

THE COMPETITION BOARD'S ON-SITE INSPECTION AUTHORITY AND THE UNILEVER DECISION

As per Article 15 of the Competition Law, the Turkish Competition Authority's case handlers are authorized to exercise on-site inspections during which they can investigate any type of electronic and hard copy documents owned by the investigated company. According to Article 16 of the Competition Law, if the investigated company prevents or obstructs the inspection, it will be imposed an administrative monetary fine equal to the five in thousands of its turnover generated in the previous fiscal year. In fact, in the last months of 2019 and early 2020, the Competition Board decided to impose an administrative monetary fine to four different companies in a row, on the basis of prevention or obstruction of on-site inspection. Among these, the Unilever decision is the most interesting¹ one. Even though Unilever is an experienced company being subject to many on-site inspections in the recent years, the reason for this administrative monetary fine is quite different from the prevention/obstruction cases we have seen so far.

The decision states that the case handlers went to Unilever's head office for the on-site inspection, informed the authorized officials about the inspection and started to investigate on certain employees' computers. Thus, we understand that until this stage Unilever did not raise any objections to the inspection. However, upon the case handlers' request to investigate the accounts of Unilever employees with specific dates and keywords through e-discovery Unilever's IT

¹ Competition Board's decision numbered 19-38/584-250 and dated 7 November 2019.

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supervisors stated that such investigation should primarily be consulted with the global office of Unilever. The process of prevention of the on-site inspection started afterwards.

According to the decision, the case handlers' request was to run a content search through the e-discovery² software featured in the Office 365 application. Only the authorized officials who have the "e-discovery management role" can make the e-discovery search. Sharing e-discovery authorizations and authorizing the case handlers with e-discovery management role might be needed to investigate employee computers during on-site investigations. However, it is understood from the decision that the case handlers did not request an e-discovery authorization during the Unilever on-site inspection. Instead, they requested to run a search through a Unilever Turkey user account having the e-discovery management role.

After discussions with Unilever's global officials and Unilever's objections (such as admin authorization powers only being on a global level, authorizations regarding Turkish data not being separable from search authorization, the case handlers not having the authority to carry out the inspection and giving access after decoupling the Turkish data taking a very long time), the relevant inspection was allowed at 17:45. The Competition Board decided that Unilever's internal decision making process which started at 11:00 and continued until 17:45, along with the process of the decoupling the Turkish data, constituted a prevention of inspection which led to an administrative monetary fine. In its decision, the Competition Authority followed a ruling of the Council of State which indicates that the delay of the inspection even for 40 minutes suffices to be considered as an elimination of evidence³ and ruled that such delay in the Unilever case constitutes a prevention of inspection.

However, the situation in the Council of State's decision and the Unilever case are different. Unilever case is more complex than a simple prevention of entrance to the premises. One of the reasons for such prevention stems from Unilever's hesitation in whether or not the case handlers are authorized to make an e-discovery search, which the company did not encounter in the previous on-site inspections. With this decision, the Competition Board confirmed that it considers the search on an undertakings' information system by using the e-discovery software within the scope of the case handler's on-site inspection authorities.

The Unilever decision reveals the importance of scrutinizing competition law compliance programmes in parallel with developing technological opportunities and having pre-determined set of rules in case of an on-site inspection. As there is not enough time to assess whether or not

² E-discovery is the process of identifying and delivering electronic information that can be used as evidence in legal cases. It is an application of Office 365 and can be used to search for content in Exchange Online mailboxes, Office 365 Groups, Microsoft Teams, SharePoint Online and OneDrive applications, and Skype conversations: <https://docs.microsoft.com/en-us/microsoft-365/compliance/ediscovery>

³ 13th Chamber of Council of State's decision numbered E: 2011/2660, K: 2016/775 and dated 22 March 2016.

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the case handlers' requests will be fulfilled during on-site inspections, a delay in the undertakings' internal assessment process would be considered as prevention of inspection.

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