chambers of Engineers and Architects Chamber of Electrical Engineers (“**EMO**”) for the obstruction of an on-site inspection carried out by the Turkish Competition Authority (“**Authority**”) by one individual member of Alanya District Representation of Turkish Union of Chambers of Engineers and Architects Chamber of Electrical Engineers (“**EMO Alanya**”) (“**Decision**”).¹

During the on-site inspection, it was reported that a member of EMO Alanya refused to allow the examination of their mobile device by the case handlers of the Authority. Within their opinion report, the case handlers considered that this behaviour constituted obstruction of on-site inspection, and the relevant person that obstructed the on-site inspection should individually be subject to an administrative monetary fine. However, despite the case handlers’ opinion, the Board decided by majority vote that EMO should be held accountable for the behaviour of the relevant individual and imposed an administrative monetary fine against EMO. The dissenting opinion written by three of the Board members also discuss whether an association of undertaking should be held responsible for the actions of one of its members in terms of competition law violations.

(2) Legal Background on On-Site Inspections

As per the legal framework, Law No. 4054 on the Protection of Competition (“**Law No. 4054**”) grants the Board the authority to conduct on-site inspections when deemed necessary during its duties. Accordingly, the case handlers of the Authority can examine documents, data, and records, request written or oral explanations, and carry out inspections at the premises of undertakings.

¹ The Board’s *Mühendis ve Mimar Odaları Birliği* decision dated 20.10.2022 and numbered 22-48/689-296.

Law No. 4054 also stipulates that any hindrance to such inspections may result in administrative monetary fines imposed on the relevant association or undertaking. Furthermore, Article 16 of Law No. 4054 specifically foresees that if an on-site inspection is hindered or complicated, the Board can impose administrative monetary fines on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations.

There is a noticeable increase in the number of decisions where the Board imposed administrative monetary fines against undertakings that are found to obstruct on-site inspections of the Authority. The recent decisional practice of the Board on this front shows that the Board intends to adopt a ‘zero tolerance policy’ when it comes to obstruction of on-site inspections. An example of this strict approach can be observed in the Board’s *Çimsa*² decision, where the Board determined that Çimsa Çimento Sanayi ve Ticaret AŞ obstructed the on-site inspection given that an employee deleted e-mail correspondences and therefore imposed an administrative monetary fine even though these correspondences were retrieved by the case handlers. The relevant decision implies that the Board will not hesitate to determine an obstruction of on-site inspection even in cases where the Authority obtained and examined the erased documents later on.

In the Board’s *Pasifik*³ decision, the deletion of e-mail correspondences by an employee of the inspected undertaking, despite being warned not to terminate any information/data, documents, or communications from computers, e-mail messages, or any other sort of mobile or immobile devices containing information belonging to the undertaking, lead to an administrative fine for hindering the on-site inspection. Similarly, in the Board’s *Unmaş*⁴, *Çiçek Sepeti*⁵, *Fatih Römorkörcülük*⁶, and *Groupe SEB*⁷ decisions, the Board imposed administrative monetary fines for hindering the on-site inspections due to actions of employees (i.e. termination of information/data, documents, or communications from computers, e-mail messages, or any other sort of mobile or

² The Board’s *Çimsa* decision dated 26.01.2023 and numbered 23-06/74-23.

³ The Board’s *Pasifik* decision dated 29.03.2021 and numbered 21-24/279-124.

⁴ The Board’s *Unmaş* decision dated 20.05.2021 and numbered 21-26/327-152.

⁵ The Board’s *Çiçek Sepeti* decision dated 27.03.2021 and numbered 21-27/354-173.

⁶ The Board’s *Fatih Römorkörcülük* decision dated 29.07.2021 and numbered 21-36/486-254.

⁷ The Board’s *Groupe SEB* decision dated 09.01.2020 and numbered 20-03/31-14.

immobile devices containing information belonging to the undertaking), despite the fact that the undertakings warning them not to, during and even before the on-site inspections.

In *Unilever*⁸ decision, the Board considered that failure to grant access to Unilever's e-mail system for a search using "eDiscovery" for approximately eight hours during the on-site inspection amounted to obstruction of on-site inspection. Similarly in *Siemens*⁹ decision, given that Siemens failed to allow the case handlers of the Authority to conduct "eDiscovery" inspection during the on-site inspection, for the reason that such an inspection will allow the case handlers to reach the information of employees residing in the European Union and not just the information of Turkish employees which could lead to risks under different legislations, the Board imposed an administrative monetary fine for the obstruction of on-site inspection.

(3) The Board's Assessment in the Decision

Within the scope of a preliminary investigation, the Authority conducted an on-site inspection at the premises of EMO Alanya on September 15, 2022. During the on-site inspection, the case handlers of the Authority examined the e-mails and mobile devices of three individuals that were present as well as the corporate e-mail account of EMO Alanya. It is worth noting that the case handlers examined these three individuals' mobile devices that belong to the undertaking as well as their personal mobile devices that were not a property of the undertaking. However, although the case handlers requested another member to provide its mobile device for examination and also informed the relevant member that the examination will be conducted by only searching keywords related to the preliminary investigation, and there is a risk of a potential administrative monetary fine in case the examination is prevented, the relevant member of EMO Alanya did not allow the case handlers to examine the mobile device.

In terms of its assessment, the Board determined that the on-site inspection was obstructed given that the relevant member of EMO Alanya did not allow the case handlers to examine its mobile device. It is indicated in the decision that EMO has a branch in Antalya (i.e. Antalya Branch of

⁸ The Board's *Unilever* decision dated 07.11.2019 and numbered 19-38/584-250.

⁹ The Board's *Siemens* decision dated 07.11.2019 and numbered 19-38/581-247.

Turkish Union of Chambers of Engineers and Architects Chamber of Electrical Engineers (“*EMO Antalya*”), and EMO has a representation in Alanya (i.e. EMO Alanya) which is affiliated with EMO Antalya). The Board further remarked that EMO is an association of undertaking with a legal entity; on the other hand, EMO Alanya does not have any decision-making body or executive body; EMO Alanya, which does not have an entity independent from EMO is authorized to implement the decisions adopted by EMO but not authorized to adopt decisions itself. To that end, the Board evaluated that EMO should be held responsible for the obstruction of on-site inspection in the present case. Accordingly, the Board imposed an administrative monetary fine of TL 47,409 against EMO by majority vote.

(4) The Dissenting Opinion

While the Board decided in favour of an administrative monetary fine against EMO for the hindering of the on-site inspection, three members of the Board discussed in their dissenting opinion as to whether EMO should be held accountable for the behaviour of an individual member of EMO Alanya. In the dissenting opinion, the relevant Board members argued that while there is no hesitation that the failure to allow the case handlers to examine the mobile device amounts to the obstruction of on-site inspection, the relevant person that prevented the case handlers from examining the mobile device should be individually/personally hold responsible for this action rather than EMO.

In terms of their assessment, the members of the Board discussed whether the relevant member of EMO Alanya could be considered as an undertaking that would be subject to a sanction within the framework of competition law. In this respect, the members of the Board indicated that an “undertaking” does not have to be a legal entity and to the extent a real person is independently engaged in economic activities, such real person should be deemed as an undertaking from a competition law standpoint. Accordingly, the dissenting opinion concluded that the relevant real person who is a member of EMO Alanya and who engages in engineering should be considered as an undertaking for the purposes of competition law.

The relevant Board members also argued that the case handlers of the Authority had already managed to conduct on-site inspection at EMO Alanya by examining the devices of individuals that have the authority to represent the association of undertaking; there is no bond between EMO Alanya and the individual member of EMO Alanya in the present case; and therefore the individual member of EMO Alanya should be personally responsible for the obstruction of on-site inspection. The dissenting opinion also underlined that otherwise, associations of undertakings would be hold responsible when any of their members obstructed on-site inspection, therefore the associations of undertakings would be under the permanent risk of an administrative monetary fine, and this situation would not be compatible with the principles of legal certainty and predictability in competition law enforcement.

(5) Conclusion

The Decision, including the dissenting opinion, is noteworthy in terms of the framework of individual responsibility in cases of obstructing on-site inspections, as well as the assessments based on the definitions of “undertaking” and “association of undertakings” from a competition law perspective. Despite the dissenting vote, the Decision demonstrates the Board’s inclination to impose administrative monetary fines on associations of undertakings where the on-site inspection was hindered by a member of such association, rather than the individual that obstructed the on-site inspection. However, the Decision is a reminder that even a seemingly straightforward and established matter can lead to heated discussions.

Article Contact: Dr. Gönenç Gürkaynak

E-mail: gonenc.gurkaynak@elig.com

(First published by Mondaq on September 29, 2023)